

**IN THE ENVIRONMENT COURT
AT CHRISTCHURCH
I TE KŌTI TAIAO O AOTEAROA
KI ŌTAUTAHĪ**

Decision No. [2024] NZEnvC 26

IN THE MATTER of the Resource Management Act 1991

AND an application for a declaration under
s311 of the Act

BETWEEN NELSON CITY COUNCIL

(ENV-2022-CHC-027)

Applicant

Court: Environment Judge P A Steven
Sitting alone pursuant to s309 of the Act

Hearing: at Nelson on 9 October 2023

Appearances: K Anderson and M Mackenzie Everitt for the applicant
J Ferguson and K Tarawhiti for the Ngāti Tama Ki Te
Waipounamu Trust and Wakapuaka No. 1B Incorporation
and Te Huria Matenga Wakapuaka Trust
N McFadden and C Osborne for the Delaware Bay Access
Group Incorporated

Last case event: 11 December 2023

Date of Decision: 1 March 2024

Date of Issue: 1 March 2024

DECISION OF THE ENVIRONMENT COURT

A: The court makes the declarations sought that:



NELSON CITY COUNCIL

- (1) The use of beach area below mean high water springs (MHWS) at Delaware Bay (shown on Plan A attached) for driving vehicles across to launch and retrieve recreational boats/fishing vessels at the water's edge is not a Permitted Activity under Rule CMr.33 of the Nelson Resource Management Plan (Plan), and therefore, the activity requires resource consent.
- (2) The beach area at Delaware Bay (shown on Plan A attached), below MHWS, which is used to launch and retrieve recreational boats/fishing vessels, is not a launching ramp under Rule CMr.33(d) of the Plan.

B: Costs are to lie where they fall.

REASONS

Introduction

[1] On 8 August 2022 the Nelson City Council (the Council) filed an application for the following declarations:

- A The use of the beach area below mean high water springs (**MHWS**) at Delaware Bay (shown on Plan A attached) for driving vehicles across to launch and retrieve recreational boats/fishing vessels at the water's edge is not a Permitted Activity under Rule CMr.33 of the Nelson Resource Management Plan (**Plan**), and therefore, the activity requires resource consent.
- B The beach area at Delaware Bay (shown on Plan A attached), below MHWS, which is used to launch and retrieve recreational boats/fishing vessels, is not a launching ramp under Rule CMr.33(d) of the Plan.

[2] The application was supported by the affidavits of Julie Barton and Jane Doogue lodged with the application, although further affidavits were filed by Ms Doogue over the course of the proceedings in response to the court's questions.

[3] The Council's reason for making the application is to obtain a definitive answer on the interpretation of the regional coastal plan r CMr.33.1 and whether in terms of that rule vehicles are permitted to drive across Delaware Bay Beach to launch and retrieve boats at the water's edge.¹

[4] This has been a long-standing issue to the Council and interested members of the community. Several parties had joined the proceedings, both supporting and opposing the application.

Relevant facts

[5] The area that is the subject of the application is Delaware Inlet, also referred to as Delaware Bay. The area where the vehicles gain access to the beach is on the eastern side of the Delaware Inlet which is the estuary of Wakapuaka River. Delaware Bay is separated from the adjacent Cable Bay by a narrow sandbar, which connects Pepin Island to the mainland.²

[6] An area of legal road at Delaware Bay is used by the public as vehicular access to the beach to drive to the water's edge to launch and/or retrieve recreational boats/fishing vessels. This area is depicted in the following image as a dirt track:

¹ Submissions for Nelson City Council, dated 18 November 2022 at [2].

² Affidavit of Julie Barton in support of the application, dated 11 July 2022 at [12].



[7] The red line on the image above shows the area that is legal road. The road that provides access to the dirt track used for launching and retrieval is a two-way sealed road (Māori Pa Road) ending in a cul de sac evident in the image.

[8] The line of MHWS closely follows but is not contiguous with the boundary of the legal road. However, the dirt track referred to is (mostly) on the landward side of the MHWS.

[9] In 1999, Māori Pa Road was extended along the edge of the estuary, following a subdivision in the area. The Council understands that some locals had been crossing the beach to launch boats prior to 1999, although since the road was extended, the number of vehicles using this track has increased.

[10] The dirt track is referred to as an ‘informal launching ramp’ by the Council and many others involved in this case, although I will refer to it as a ‘dirt track’ for the purpose of this decision.³

[11] Vehicles drive across the beach to the edge of the water for the launching and retrieving of recreational boats/fishing vessels. The area where that activity generally occurs is described as the low tide launching fan. Depending on tidal conditions, the distance from the legal road to the low tide launching fan area is

³ Although I acknowledge that it is gravelled, it is widely referred to as the dirt track.

some 320m.

[12] While it may be possible in very high tide conditions to launch straight from the road into the water without traversing the beach this has not been observed by Council officers, whereas vehicles and trailers have been frequently observed in the location of the low tide launching fan.⁴

Relevant plan provisions

[13] The Nelson Resource Management Plan (NRMP) is a combined Regional and District plan. Chapter 13 manages activities within the Coastal Marine Area (CMA) and (with a limited number of identified exceptions) constitutes the Regional Coastal Plan.

[14] Delaware Inlet (and its estuarine values) is described in Chapter 13 Introduction of the NRMP (CMd1.4.i) as follows:

Delaware Inlet is a relatively unmodified inlet at the mouth of the Wakapuaka River, some 15km north of Nelson City. It provides a sheltered estuarine habitat for a wide range of species, including some rare or endangered bird species. The inlet is of national significance for nature conservation and estuarine values. A large number of archaeological sites exist around the margins of the Inlet. The Inlet is of high value to Maori for spiritual reasons and as a traditional food gathering area. Some significant forest remnants occur in the Wakapuaka River Valley. The area is sensitive to change due to its relatively unmodified state.

The rule

[15] Chapter 13 of the NRMP contains provisions that make provision and/or restrict activities within the CMA. Of relevance to this proceeding, r CMr.33.1(d) permits the driving of vehicles on the foreshore or seabed that is associated with

⁴ Affidavit of Julie Barton, dated 11 July 2022 at [18].

launching or retrieving of recreational or commercial vessels at 'launching ramps'.

[16] Rule CMr.33.1 is a regional rule, which only applies to the CMA, and provides:

Driving of vehicles on, and disturbance of the foreshore or seabed by vehicles, is permitted if the activity is associated with any of the following activities:

- a) surf life-saving operations, or
- b) emergency situations or special circumstances including oil spills, rescue operations, salvage of vessels or sea mammal stranding, or
- c) the removal of litter, nuisance matter, or debris which may affect navigation and safety, or
- d) the launching or retrieving of recreational or commercial vessels at launching ramps, or
- e) Council data collection, monitoring or enforcement activity, or
- f) beach grooming undertaken by the Council, its agent, or a consent holder as part of the conditions on a consent, or
- g) activities undertaken in accordance with an Approved Conservation Management Strategy or Plan or Reserves Management Plan, or
- h) legitimate research, law enforcement or military activities undertaken by either the police, customs, Government departments or New Zealand Defence Force or recognised educational institutes, or
- i) use of the portion of Point Road below mean high water springs, or
- j) the maintenance, construction or placement of network utility structures undertaken under a permitted activity rule of this Plan or authorised by way of a Resource Consent, or
- k) the transportation of lawfully harvested aquatic organisms.

[17] If driving across the foreshore/seabed is not permitted under r CMr.33, that activity requires consent under r CMr.33.3:

Disturbance of the foreshore or seabed that contravenes a permitted condition, and is not regulated under another rule, is discretionary.

[18] ‘Launching ramp’ is not defined in the NRMP, although ‘launching structure’ is defined to mean ‘any structure intended for the purposes of launching vessels.’⁵

[19] There is no dispute that the dirt track is not a structure; it is a sloping area with a surface of gravel created by years of usage.

Planning maps

[20] There are a number of ‘launching ramps’ depicted by use of a symbol on planning maps within the NRMP, although there is no ‘launching ramp’ symbol depicted on the relevant planning map for Delaware Bay in the location of the dirt track (Planning Map 37). However, that has not always been so.

Alteration to NRMP planning maps

[21] The proposed NRMP was publicly notified in 1996 and decisions on submissions were made around December 1999. The notified version contained CMr.33.1(d) in its present form. However, none of the planning maps included symbols denoting launching ramps.⁶

[22] The NRMP notified shortly after decisions in December 1999 contained the launching ramp symbol in the location of the dirt track in Delaware Bay.⁷ That was referred to by the Council as the decisions version of the proposed NRMP.

[23] Around the time of decisions, according to the Council’s records,⁸ various versions of the planning map (described as working copies) for Delaware Bay were circulated for internal use.⁹ These were annotated with handwritten notes along

⁵ Application for declarations, dated 8 August 2022 at [11].

⁶ Third affidavit of Jane Doogue, dated 10 November 2023 at [7].

⁷ This was the version of the plan published after decisions on submissions to the notified plan.

⁸ Affidavit of Jane Doogue, dated 29 September 2022 at [17]-[19].

⁹ Which at the relevant time was depicted on Planning Map 32.

with a symbol depicting the location of a launching ramp in the location of the dirt track.

[24] That symbol had been deleted by the time the relevant parts of the plan (comprising the regional coastal plan) became operative on 1 May 2006.

[25] No submissions were made to the plan in relation to insertion of symbols on the planning maps. Although submissions were made on r CMr.33.1, no submissions related to r CMr.33.1(d).¹⁰

[26] The evidence from the Council was that the launching ramp notation at Delaware Bay was “an error” and was deleted sometime in 2001.¹¹ However no explanation was provided as to what that “error” was or as to the statutory basis for the amendment.

[27] The circumstances of that amendment, and whether it was lawful or not, featured in the case for the opposing parties. However, that issue is irrelevant to the issue that I am to decide. The NRMP is deemed to be prepared and approved in accordance with Schedule 1 RMA and cannot be challenged outside of the narrow scope provided by s83 RMA which states:

A policy statement or plan that is held out by a local authority as being operative shall be deemed to have been prepared and approved in accordance with Schedule 1 and shall not be challenged except by an application for an enforcement order under section 316(3).

[28] Section 316(3) RMA states that an application for an enforcement order may only be lodged by any person other than a local authority no later than three months after the date on which the policy statement or plan becomes operative.

¹⁰ Affidavit of Jane Doogue, dated 29 September 2022 at [16]; Third affidavit of Jane Doogue, dated 10 November 2023 at [21]-[22].

¹¹ The evidence was that this was a correction made by an officer within the Council.

[29] The NRMP became operative many years ago and therefore the time for challenging it has passed. It is deemed to be prepared and approved in accordance with the First Schedule process.

Archaeological Sites and Archaeological Overlay

[30] Ngāti Tama referred to the Archaeological Overlay which applies to the whole of Delaware Bay and to r CMr.65 which states that disturbance of the foreshore and seabed is not a permitted activity within an Archaeological Overlay.

[31] Any vehicular use in foreshore and seabed associated with the use of the dirt track is necessarily a disturbance of the foreshore and seabed within the Archaeological Overlay area and therefore cannot be a permitted activity.

[32] However, the Council was not reliant on this rule. Moreover, r CMr.65 must be understood in the context of the definition of disturbance within the NRMP which means “excavation, dredging, drilling and tunnelling” none of which occurs when a vehicle is travelling across the foreshore for the purposes associated with the launching or retrieving a vessel.

[33] Accordingly, I do not intend to decide the application on the basis that the activity (of driving over the foreshore) is caught by r CMr.65.

Summary of the parties’ positions

The Council

[34] The Council has long held the view that the dirt track in Delaware Bay does not come within the ambit of the permitted activity rule (r CMr.33.1(d)) as it does not qualify as a launch ramp and nor is it depicted on Planning Map 37.

[35] Despite that, the dirt track has a long history of usage going back to as early as 1999, if not longer. The Council has made various attempts to block access to

the dirt track in the past, although these are being met with opposition from locals and recreational fishers.

[36] The affidavit filed in support of the application explains that the Council has also been considering alternative options for addressing this usage including in the context of the new draft Whakamahere Whakatu Nelson Plan, however, consultation did not reveal an optimal solution. The draft Whakamahere Whakatu Nelson Plan has not yet been advanced.

[37] The Council's interpretation of r CMr.33.1 is that resource consent is required to launch and retrieve boats at Delaware Bay. To be a 'launching ramp' under r CMr.33.1(d) of the Plan, the Council considers that the ramp must be identified on Planning Map 37 by use of the requisite symbol.

[38] The Council further contends that the area used to access the beach (the dirt track) is not a ramp in a practical sense; it is an unformed track within the legal road reserve used for access to the foreshore/beach across which vehicles drive to the water's edge (which could be a distance away of 320m depending on tide).

[39] Boats can be launched into the water (and retrieved) at various locations along the water's edge (within the CMA). There are no purpose-built launching facilities along any part of the water's edge in Delaware Bay.

[40] The Council submits that it cannot be that every point of potential vehicular access from a legal road to the foreshore and seabed from which a vessel may be launched, constitutes a "launching ramp" for the purposes of r CMr.33.1(d).

[41] Moreover, it argues that longstanding usage is not the defining feature for the purpose of construing the rule.

[42] If a boat can be launched straight from this location into the water (say, at

a very high tide),¹² the Council acknowledges that such activity would not be captured by r CMr.33.1(d); that is an activity occurring on the landward side of the CMA (in this case, on legal road). However, vehicle use on the foreshore below MHWS is regulated by r CMr.33.1.

[43] The Council contends that to take a contrary view of the rule would result in absurdity; this would mean that any area of beach within the Nelson region would be a ‘launching ramp’ (for the purpose of the rule) where vehicular access can be physically gained to the beach and hence to the edge of the water. Such an approach cannot have been the intended meaning of the rule.

[44] The access point (to the beach) within the legal road reserve is simply that – a short, compacted but otherwise unformed dirt/sand road area providing access from Māori Pā Road to the foreshore. This access point is not itself used for launching or retrieving boats, but rather, to obtain access to the foreshore and to the water’s edge for launching and retrieving vessels.¹³

[45] The Council submits that the logical and plain reading of r CMr.33.1 is that it allows ‘launching ramps’ to be used for their intended purpose, part of which is that a vehicle is likely to travel across (and disturb) the foreshore and seabed to complete the launching or retrieving process.

Supporting parties

[46] Te Rūnanga o Ngāti Kuia and Ngāti Apa ki te Rā Tō support the Council’s interpretation. Ngāti Tama ki Te Waipounamu Trust (‘Ngāti Tama Trust’), Huria Matenga Trust and the Proprietors of the Wakapuaka No. 1B Incorporation (‘Wakapuaka 1B’) support the general thrust of the declarations sought by the Council.

¹² Affidavit of Julie Barton, dated 11 July 2022 at [18].

¹³ Affidavit of Julie Barton, dated 11 July 2022 at [60] and [61].

[47] Ngāti Tama Trust submits context is important as did Te Rūnanga o Ngāti Kuia Trust and Ngāti Apa ki te Rā Tō. Evidence and submissions for Ngāti Tama Trust spoke to the historical and cultural significance of Te Parumoana o Wakapuaka (which is in Delaware Bay), and the surrounding lands to Ngāti Tama ki Te Tau Ihu, particularly as an important food gathering area for Ngāti Tama.¹⁴

[48] The launching and retrieving of boats, and the associated use of vehicles, within Te Parumoana o Wakapuaka has been a longstanding issue for the Wakapuaka whanau and Ngāti Tama.¹⁵ Ngāti Tama is, and always has been, clear on its position; namely, that it opposes any vehicles being driven on or across Te Parumoana o Wakapuaka.¹⁶

[49] Wakapuaka 1B submits the broader context of the Plan, particularly insofar as it relates to the CMA, together with the historical, cultural and environmental importance of the Te Parumoana o Wakapuaka, are consistent with the position that permitted vehicle access to the foreshore and seabed for the purpose of launching and retrieving boats must be associated with designated launching ramps.

[50] Wakapuaka 1B submits that use of launching ramps, which by their nature are within, or straddle, the foreshore and seabed, necessarily requires a vehicle to be driven on that part of the foreshore and seabed occupied by the ramp (and potentially a small part of the foreshore and seabed immediately beyond the ramp in some circumstances).

[51] However, Wakapuaka 1B submits, it cannot be the case that any point of potential vehicular access to the foreshore and seabed from which a vessel may be launched (or retrieved) constitutes a 'launching ramp' for the purpose of CMr.33

¹⁴ Affidavit of Andrew Stephens, dated 14 November 2022 at [12].

¹⁵ Affidavit of Andrew Stephens, dated 14 November 2022 at [16].

¹⁶ Affidavit of Andrew Stephens, dated 14 November 2022 at [16].

consistent with the Council’s position on this issue of interpretation.¹⁷

Ownership

[52] The Ngāti Tama parties have an extant application under the Marine and Coastal Area (Takutai Moana) Act 2011 which includes the foreshore and seabed comprising Te Parumoana o Wakapuaka. Wakapuaka 1B manages approximately 1,467ha of land which abuts Te Parumoana o Wakapuaka.

[53] While the submissions and evidence from these parties has been considered, I do not refer to that beyond that which is summarised above. The question before the court is one of plan interpretation.

Opposing parties

[54] Delaware Bay Access Group Incorporated (DBAG), Mr Bright, Mr Wilson and Mr Harvey oppose the Council’s interpretation. The opposing parties say the access point to the foreshore and seabed, on legal road, is a ‘launching ramp’ despite not being identified as such on Planning Map 37.

DBAG

[55] DBAG contends that driving across the foreshore/seabed to then launch at the water’s edge (no matter how far away it is) is permitted by r CMr.33.1. This is because it is “associated with” launching and retrieving from that access point. DBAG contends that for the purpose of r CMr.33(d), it is sufficient that there is a formed (including informally by usage) launching ramp that directly accesses coastal water.

[56] DBAG submits that there is no need to resort to the context of the NRMP to help determine the meaning of r CMr.33.1 because a reasonable interpretation

¹⁷ The Council agrees with this submission, see submissions in reply on behalf of Nelson City Council, dated 19 December 2022 at [8]-[10].

is available on a plain reading of it. DBAG does not however agree with the Council's interpretation.

[57] DBAG submits that permitted activity status is accorded to the disturbance of the foreshore or seabed by activities (vehicles being driven over the beach) *associated with* the launching or retrieval of recreational or commercial vessels at launching ramps.

[58] It follows that if driving over or disturbance of the foreshore or seabed by vehicles is associated with the launching or retrieval associated with a launching ramp, whether that ramp is within or outside the CMA, then the associated driving over or disturbance of the foreshore and seabed is a permitted activity under the rule.

[59] DBAG refutes the contention that the launching ramp must be a launching ramp marked on planning maps with the blue cross symbol as that amounts to reading words into the rule that are not there. DBAG submits it also would not make sense for the rule to apply only to those ramps shown on planning maps because launching occurs throughout the Nelson district at non-structured and/or informal ramps.

[60] DBAG submits the Council appears to be attempting to conflate the provisions of the rule to make the whole of the area between the road reserve and the point of launch the 'launching ramp'. DBAG submits this is a flawed approach to the term as there is a launching ramp clearly apparent. The ramp is a sloping area which takes the vessel down to enable the driving across the foreshore or seabed.

[61] This 'access point' has historically and commonly been referred to as a 'launching ramp', referring to the MPI Recreational Fishing Regulation signage erected at the top of the ramp.¹⁸ DBAG also refers to the MPI National Register

¹⁸ Submissions for DBAG, dated 12 December 2022 at Annexure B2. Note: the Council submits

of Recreational Signage which refers to the location as ‘Maori Pa boat ramp’.¹⁹

[62] DBAG submits that Planning Map 36 for Cable Bay shows three ramps of a similar standard of construction to the ramp at issue in Delaware Bay.

Mr Harvey

[63] Mr Harvey opposed the application for declarations. Mr Harvey submits that boat users rely on the wording of r CMr.33.1(d) as permitting launching and retrieval of boats.

[64] In his s274 notice, Mr Harvey referred to three launching ramps at Cable Bay identified in planning maps with blue cross symbols. He described those ramps are naturally occurring ramps, which the Council have accepted without resource consent for their usage.

[65] Mr Harvey submits the ‘ramp’ in question is similarly naturally occurring, the only difference being the length of the travel from it to the water.

[66] The area in issue, a small area of the launch corridor, is the only safe way to retrieve any boat launched at hightide. Fishing access becomes unachievable unless there is a launching ramp accepted as safe or legitimate use.

[67] Mr Harvey stated that submissions have been made on the draft NRMP seeking to reinstate the launching ramp symbol, including by him, although the submissions are yet to be determined, as the process has been suspended.

[68] He accepts that the decision to restore the launching ramp symbol to the planning maps is an administrative decision beyond the scope or jurisdiction of this proceeding. However, he considers that these proceedings are an attempt to

the photograph is evidence from the bar and is inadmissible for that reason.

¹⁹ Submissions for DBAG, dated 12 December 2022 at Annexure C1. Note: the Council submits the photograph is evidence from the bar and is inadmissible for that reason.

circumvent the plan process and public feedback on it.

[69] If the declaration is made, the court's decision will have the effect of endorsing an administrative decision as a legitimate alternative to undertaking a planning process that mandates public consultation.

[70] He submits that if the court determines it is not a permitted activity to launch and retrieve boats at the location in question, it will have the effect of usurping the administrative process to hear and determine submissions on the NRMP.

Mr Bright

[71] In his s274 notice Mr Bright advised that he recalled attending a public meeting in 2017 at which Council staff were supportive of creating a designated and approved launching location. Mr Bright further recalls receiving a brochure prepared by the Council setting out their plan for a designated launching strip. Mr Bright questions the Council's change in attitude.

Mr Wilson

[72] In his s274 notice Mr Wilson attached and referred to a letter he had sent to the Council on 30 January 2020. In that letter Mr Wilson expressed concern over the direction the Council appeared to be taking in closing access to boat users. He had concerns that the matter would divide the community.

[73] He commented that there are safety and capacity concerns with the alternative of using Cable Bay. Mr Wilson suggested signage could be placed in the area which could include information on where it is acceptable to drive and launch boats, as well as outlining culturally and environmentally sensitive areas to stay away from. He further suggested low tide markers could be placed along the gravel strip.

Legal framework

[74] The Environment Court's declaratory jurisdiction is within the confines of s310 RMA. Section 310 RMA states:

310 Scope and effect of declaration

A declaration may declare—

...

- (c) whether or not an act or omission, or a proposed act or omission, contravenes or is likely to contravene this Act, regulations made under this Act, or a rule in a plan or proposed plan, a requirement for a designation or for a heritage order, or a resource consent; or
- (d) whether or not an act or omission, or a proposed act or omission, is a permitted activity, controlled activity, discretionary activity, non-complying activity, or prohibited activity, or breaches section 10 (certain activities protected) or section 20A (certain existing lawful activities allowed);

...

[75] I am satisfied that the questions asked of the court are within the scope of these provisions.

Interpretation

[76] The principles of interpretation are well developed. In general, the approach is that the plain and ordinary (or common) meaning should be given to the words in an RMA plan, unless there is something in the context of the plan that means an extension of that meaning is required to avoid absurdity or ambiguity.

[77] However, ascertaining the plan meaning of a rule from the words itself cannot be undertaken in a vacuum (*Powell v Dunedin City Council*).²⁰ A further useful consideration derives from an early Court of Appeal decision in *Waimairi County*

²⁰ *Powell v Dunedin City Council* [2004] 3 NZLR 721.

Council v Hogan,²¹ namely:

What would an ordinary reasonable member of the public, examining the scheme [the plan] have taken from the designation?

[78] That question can usefully be considered here.

Wider plan context

[79] The Council submits there is no need to resort to wider plan context to assist in ascertaining the meaning of the rule, because a reasonable interpretation is available if the rule is given a plain reading.

[80] However, Ms Barton did identify some contextual provisions²² which she considers to be of relevance to this question of interpretation. That said, the Council submits they do not point to a different interpretation than that advanced.

Relevance of NZCPS

[81] The Council submits the NZCPS policy demonstrates the value of the seabed and foreshore. This value reinforces the point that it cannot have been intended in the NRMP to allow ad hoc driving on beaches, and that instead the intention (and the plain and ordinary meaning of the words in the NRMP) is that driving on a beach is only authorised in combination with a launching ramp clearly identified on the planning maps.

[82] While broadly agreeing with the Council, the content of the NZCPS provides little assistance in determining the questions I am to decide.

²¹ *Waimairi County Council v Hogan* [1978] 2 NZLR 587.

²² NRMP, Policy CM4.1 and NZCPS, Policy 20.

NRMP – Policy CM4.1

[83] There are no objectives and policies within the NRMP specifically relevant to the interpretation of r CMr.33.

[84] However, general policy (Policy CM4.1) is that activities within the CMA should avoid significant adverse effects on amenity values and public safety. Text from the explanation of the reason for that policy states:²³

Certain types of structures and activities involving the disturbance of, or deposition of, substances on the foreshore or seabed fall into this category. Some structures can improve amenity values. The erection and operation of structures within the coastal environment have the potential for a range of adverse effects on amenity values, depending on their location, size and design. Coastal structures below, or straddling, mean high water springs include moorings, jetties, bridges, wharves, launching ramps, slipways, pipelines, cables, culverts, navigation aids, transmission lines, shoreline protection works (seawalls, groynes, and breakwaters).

[85] DBAG referred to other provisions providing for access to and safety within the CMA, including objective CM4,²⁴ CM7 and CM7.1,²⁵ and DO6.1 and DO6.1.5 NRMP.²⁶

[86] However, these provisions are neutral in the context of the questions I am to decide.

Chapter 13

[87] The question of interpretation arises in the context of the NRMP as it

²³ Affidavit of Julie Barton, dated 11 July 2022 at [53].

²⁴ Requires the maintenance and enhancement of amenity values in the coastal marine area.

²⁵ Relate to public access to the coastal marine area.

²⁶ Relate to riparian and coastal margins.

applies to the CMA.

[88] Under Chapter 13 of the NRMP, and within the CMA, a person is not able to carry out activities on the foreshore or seabed unless there is a rule which says that activity is permitted. Reclamation or disturbing the foreshore or seabed are examples of activities regulated under the rules in explanatory text to Chapter 13, (see AB3.1.111 NRMP).

[89] The NRMP clearly evinces an intention to restrict the activity of driving vehicles on, and disturbance of the foreshore or seabed. That activity is provided for as a permitted activity only if associated with any one of several listed reasons/purposes in r CMr.33.1, of which the launching or retrieving of recreation or commercial vessels at launching ramps is one (in r CMr.33.1(d)).

[90] The question is what is, or where, are the launching ramps for the purposes of r CMr.33.1(d)?

Relevant definitions

[91] The NRMP does not define a “launching ramp”. A “launching structure” is defined. That term is defined for the purpose of its application in a different rule. Clearly these terms are not intended to mean the same thing.

[92] There is no guidance within the NRMP as to whether a launching ramp must be a structure, although I doubt that.

[93] I was referred to other rules that govern the erection or placement of a berthing structure or launching structure with a handling capacity of 130 tonnes or less...) within the CMA, to which the definition of “launching structure” will apply.

[94] If r CMr.33.1(d) was only intended to capture ramps that are structures the phrase ‘launching structure’ could have been used in the rule.

[95] The NRMP states that any term which is not defined is to have its common meaning as defined in the Concise Oxford Dictionary (11th ed.). “Ramp” is there defined as “a slope or inclined plane, esp. for joining two levels of ground...”.

[96] That definition encompasses the informally created dirt track at Delaware Bay. I was told that other similarly formed ramps exist at nearby Cable Bay. These ramps are depicted with the launching ramp symbols on relevant planning maps. Accordingly, the NRMP has given recognition to the use of launching ramps similarly constructed to the ramp at Delaware Bay. However, that is not of itself determinative of the interpretation issue.

Court’s consideration

[97] The essential question is whether r CMr.33.1(d) applies to all launching ramps existing around the coast of the Nelson region or only those depicted on the planning maps with the launching ramp symbol as the Council contends, irrespective of the standard of construction.

[98] Conceivably if the former, that could include any ramp created informally (by usage) during the life of the NRMP.

[99] For DBAG, Mr McFadden invited the court to ignore the planning maps and base my decision on the text of the rule in issue. Mr McFadden contends that that there is too much confusion and concern over the planning maps to regard them as reliable in any way for the purposes of the rule’s interpretation, considering the amendments made to them, seemingly without any authorisation under the RMA.

[100] Only the words of r CMr.33.1 should inform the court’s consideration of the application for declarations. His submissions also noted the absence of any explanatory notes in the plan connecting the rule to symbols on the planning maps, for the purpose of identifying authorised launching ramps.

[101] As to the last of his points, it is not uncommon for plans to include explanatory information to the reader to assist in understanding how to apply chosen methods within a regional or district plan, including in relation to the significance of zones, overlays, and rules.

[102] Chapter 1 of the NRMP (titled “About this document”) contains information to assist the reader in understanding how the plan affects what can be done on land or within the CMA.

[103] Various steps are included to assist in navigation of the plan, the first of which commences with the instruction to check the planning maps (see Step 1, AB3.1.i). This instruction is repeated in many of the subsequent steps.

[104] It is also not unusual for explanatory notes to be included for the purpose of explaining the link between a rule with notations on the planning maps including symbols or overlays. This would be one occasion where that linkage could have been usefully applied.

[105] Without that explanation, the reader is left wondering what launching ramps come within the ambit of the rule given the absence within the rule of any reference to the planning map symbols.

[106] However, this absence may be explained as an oversight given that clause (d) of this rule addresses the only one of several permissible reasons for driving over the foreshore that is not self-contained in the way it is described. No other limb of this rule refers to structures or features that require identification (say on a planning map) to fully understand the import of the rule.

[107] I am not willing to ignore the existence of the planning map symbols for the reasons advanced for DBAG. If I were to accept Mr McFadden’s rationale for doing so, I would be giving validity to allegations of irregularities in the Sch 1 process in relation to the amendments made to the planning maps. In this declaratory context, I am unable (if not reluctant) to do that.

[108] I am also not prepared to ignore the planning map symbols due to the absence of any express linkage or cross-referencing with r CMr.33.1(d). I have earlier referred to some of the explanatory information set out in Chapter 1 of the NRMP.

[109] I consider that an ordinary reasonable member of the community reading the NRMP would likely refer to this chapter before navigating the remainder of the plan. In that event the reader would be left in no doubt that to have a proper understanding of how the NRMP affects what can be done on land or within the CMA, the zone or overlay rules must be read alongside the planning maps.

[110] On that basis I am not willing to arrive at a conclusion that the presence of the launching ramp symbols on the planning maps (or absence thereof) can be ignored in understanding the meaning of r CMr.33.1(d).

[111] Reading all relevant NRMP provisions together, including the planning, assists in achieving the requisite degree of certainty that is a requirement of a plan rule. Without resort to the planning maps, that certainty is unable to be achieved.

[112] Such an outcome would also be inconsistent with the clear intention of the NRMP to restrict certain activities on the foreshore and seabed including those categories of activities caught by r CMr.33.1.

Conclusion

[113] This has not been an easy question to answer because (as a first-generation plan under the RMA) the drafting of this plan is not as clear as it could be. However, it is due to be replaced. The process of preparing a new plan will not be undermined by the court's decision on this application, contrary to the fears of some of the opposing parties. The Council is not bound to carry over the content of any of the current NRMP provisions into a new NRMP.

[114] Importantly, this decision does not address the merits of using the dirt track

at Delaware Bay. Evidence from the parties directed to that question of merit has been set aside. Those merit issues are for the Council's future consideration in considering a replacement NRMP.

[115] Nor can the Council be criticised for bringing this application. The uncertainty surrounding this issue has been a long-standing source of disharmony within the Nelson community.

Outcome

[116] The court hereby makes the declarations sought by the Council that:

- A: The use of the beach area below mean high water springs (MHWS) at Delaware Bay (shown on Plan A attached) for driving vehicles across to launch and retrieve recreational boats/fishing vessels at the water's edge is not a Permitted Activity under Rule CMr.33 of the Nelson Resource Management Plan (Plan), and therefore, the activity requires resource consent.
- B: The beach area at Delaware Bay (shown on Plan A attached), below MHWS, which is used to launch and retrieve recreational boats/fishing vessels, is not a launching ramp under Rule CMr.33(d) of the Plan.

[117] Costs are to lie where they fall.



P A Steven
Environment Judge

Plan A - Delaware Bay Area

