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KENT BAIGENT, SUBMISSION NO. 6127
SUMMARY FOR ORAL HEARING, 30 OCTOBER 2014

IMPORTANCE OF REGIONAL POLICY STATEMENT

Statement: The Regional Policy Statement in Chapter B sets the framework for the entire Unitary Plan. Public input is therefore important to give the Council a mandate for making major constitutional or regulatory changes.

Auckland Regional Council v North Shore City Council **[1995] 3 NZLR 18 (CA) Cooke P**

> *Counsel for the defendants are on unsound ground in suggesting that, in everyday New Zealand speech or in parliamentary drafting or in etymology, policy cannot include something highly specific. We can find nothing in the Resource Management Act adequate to remove the challenged provisions from the permissible scope of "policies".*"
>
> *"Regional policy statements may contain rules in the ordinary sense of that term, but they are not rules within the special statutory definition and directly binding on individual citizens. Mainly they derive their impact from the stipulation of Parliament that district plans may not be inconsistent with them."*

Environmental Defence Society Inc v New Zealand King Salmon Company Ltd **[2014] NZSC 38**

> *[11](b) "…There must be at least one regional policy statement for each region, [25] which is to achieve the RMA's purpose "by providing an overview of the resource management issues of the region and policies and methods to achieve integrated management of the natural and physical resources of the whole region". [26] Besides identifying significant resource management issues for the region, and stating objectives and policies, a regional policy statement may identify methods to implement policies, although not rules."*
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> *[15] "…the RMA requires that the various planning documents be prepared through structured processes that provide considerable opportunities for public consultation. Open processes and opportunities for public input were obviously seen as important values by the RMA's framers."*

TREATY OF WAITANGI BETWEEN CROWN AND IWI

Statement:

The Regional Policy Statement and the provisions contravene the clear principle enunciated by the Crown, that Treaty obligations run between the Crown and iwi, and that they do not run from citizens to iwi.

Treaty of Waitangi Act 1975, s 6(4A) prohibits the Tribunal from recommending the return to Maori ownership of any private land or the acquisition by the Crown of any private land.

Hon Doug Kidd, the then Minister of Maori Affairs

> *"A fundamental principle of the treaty claims settlement process that is accepted on all fronts is that one injustice cannot be addressed by creating another."*
>
> *"The amendment…will make absolutely plain to all New Zealanders, whether they own land, whether they lend money on it, or whatever their relation might be to it, that private land is sacrosanct and totally excluded from the treaty claims and settlement process."*

Hon D.A.M Graham, the then Minister of Justice

> *"Private citizens hold their tenure from the Crown, and they are entitled to look to the Crown to protect that right and tenure. That right will now be enshrined in legislation for the protection of all private landowners in New Zealand. All New Zealanders will now be totally confident that this will be the law."*
>
> *"The Bill is consistent with the Treaty of Waitangi."*
>
> *"A claim made to the Waitangi Tribunal under section 6 of the Treaty of Waitangi Act 1975, and its final settlement, is a matter between Maori and the Crown. It is not a matter between Maori and private landowners or the Crown and private landowners.*

Hansard from 1st and 2nd readings of Treaty of Waitangi Amendment Bill 1993 (23 February 1993 and 29 July 1993)

There are policies in the RPS which would make new restrictions on a private property rights and require property owners to pay for cultural impact assessments. As it applies to private land, it threatens takings unauthorised by Parliament and effectively circumvents the statutory bar on taking private land for Treaty settlements.

The principles of the Treaty bind the Crown in dealing with Maori entities. The Auckland Council represents all citizens resident in the City and should not propose to give a particular sub-set of the population undue decision making power on matters not directly affecting their interests.

The statement purports to advance and facilitate Tino Rangatiratanga, and introduces, explains and conditions the application of provisions intended to enable Maori to affect private uses of private land. The statement and the implementing provisions make a mockery of the Treaty.

They turn on its head the clear assurances of Article 2, that "all the ordinary people of New Zealand" (Kawharu's translation) would have "the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess…."

RULES OF LAW AND CONSTITUTIONAL CONVENTIONS

Statement: The Proposed Plan is lengthy and complex and full of vague assertions as to the relationship of Maori with the land. Many appear to be supported by no evidence. They are slogans or statements of wishful belief. There are policies which are so vague as to be capable of supporting virtually any claim to implementation, or more, for example there is no explanation as to how it will be determined that a site nominated for scheduling as a site of significance to Mana Whenua has been demonstrated to be of significance (**ch B5.4, policies 1 and 2**

Rules of law:

Lord Hoffman in *Ex parte Simms* [1999] 4 All ER 400 (HL), at 412:

> *"… Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual."*

Resource Management law is not exempt from these principles of construction or interpretation. Hon Justice Brian J Preston, Chief Judge of the Land and Environment Court of New South Wales, Australia "The enduring importance of the rule of law in times of change" (2012) 86 ALR 175"

> *"The law must be general, both in statement and intent, and not be used in a way of harming particular individuals"*
>
> *"The law must apply to everyone equally without making arbitrary distinctions among people"*
>
> *"Laws should be certain and predictable."*
>
> *"An ambiguous, vague, obscure or imprecise law is likely to mislead or confuse at least some of those who decide to be guided by it."*
>
> *"Arbitrariness, in the sense of unbounded discretion, is the antithesis of the rule of law"*

Examples from RPS:

B1.4:

> *"Development and expansion of Auckland has negatively impacted on Mana Whenua taonga, on customary rights and practices of Mana Whenua within their ancestral rohe"*

As kaitiaki, Mana Whenua have responsibilities to maintain and enhance the mauri of resources on both public and private land throughout Auckland. Mana Whenua are experts in tikanga and mātauranga which apply to the region's resources.

B 5.1

The principles of the Treaty are recognised and provided for in the sustainable management of ancestral lands, water, air, coastal sites, wāhi tapu and other taonga, and natural and physical resources. The Treaty is articulated in law through an evolving set of principles. These include:

- *reciprocity*
- *rangatiratanga*
- *partnership*
- *shared decision making*
- *active protection*
- *mutual benefit*
- *right of development*
- *redress.*

Mana Whenua can exercise Tino Rangatiratanga through participation in resource management processes and decisions.

B 5.4 Policy 1

1. *The council will work with Mana Whenua to develop a methodology for identifying, researching and assessing unscheduled sites and places of significance to Mana Whenua that will be nominated for scheduling.*
2. *Schedule Mana Whenua cultural heritage where it can be demonstrated it is of significance to Mana Whenua.*