BEFORE THE AUCKLAND UNITARY PLAN INDEPENDENT HEARINGS PANEL

IN THE MATTER:	of the Resource Management Act 1991 and the Local Government (Auckland Transitional Provisions) Act 2010
AND:	
IN THE MATTER:	Of Topic 005: RPS Issues

STATEMENT OF EVIDENCE OF PAMELA ELAINE MCMILLAN FOR LEE W AND SUSAN C SHORT IN RELATION TO TOPIC 005 – RPS: MANA WHENUA ISSUES

Dated: 17 October 2014

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SUMMARY

1. My full name is Pamela Elaine McMillan. I am a solicitor employed by Franks Ogilvie, a public and commercial law firm in Wellington. I have been in this position since October 2009. I assisted Stephen Franks in writing the further submission for Lee and Susan Short on behalf of Democracy Action: **Submission no. FS 2746**.

2. I am not an expert witness. My qualifications include a BA(Hons) from the University of Waikato and a Dip Libr and LLB(Hons) from the University of Victoria. I have been a practicing lawyer for the past 5 years. I advise clients in local government law, public law and commercial law. Prior to that I was a law librarian.

3. Democracy Action is a not-for profit association established to champion the fundamental importance of democracy and equality of citizenship in New Zealand. They are a group of concerned citizens based in Auckland, but with members throughout New Zealand.

4. The purpose of this statement is:

    a) To respond to Auckland Council's evidence on the Regional Policy Statement ("RPS"), B1.4 Addressing issues of significance to Mana Whenua; and

    b) To provide evidence in support of the issues raised in Submission no. FS 2746 regarding the RPS and the relief sought in paragraph 5.3 of that submission:

        "5.3 We recommend either amending all provisions that purport to privilege "Mana Whenua" with power over private land, to exclude that meaning, or:

            i. Ch A 1.2 – remove references to increasing iwi capacity or expanding the perspective of the council to include Mana Whenua interests.

            ii. Ch A 1.2 – remove the reference to the Unitary Plan purporting to identify clearly Mana Whenua interests and values - it is far from clear and provides little in the way of clear methodology or criteria.

iii. *Ch A 2.2 – either remove reference to the Treaty of Waitangi being "a foundation legal document for New Zealand", or ensure that it is not treated with contempt. It undermines the Treaty to describe it as a legal document, then expressly abuse Article 2 that conferred and upheld property rights*

iv. *Ch A 2.2 – remove references to Treaty principles which create uncertainty in the overlays*

v. *Ch B 1.4 – remove references to greater participation by Mana Whenua in resource consent decision-making*

vi. *Ch B 5.1 – remove policies 1, 2, 3 and 4.*

vii. *Replace all references to "Mana Whenua" in the PAUP with "Tangata Whenua" and use definitions from RMA"*

5. I have used my research skills to search for evidence both in support and against the assertions of fact made in the Proposed Auckland Unitary Plan ("PAUP") and the Statements of Evidence from Andrew Eruera Vercoe and Chloe Astra Trenouth on behalf of Auckland Council ("the Council"). There may be evidence and sources that I am not aware of. But I have found little in the PAUP or the Statements of Evidence or elsewhere to support these assertions. I refer to some of the assertions below.

6. I annex to this statement a paginated bundle of evidence listed in Appendix 1 (pages numbered 1 to 48). The page numbers in square brackets in the remainder of this statement are to pages in this bundle.

Auckland Council's evidence

Statement of Evidence of Andrew Eruera Vercoe, 10 October 2014

7. The evidence of Andrew Vercoe outlines the extensive consultation the Council had with iwi authorities prior to the notification of the PAUP. On 10 October 2014 the Council was asked in writing by Franks Ogilvie whether they should have also consulted with or at least warned Auckland property owners of the implications of the RPS and Mana Whenua provisions on their properties and the immediate enforceability of it and about the role of the Independent Maori Statutory Board in the decision making leading up to the notification of the PAUP. I refer to:

a) Questions for Roger Blakeley on Proposed Auckland Unitary Plan for 10 October meeting (questions 3 to 6): **[page 22]**

> *"3. The Council has specific statutory duties to the Independent Maori Statutory Board to provide information to them, to consult with them, and to take into account its advice. How was the Board involved in decision-making on the Unitary Plan?*
>
> *4. The Council is recorded as allocating $200,000 for Maori engagement during 2013 and 2014. What was this spent on? How much of this was spent on iwi involvement in the draft unitary plan process? How much was each iwi given?*
>
> *5. What engagement did the Council have with property owners affected by the overlay of sites of value prior to notification? How much was spent on it?*
>
> *6. Why was so much spent on consulting and receiving feedback from Maori and yet nothing spent on consulting with the thousands of private property owners affected by this change prior to notification?"*

8. As at the date of the filing this statement no reply to these questions has been received.

9. Franks Ogilvie lodged a complaint under the Human Rights Act 1993 the Office of the Race Relations Conciliator on 30 July 2014 that the PAUP breaches New Zealand's domestic and international human rights and anti-racial discrimination obligations. A response from the Human Rights Commission ("HRC") declined to investigate the complaint. As evidence of the HRC opinion on these matters that correspondence is provided. Franks Ogilvie's open letter of response to this refusal is also provided. It refers to the Independent Maori Statutory Board.

a) Open response to HRC's refusal to intervene in the Proposed Auckland Unitary Plan, paragraph 21: **[page 7]**

> *"21. We noted above that one of the LG(AC)A's purposes is to establish arrangements to promote issues of significance for mana whenua groups. The creation of a Board is how it achieves this. It is unclear to us why the HRC feels that this authorises the approach taken by Auckland Council in the PAUP. The LG(AC)A*

also notes that the Board is independent of Auckland Council (s 82(2)). Further, it does not grant the Board any power over Auckland Council and only subjects Auckland Council to a duty to consult the Board and to take into account the Board's advice (s 88(1))."

10. At paragraph 6.9 Mr Vercoe says "**in my view, the issues of significance identified in B1.4 are consistent with the priorities contained in the Auckland Plan**". I have found nothing to justify that opinion's omission to consider the issues raised in paragraph 9 of the Short submission no. FS 2746 which refers to examples of inconsistencies between the Auckland Plan and the PAUP in relation to Mana Whenua.

Statement of Evidence of Chloe Astra Trenouth, 10 October 2014

11. Paragraph 6.2 of Chloe Trenouth's evidence states "**Mana Whenua are acknowledged as having a special relationship with natural and physical resources in Part 2 of the RMA**". This adopts a novel use of the term Mana Whenua for which I have not found evidential support. The RMA defines mana whenua to mean "customary authority exercised by an iwi or hapu in an identical area." The Open Response to HRC explains this. I refer to:

    a) Open response to HRC's refusal to intervene in the Proposed Auckland Unitary Plan ("Open Response to HRC"), paragraphs 14 -15: **[page 5]**

        "14. The PAUP uses Mana Whenua as a noun and defines them as "Maori with ancestral rights to resources in Auckland and responsibilities as kaitiaki over their tribal lands, waterways and other taonga. Mana Whenua are represented by iwi authorities. Defined as tangata whenua in the RMA." This definition is vague. It begs further questions and is probably circular. It cannot be reconciled with the legislation (the Resource Management Act 1991 (RMA)) to which it makes reference. It is unsuitable for application in a law. Law must be intelligible to people in advance. This is a serious deficiency given that the Mana Whenua provisions already directly affect the properties of thousands of people.

        15. The RMA actually defines mana whenua (un-capitalised) to mean "customary authority exercised by an iwi or hapu in an

identical area." It defines tangata whenua as meaning "in relation to a particular area, the iwi, or hapu, that holds mana whenua over that area."

12. Paragraph 6.9 of Ms Trenouth's evidence states **"[c]oncerns regarding the impacts of B1.4 on democratic processes created by enabling Mana Whenua involvement in decision-making are in my opinion unfounded**". I have not found evidence in support of this opinion. If the opinion is evidence I offer reasons to consider it unfounded as explained in the Open Response to HRC. I refer to:

    a) Open Response to HRC's refusal to intervene in the Proposed Auckland Unitary Plan, paragraph 34: **[page 10]**

        "34. The PAUP provisions constitute 'racial discrimination' for the purposes of Article 1 (1). The framework of co-governance it creates allows unelected iwi members to share in Council decisions and is a distinction based on descent. They impair the enjoyment and exercise on an equal footing of the fundamental political right of democratic participation. Provisions that force private property owners to pay for CIA's (Ch G2.7.4) or allow the Council to make successful subdivision applications contingent on granting iwi access rights (Ch H5.2.3.3) represent a preference based on race and descent that has the effect of impairing the enjoyment on an equal footing of the right to free and undisturbed possession of private property and freedom of belief."

13. Attachment C of Ms Trenouth's evidence is a track changed version of B1.4. The following paragraphs are in regards to Attachment C.

14. The wording in the second sentence of paragraph two (on page 59)which now starts with "**[a]ppropriate protection**". Many of the 3600 sites and places of value to Mana Whenua scheduled in Appendix 4.2 of the PAUP are described in the Council's CHI "no longer exist", "totally destroyed" or "location not known". There was no evaluation of these sites before notification. On 10 October 2014 Franks Ogilvie questioned the Council on why so may sites were scheduled in the PAUP without having been evaluated properly. I refer to:

a) Questions for Roger Blakeley on Proposed Auckland Unitary Plan for 10 October meeting (questions 13 to 16): **[page 23]**

"13 Is the New Zealand Archeological Association (NZAA) submission correct when it says these 3600 sites were scheduled without any prior assessment or evaluation (apart from those that are also included in the Schedule of Significant Historic Heritage Place)?

14 Is the NZAA submission correct when it says the 3600 sites were selected "on the basis of a global mapping exercise, the criteria for which are that sites "are of Maori origin and specified by a geospatial co-ordinate"? If so, why did the Evaluation Report describe this as "robust information" (page 8)?

15 How were these sites originally located, by whom, and what criteria was used?

16 Is the NZAA correct in saying many of these middens no longer exist and some no longer have GPS locations (i.e. they have no confirmed location)?"

15. Chapter B 1.4 refers to the "Crown" as it if includes local government. For example, the first bullet point in paragraph 3 on page 60 states "**the Crown has an obligation to actively protect Maori interest**". I have searched extensively and found no evidence suggesting Crown's Treaty obligations should encompass local government responsibilities. The Office of Treaty Settlement's publication *Ka tika ā muri, ka tika ā mua: Healing the past, building a future* defines the meaning of "Crown" in relation to Treaty negotiations and redress. I refer to:

a) OTS: Ka tika ā muri, ka tika ā mua: Healing the past, building a future, page 22 **[page 37]**

"The expression "the Crown" is used a lot in this Guide. It refers to the executive branch of government (i.e. the branch that carries out the administration of government) and stands for the historical authority of the sovereign (i.e. the Queen or King) as head of state. Today the executive government is made up of the Governor-General (the Queen's representative), Ministers who are Members of Parliament (the legislative or law-making arm of government), and their departments."

b) Open response to HRC's refusal to intervene in the Proposed Auckland Unitary Plan, paragraph 5: **[page 8]**

> *"25……Neither local government nor private citizens are parties to the Treaty. They have no obligations under the Treaty except where those are defined in specific functional areas of legislation. Neither the RMA nor the LGA create the right to access or cultural harvest."*

16. The last paragraph on page 60 states "**in accordance with the principle of redress, the Unitary Plan takes into account the aims of redress as stated by the Office of Treaty Settlements**". A bullet point list follows of the "aims of redress". This is similar but different to the aims of commercial and cultural redress stated in the OTS publication *Ka tika ā muri, ka tika ā mua: Healing the past, building a future*. The "aims" in the OTS publication are in relation to treaty claimants and treaty settlements. It was not intended to apply to local authorities. The PAUP list leaves out some important aims in the OTS list. For example, the aim for cultural redress in the OTS publication "*takes account of New Zealand's ability to pay, considering all the other demands on public spending such as health, education, social welfare, transport and defence"* is not in the PAUP list. Another difference is that the bullet point list in the PAUP beneath this paragraph refers to "Mana Whenua group". The only use of the term "mana whenua" in the OTS publication is as an adjective and not as a noun. I have searched the OTS website and found no other references to Mana Whenua in the way used in the PAUP. I refer to:

a) Ka tika ā muri, ka tika ā mua: Healing the past, building a future, pages 87 and 96: **[pages 39 & 40]**

> *"Financial and commercial redress also recognises that where claims for the loss of land and/or resources are established, the Crown's breaches of the principles of the Treaty will usually have held back the potential economic development of the claimant group concerned.*
>
> *….*

The task for the Crown in developing the current settlement policy was to devise an approach to financial and commercial redress that, within a negotiated settlement as a whole:

• enables the claimant group's sense of grievance to be resolved

• contributes to the economic and social development of the claimant group"

…

"In negotiations claimant groups will therefore often want redress to meet the following linked interests:

• protection of wähi tapu (sites of spiritual significance) and wähi whakahirahira (other sites of significance) possibly through tribal ownership or guardianship (kaitiakitanga – see page 107)

• recognition of their special and traditional relationships with the natural environment, especially rivers, lakes, mountains, forests and wetlands

• giving claimant groups greater ability to participate in management and making decision-makers more responsible for being aware of such relationships, and

• visible recognition of the claimant group within their area of interest."

• is fair between claimant groups, and

• takes account of New Zealand's ability to pay, considering all the other demands on public spending such as health, education, social welfare, transport and defence."

17. Paragraph 9.10 of Ms Trenouth's evidence refers to the inconsistent terminology currently used throughout the issues in referencing sites and places or cultural and historic heritage. The terminology used in Appendix C has been changed to "**sites and places of cultural and historic heritage**". The Council has released guidelines on the interpretation and application of the identification and extent of sites and places of value to Mana Whenua. The Guidelines refers to the sites or places of value to Mana Whenua as "archeological sites". The Guidelines refer to the definition of "archeological sites" in s 2 of the Historic Places Act 1993. The long title of

this Act includes "To promote the identification, protection, preservation, and conservation of the historical and cultural heritage of New Zealand". I refer to:

a) Auckland Council: PAUP overlay relating to sites or places of value to mana whenua: Guidance for responding to queries about its potential application: **[page 46]**

18. The last paragraph on page 61 states:

> "**The management of sites and places of cultural and historic heritage has not always enabled Mana Whenua aspirations. As a consequence, Mana Whenua have been hesitant to provide information to support scheduling of sites and places for protection in Auckland's legacy regional and district plans**".

19. The PAUP duplicates the processes under the Historic Places Act 1993 and now the Heritage New Zealand Pouhere Taonga Act 2014 to protect archeological sites. The 3,600 sites were taken from the Council's Cultural Heritage Inventory ("CHI"). I have searched for evidence of hesitation by Maori to schedule sites and places for protection and not found any. I acknowledge there is a difference between the way sites are scheduled in the CHI and the way sites are assessed and determined for entry on the New Zealand Heritage List and District Plans.

20. The references in B1.4 to Mana Whenua's responsibilities over private land are unchanged. For example on page 62 it states "**as kaitiaki, Mana Whenua have responsibilities to maintain and enhance the mauri of resources on both public and private land throughout Auckland**". I have searched for commentary supporting that statement and have not found any. The OTS publication *Ka tika ā muri, ka tika ā mua: Healing the past, building a future,* explains the role of third parties in settlement negotiations. Private land is not available for use in settlements. If third parties have existing rights over Crown Law that is included in settlements their interests are suitably protected in settlement negotiations. Similarly, land used or vested in local authority is not available for use in Treaty Settlements unless the local authority offers it for use. I refer to:

a) OTS, Ka tika ā muri, ka tika ā mua: Healing the past, building a future, page 67: **[page 38]**

> *"Local authorities are often responsible for managing many of the reserves in their area. These reserves may cover both land owned by the council and land owned by the Crown that has been set aside as a reserve. Land owned by or vested in a local authority is not available for use in Treaty settlements, unless the local authority offers it for use."*
>
> *…*
>
> *"As previously noted, private land is not available for use in settlements. Many areas of Crown land are also subject to private property rights for the benefit of third parties. These rights include easements, licences and leases. The Crown ensures that third parties are notified and their interests are suitably protected in settlement arrangements"*

Pamela Elaine McMillan

17 October 2014

APPENDIX 1: SCHEDULE OF EVIDENCE

Date	Type	From	Relevance	Page
16 Oct 2014	Open response to HRC's refusal to intervene in the Proposed Auckland Unitary Plan	Franks Ogilvie	Discusses human rights legislation, international instruments and the PAUP	1
10 Oct 2014	Questions to Roger Blakeley on Proposed Auckland Unitary Plan for 10 October 2014 Meeting	Franks Ogilvie	Questions the Council on matters relevant to the RPS	22
1 Sept 2014	Letter from Sylvia Bell, Principal Legal & Policy Analyst, Human Rights Commission to Stephen Franks	Stephen Franks	Response to Franks Ogilvie complaint	27
30 July 2014	Letter from Stephen Franks to Dame Susan Devoy, Office of the Race Relations Conciliator	Stephen Franks	Complaint that PAUP breaches NZ's domestic and international human rights and anti-racial discrimination obligations	30
	Exerpts from Ka tika ā muri, ka tika ā mua: Healing the past, building a future	Office of Treaty Settlements	Considers options for redress. Defines "Crown". No references to "Mana Whenua" as a group. No references to interfering with private property rights.	36
	PAUP overlay relating to sites or places of value to mana whenua: Guidance for responding to queries about its potential application	Auckland Council	Uses "archeological site" when referring to sites and places of value to Mana Whenua	46