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Memorandum

To: Lee Short, Democracy Action

From: Stephen Franks, Pam McMillan, Franks Ogilvie

Date: 18 November 2014

Subject: Legal Advice on the Mana Whenua provisions of Proposed Auckland Unitary Plan

Summary

1. We have been asked for advice on the legality of the following aspects of the Mana Whenua provisions of the Proposed Auckland Unitary Plan (PAUP):

   (a) The use of the precautionary approach for the Sites and Places of Value to Mana Whenua Overlay;

   (b) The purple circles on the Sites and Places of Value to Mana Whenua Overlay Map;

   (c) The mandatory requirement for cultural impact assessments ("CIA's");

   (d) Their immediate effect;

   (e) Their vagueness and uncertainty;

   (f) The process leading up to the notification of the PAUP; and

   (g) The application of concepts of 'partnership' and 'co-management'.

2. A summary of our view on each of these aspects is:

   (a) **Precautionary approach:** According to the New Zealand Coastal Policy Statement and case law the precautionary approach should only be used when there is a possibility of significant adverse effect from a proposed activity. Even for sites with known characteristics the threat through activities such as excavation in neighbouring properties is unlikely to meet that threshold in most cases. Where the sites have unknown characteristics it is likely to be because they do not have obvious features or have not been evaluated. Existing law covers the discovery of buried archaeological

evidence. On a site by site basis it would likely be hard for the Council to defend an assumption of significant adverse effects in many locations from activity on **adjacent land**.

(b) **Purple circles:** The Council has admitted that the size of the purple circles on the Sites and Places of Value to Mana Whenua map was a mistake.[1] The map is part of the PAUP and therefore the circles represent the sites. Usually a significant mistake like that would be corrected by a local authority on application to the Environment Court under s 292 of the RMA.

(c) The Council's failure to seek immediate correction and to institute interim arbitrary measures is reprehensible, and could justify court application for compensation if loss is established.

(d) **CIAs:** Requiring applicants to consult with iwi as part of the resource consent process in order to obtain a CIA is contrary to s 36A of the RMA, case law, and the practice of local authorities. It improperly applies procedures which are proper for plan development, to resource consent or plan administration processes.

(e) **Immediate effect:** There is doubt whether the Mana Whenua provisions should have been given immediate effect. Under s 75(4) of the RMA rules cannot be contrary to a regional policy statement (RPS) under certain circumstances. In addition it is unclear if sites (including large buffer zones) that have not been evaluated to determine if they are of value to Mana Whenua would meet the definition of 'historic heritage' in the RMA and therefore require 'protection'.

(f) The Council's apparent indifference to the costs of this unnecessary immediate application of the provisions invites consideration of the kind of proceedings mentioned above in relation to the wrong sizing of the purple circles.

(g) **Uncertainty:** Some of the Mana Whenua provisions are so vague they could be found by a court to be void for uncertainty. The Council has been wilfully (knowingly) careless in this respect.

(h) **Flawed process:** If councillors have no recollection of considering the CIA provisions, taking account of correspondence and minuted absence of positive records, it is unlikely the correct procedure was followed prior to notification. The Harrison Grierson/NZIER audit of the section 32 evaluation may indicate a reprehensibly casual approach to the purpose of legal requirements.

(i) **Partnership / co-management:** The RMA requires local authorities to take in account the principles of the Treaty of Waitangi but this does not make the

[1] Letter from Roger Blakeley to Lee Short, 23 October 2014, A12.

local authority a treaty partner. They have only treaty obligations that are explicitly imposed by statute. The PAUP provisions and officer answers to questions disclose material misconceptions about the proper interpretation of RMA references to relevant matters.

3. This opinion is based on the information which is publicly available or which the Council has given us and our own research. We enclose the advice given to Democracy Action by Dr Kenneth Palmer on 29 September 2014 and concur with it. The purpose of the opinion is to advise on the legality of the Mana Whenua provisions of the PAUP. Advice on the prospects of success in litigation, in relation to costs would be separate.

4. Relevant to all of these issues are the fiduciary duties of the Council to Auckland property owners to act in good faith.[2] It the issues were tested in court this would be taken into account.

Precautionary approach

5. The Council has justified the sites and places of value to Mana Whenua overlay on the need to take a 'precautionary approach'.[3] The Statement of Evidence of Mr Smitheram on behalf of Auckland Council states:[4]

> *There are 3600 Sites and Places of Value which are identified on an overlay by purple circles in accordance with the precautionary approach to these sites and places. Available archaeological information confirms the presence and location of Mana Whenua cultural heritage for Sites and Places of Value, but their significance has not been assessed in detail.*
>
> …
>
> *"A precautionary approach recognises circumstances where there is considerable risk in not acting. In the case of Mana Whenua cultural heritage where there is uncertainty or a lack of information, precaution should be taken in decision-making to avoid further loss and deterioration of a finite and irreplaceable resource."*

6. We note the assertions, without evidence, that sites have already suffered "loss" and that they represent resources that are "finite and irreplaceable". This appears to misapply language which may be pertinent to physical or tangible resources, as if it has equivalent meanings in relation to cultural heritage assertion, without anchoring or connecting them to the sites.

7. Chapter B5.4 states:

> *The approach to Mana Whenua cultural heritage addresses the multiple levels of Mana Whenua cultural heritage, incorporates the provisions of Policy 2 of the NZCPS and applies a precautionary approach where information is lacking but protection is warranted.*

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[2] *Waitakere City Council v Lovelock* [1997] 2 NZLR 385 (CA).
[3] Letter from Roger Blakeley to Lee Short, 23 October 2014, A13.
[4] Statement of Evidence of Maximus Graham Smitheram on behalf of Auckland Council (21 October 2014) paragraph 1.11

8. The term 'precautionary approach' stems from Principle 15 of the 1992 Rio Declaration[5]:

> *In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost effective measures to prevent environmental degradation.*

9. We observe that it stipulates for careful assessment, not potential freezing of decisions. The PAUP provisions do not contemplate special care, or a higher standard of reassurance pending the gaining of 'scientific certainty'. They do not require that uncertainty be reduced by research. Instead they require indefinitely subjective assessments by parties with conflicting interests.

10. Since then courts have developed the meaning. The Environment Court in *NZ Forest Research Institute Ltd v Bay of Plenty Regional Council* summarised it as follows: [6]

> *The short point is that what is required, if there is an unknown degree of risk, but possible significant adverse effects if the risk comes to pass, is that those undertaking whatever it is should be very careful in assessing what activities might be regarded as appropriate in that place.*

11. In that case the Bay of Plenty Regional Council's proposed regional policy statement included a requirement to use a precautionary approach for genetically modified organisms. The Court directed a replacement provision which would "*de-couple the GMO issue from the precautionary approach and defuse the suggestion of policy by stealth*".[7]

12. The Court noted that the precautionary approach is implicit in the RMA via the definition of the term "effect" in s 3(f). The definition is [our emphasis]:

> *3 Meaning of "effect"*
> *In this Act, unless the context otherwise requires, the term effect … includes—*
> *(a) Any positive or adverse effect; and*
> *(b) Any temporary or permanent effect; and*
> *(c) Any past, present, or future effect; and*
> *(d) Any cumulative effect which arises over time or in combination with other effects—*
> *regardless of the scale, intensity, duration, or frequency of the effect, and also includes—*
> *(e) Any potential effect of high probability; and*
> ***(f) Any potential effect of low probability which has a high potential impact.***

13. The PAUP shows no sign of reliance by the Council on evidence related to sites of value that goes to scale, time of effect, intensity, duration, frequency, probability, or impact. Nor does it stipulate for anything of that kind in cultural impact assessments.

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[5] The report of the United Nations Conference On Environment and Development 1992
[6] *NZ Forest Research Institute Ltd v Bay of Plenty Regional Council* (EC) [2013] NZEnvC 298 para 17.
[7] Ibid, para 29.

14. B5.4 refers to Policy 2 of the NZCPS which is the NZ Coastal Policy Statement. Policy 2 is: [our emphasis]

> ***Policy 2: The Treaty of Waitangi, tangata whenua and Māori***
>
> In taking account of the principles of the Treaty of Waitangi (Te Tiriti o Waitangi), and kaitiakitanga, in relation to the coastal environment:
>
> a. recognise that tangata whenua have traditional and continuing cultural relationships with areas of the coastal environment, including places where they have lived and fished for generations;
> b. involve iwi authorities or hapū on behalf of tangata whenua in the preparation of regional policy statements, and plans, by undertaking effective consultation with tangata whenua; with such consultation to be early, meaningful, and as far as practicable in accordance with tikanga Māori;
> c. with the consent of tangata whenua and as far as practicable in accordance with tikanga Māori, incorporate mātauranga Māori[1] in regional policy statements, in plans, **and in the consideration of applications for resource consents**, notices of requirement for designation and private plan changes;
> d. provide opportunities **in appropriate circumstances for Māori involvement in decision making, for example when a consent application** or notice of requirement **is dealing with cultural localities or issues of cultural significance**, and Māori experts, including pūkenga[2], may have knowledge not otherwise available;
> e. take into account any relevant iwi resource management plan and any other relevant planning document recognised by the appropriate iwi authority or hapū and lodged with the council, to the extent that its content has a bearing on resource management issues in the region or district; and
> i. where appropriate incorporate references to, or material from, iwi resource management plans in regional policy statements and in plans; and
> ii. consider providing practical assistance to iwi or hapū who have indicated a wish to develop iwi resource management plans;
> f. provide for opportunities for tangata whenua to exercise kaitiakitanga over waters, forests, lands, and fisheries in the coastal environment through such measures as:
> i. bringing cultural understanding to monitoring of natural resources;
> ii. providing appropriate methods for the management, maintenance and protection of the taonga of tangata whenua;
> iii. having regard to regulations, rules or bylaws relating to ensuring sustainability of fisheries resources such as taiāpure, mahinga mātaitai or other non commercial Māori customary fishing;
> g. in consultation and collaboration with tangata whenua, working **as far as practicable in accordance with tikanga Māori**, and recognising that tangata whenua have the right to choose not to identify places or values of historic, cultural or spiritual significance or special value:
> i. recognise the importance of Māori cultural and heritage values through such methods as historic heritage, landscape and **cultural impact assessments**; and
> ii. provide for the identification, assessment, protection and management of areas or sites of significance or special value to Māori, including by historic analysis and archaeological survey and the development of methods such as alert layers and predictive methodologies for identifying areas of high potential for undiscovered Māori heritage, for example coastal pā or fishing villages.

15. Regional policy statements must give effect to the NZCPS under s 62(3) of the RMA. We emphasized words above which appear relevant to the question of whether the Policy contemplates or requires iwi involvement in the decision-making on the plan, or goes further and justifies provisions that would involve iwi in discussions on the application of the Plan. Policy 2 has phrases such as "in appropriate circumstances" and "as far as practicable". This is in contrast to the Mana Whenua provisions in the PAUP which include policies which are absolute and universal (e.g. Policy 3 in chapter E5.2 Sites and Places of Value to Mana Whenua) and with no need determination of justification on a case by case or site by site basis.

16. Nevertheless, in our opinion, paragraphs (c) and (d) of Policy 2 do contemplate Maori involvement in decision making that goes beyond assistance in making sure

that Plans are sensitive to, and 'recognise' or respect Maori cultural sensitivities. It seems however that the NZCPS is designed to require the elucidation of matauranga Maori or involve Maori specifically only when they have relevant knowledge not otherwise available.

17. Yet the express reference to a right not to identify places or values seems necessarily to imply a form of right without exploration. Taking all this into account it seems feasible to achieve the objectives of paragraphs (c), (d) and (g) and (i) without a blanket stipulation for case by case cultural impact assessments. For example statements pertaining to sites could describe the kind of activities or uses that would have cultural or spiritual significance, and how adverse effects might be integrated, so that property owners and buyers would know it in advance. Such statements would satisfy the NZCPS and the statutory encouragement in ways less constitutionally contentious than the PAUP requirements for CIA's.

18. Policy 3 of the NZCPS is on the meaning of 'precautionary approach' and states: [our emphasis]

> ***Policy 3: Precautionary approach***
>
> 1. Adopt a precautionary approach towards proposed activities whose effects on the coastal environment are uncertain, unknown, or little understood, but **potentially significantly adverse**.
> 2. In particular, adopt a precautionary approach to use and management of coastal resources potentially vulnerable to effects from climate change, so that:
>   a. avoidable social and economic loss and harm to communities does not occur;
>   b. natural adjustments for coastal processes, natural defences, ecosystems, habitat and species are allowed to occur; and
>   c. the natural character, public access, amenity and other values of the coastal environment meet the needs of future generations.

19. The words "potentially significantly adverse" are similar to the words used in the NZ *Forest Research Institute Ltd v Bay of Plenty Regional Council* decision. The guidance note[8] to the Policy 3 of the Coastal Policy Statement says: [our emphasis]

> *"it will be a matter for local authorities to decide **on a case-by-case basis** whether the activity should be avoided until sufficient study has been done into its likely effects, or whether an activity is allowed, but subject to "complex and detailed conditions and a programme of specified testing and monitoring (as in adaptive management)".*

20. In summary a precautionary approach should only be used:

    (a) on a case by case basis rather than as part of a blanket approach;

    (b) Where the likely effects of activities are unavoidably unknown;

    (c) Where there are possible significant adverse effects if the risk comes to pass; and

[8] Department of Conservation, *NZCPS 2010 Guidance note Policy 3: Precautionary approach* para 107 http://www.doc.govt.nz/Documents/conservation/marine-and-coastal/coastal-management/guidance/policy-3.pdf

(d) Where it is interim, until definitive study has delineated the risks and characteristics.

21. The relevant PAUP provisions are apparently permanent, with no indication that CIA's will not be required once sites are properly known.

22. Mr Smitheran's claim that "there is considerable risk in not acting" is not supported by the Council's own admission that in many cases the impact from earthworks to the site is likely to be minimal.[9] There is evidence in the Council's Cultural Heritage Inventory (CHI) that some of the sites no longer exist. The Council could have checked the CHI for each site, visited the sites, and consulted with Mana Whenua before notification to determine:

(a) The current state of the site (e.g. whether it still exists, the exact location and description, the fragility of each site) ;

(b) Whether the heritage characteristics of the site meant that the specific regime for heritage was a better protection, or already provided for adequate protection;

(c) If the site was of value to Mana Whenua in accordance with a evidence which would be acceptable to the Environment Court;

(d) If the size of the buffer zone (i.e. the 200m wide purple circle plus the 50m extra) was necessary to protect each particular site;

(e) If the buffer zone comprised of 'historic heritage';

(f) The type of harm that could be done to the site by earthworks on properties within the buffer zone; and

(g) The likelihood of that harm being "significantly adverse".

23. More obviously it could have stipulated for the creation of a register or database of prior assessments for each site that would enable people in the buffer zone to understand what activities or uses might affect, or be affected by the cultural or spiritual attributes of the sites.

24. In other words, we do not think a Court would agree the precautionary approach was necessary when the Council could have taking these, or similar, steps but chose not to. And even if it did, the proposed permanent powers to interfere with uses are remote from the purpose of precautionary protection.

25. Based on the NZ *Forest Research Institute Ltd v Bay of Plenty Regional Council* decision where the Environment Court removed any express requirement to use the precautionary approach with GMOs, it is unlikely a court would find there is a need to apply a precautionary approach to activities, such as digging a new garden

[99] Letter from Roger Blakeley to Lee Short, 23 October 2014, A24.

on a property which is within 50 metres of the already excessive purple circle surrounding a small shell midden which may not even exist.

26. It should be noted however that in the recent case of *Te Tumu Landowners Group v Tauranga City Council*[10] the Environment Court appeared to uphold a more precautionary approach with regards to overlays. The Court noted that because the overlays were an interim step and that the areas would be subject to "further clarification or alteration as further studies are done for the purposes of development"[11], the area determined on the overlay was a reasonably appropriate representation.

27. The *Te Tumu* case can be distinguished on the basis that it dealt with a specific site where there was strong evidence that the site was significant to Maori. In these circumstances the court gave the matter careful consideration and favoured a delineation of the area that was conservative and justified with historical evidence.

28. *Te Tumu* should not be interpreted generally as legitimising the precautionary approach where there is alleged sensitivity but limited evidence. In *Heybridge Developments Ltd v Bay of Plenty Regional Council*[12] it was held that "*the existence of the fact is not established by an honest belief" and that it was not for the landowner to disprove the belief*". The decision of the Court, unable to determine with any certainty the possible burial site of an ancestral chief Tutereinga, was to allow the subdivision to proceed with suitable conditions.

29. *Te Tumu* is authority for following the precautionary approach where there is good evidence that the site is significant but there is uncertainty around the details but that is not the case for many PAUP sites They have been designated as of value to Mana Whenua when they may in fact have little to no cultural significance. The affected purple circle area around these sites on the overlay is arbitrary with respect to each site. It should not be the landowner's responsibility to disprove that their property contains anything of value or significance or their property use might affect a nearby site that might have significance.

30. The Council's section 32 report also invokes the precautionary approach to justify the Mana Whenua provisions. The use of s32 to justify a blanket approach has been cautioned by the Court of Appeal in *Coromandel Watchdog of Hauraki Inc v Ministry of Economic Development*[13]. The Court of Appeal held that a blanket ban on mining was not justified under a precautionary approach flag in s 32 where the facts of the risk were available or could be determined.

31. The significance or value of most of the designated sites to Mana Whenua is, or can become, a matter of historical and archaeological record. The attributes of these sites are as capable of being determined now as they ever will be. The purple circles

[10] *Te Tumu Landowners Group v Tauranga City Council* [2014] NZEnvC 38, [2014] NZRMA 317.
[11] Ibid, *Te Tuma*, [87].
[12] *Heybridge Developments Ltd v Bay of Plenty Regional Council* [2013] NZEnvC 269, [2014] NZRMA 164
[13] *Coromandel Watchdog of Hauraki Inc v Ministry of Economic Development* [2007] NZCA 473, [2008] 1 NZLR 562 at [40]

delineate areas for permanent iwi intervention rights. Given that purpose, which is not precautionary in situations of uncertainty, we think it is likely a court would support a very restrictive approach to the coverage of the circles. The purpose is to effect a ban on property owners doing certain activities on their land without first obtaining a CIA and resource consent.

Mistake made in purple circles

32. The Council acknowledges the size of the purple circles on the Overlay map are a mistake[14] (they should have been 100m wide in diameter, not 200m wide) but claims they are only an indication of the site and will not be applied in practice.

33. However, the map is part of the plan, and therefore the extent of the purple circles is likely to have legal effect if it came to a challenge in court. The statement of evidence of Sarah Macready on behalf of the New Zealand Archaeological Association says:[15]

> *The rules apply not only to the sites themselves, but to large and arbitrary buffer areas surrounding them where in most cases no archaeology will be present.*
> *…*
> *27. I note that a recent practice note adopted by the Council (Attachment D) advises that the SPVMW identified by purple circles in the overlay maps should provide an indication only, and that in practice the requirement for consent only applies "within 50m of any edge of the actual extent of the archaeological site" where the extent is known, or "within 50m of the centre of the purple circle" where the extent of the site is not known. However, the PAUP itself is not clear on this point, and the reduced scope still involves a substantial area around what may be a very small site (as shown in Attachment C), and potentially a very much larger area around a more extensive site such as one of Auckland's volcanic cone pa. Nor is it clear how the known extent of the site will be determined and whether it would be indicated on the overlays.*
>
> *28 I note also that this more recent interpretation (50m from the edge of the actual site) is very similar to what was proposed in the Draft Unitary Plan, on which the NZAA provided feedback. NZAA made the point then that a proposed 50m buffer around the actual extent of sites within which consent would be required for a range of activities would impose unnecessary costs and restrictions on large numbers of landowners … That criticism would still apply to the current interpretation. I note also that a 50m buffer restricting activities around the unscheduled SPVMW exceeds the 20m buffer proposed around scheduled SHHP that are also archaeological sites ''of Maori interest", which is inconsistent*

34. What the Council now says in mitigation is immaterial to what the PAUP requires legally.

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[14] Letter from Roger Blakeley to Lee Short, 23 October 2014, A12 says "*The difficulty has arisen since notification is that the purple circles on the Overlay purporting to represent the Sites and Places of Value have a 200m diameter, i.e. a radius of 100m measured from the centre of each circle, rather than a 50m radius (or 100m diameter) as was originally intended. This is not an accurate reflection of the Council resolution on the Overlay, and is likely to have been a result of the late addition of the Overlay."*

[15] Statement of evidence of Sarah Macready on behalf of the New Zealand Archaeological Association 29 October 2014, para 4(c).

35. The Council's claim that the size of the circles on the overlay is only indicative begs the question as to what the circles should cover. Each should differ. Some should be greater than the 7 ha area that the NZAA submission say the circles comprise of. Many should be only a few square metres. The circles as charted on the overlay are legally determinative. The problems with the 50m buffer zone identified by the NZAA are compounded by the Council's mistake in making the circles on the overlay too large.

36. By contrast, significant historic heritage places are charted in the PAUP's historic place maps (PAUP Appendix 9) with no extension of the site listing to include adjacent properties. Therefore adjoining properties can be developed in accordance with the ordinary zoning rules, and rights of property owners are not diminished. Applying an arbitrary 50m buffer around an arbitrary and mistakenly large affected area will impact the property rights, and values, of many thousands of individuals whose land is neither valuable nor significant to Mana Whenua.

37. A significant mistake like that could be corrected by the local authority on application to the Environment Court under s 292 of the RMA. Section 292 gives the Court a discretionary power to amend an operative plan to remedy any mistake, defect or uncertainty in it. [16] We think this would apply to provisions in a proposed plan which has been given immediate effect.

Mandatory CIAs

38. The Council claimed at the public meeting on 18 October that the requirement for CIAs was needed to effectively catch up with what other councils are doing.[17] We have searched for evidence of this but have not found it.[18]

39. The requirement in Chapter B5.4 policy no. 11 and Chapter G2.7.4 for applicants to consult with Mana Whenua as part of the CIA process is contrary to s 36A of the RMA which provides:

> **[36A No duty under this Act to consult about resource consent applications and notices of requirement**
> (1) The following apply to an applicant for a resource consent and the local authority:
> (a) neither has a duty under this Act to consult any person about the application; and
> (b) each must comply with a duty under any other enactment to consult any person about the application; and
> (c) each may consult any person about the application.

[16] *Re Auckland City Council* (EC Auckland) A026/06 7 March 2006 Judge Newhook, para 17.
[17] Penny Perritt said at the public meeting on 18 October 2014 "It is actually something that perhaps Auckland's legacy councils did not actually do a very good job on in terms of our obligations under the Resource Management Act. In fact, there are many other councils across New Zealand who have adopted CIA provisions for very many years. So in many respects, Auckland's catching up with other parts of the country".
[18] We searched the plans for: Bay of Plenty Regional Council; Hawke's Bay Regional Council; Manawatu-Wangauni Regional Council; Northland Regional Council; Taranaki Regional Council; Waikato Regional Council; Wellington Regional Council; Hamilton City Council; Hutt City Council; Napier City Council; Palmerston North City Council Porirua City Council; Tauranga City Council; Upper Hutt City Council; Wellington City Council; Gisborne District Council; Chatam Islands District Council; Marlborough District Council; Nelson City Council; Tasman District Council. There was nothing about cultural impact assessments in any of the RPS's, heritage sections, or district plans. The most relevant references are to 'consultation with Tangata whenua/iwi and archaeological assessments.

(2) This section applies to a notice of requirement issued under any of sections 168, 168A, 189, and 189A by a requiring authority or a heritage protection authority, as if—
(a) the notice were an application for a resource consent; and
(b) the authority were an applicant.]

40. Section 36A was inserted in 2005 to remove uncertainty over whether applicants were required to consult with iwi. CIAs are one of the tools an applicant may use when preparing an Assessment of Environmental Effects but until now it has only been an optional tool and not required under the RMA[19] or in any existing plan as far as we are aware.

41. The Council claims the CIA requirement is not a requirement to consult with iwi (i.e. under s 36A), but rather the requirement to obtain an expert report. According to the Council: [20]

> *"[cultural] assessments are not about approval: instead they constitute expert advice on how a proposal might impact on cultural heritage. The council will take that expertise into account, but it is the council that makes the decision".*

42. We consider that disingenuous, and inconsistent with the words of the PAUP and the Council's website.

43. Ch G2.7.4 notes that a CIA is required to include a "*description of the consultative process used in preparing the report.*" Ch B 5.1 of the PAUP describes recognising and providing for the principles of the Treaty as an objective. Under "methods" in this section, are "Auckland wide rules for cultural impact assessments." The purpose of the CIA provisions in the PAUP is directly to reflect the principles of the Treaty, including "shared decision making." Further, the definitions section defines cultural impact assessment functionality as "*a report that documents Mana Whenua cultural values, interests and associations with an area or resource, [and] the potential impacts of the proposed activity on these values…"* The purposes of consultation and the purposes of a CIA are largely indistinguishable.

44. CIA's appear under the heading "*provisions requiring consultation with Mana Whenua*" on the Council's website.[21] It follows that even if a CIA itself is not consultation with iwi, it is likely to be not possible in practice to obtain a CIA that would be accepted as sufficient by the Council without consulting with iwi.

45. Consultation is technically not about 'approval' either, as the Ministry for the Environment notes in a guideline on consulting with Tangata Whenua: [22]

[19]Consultation with Tangata whenua is specifically required when making policy and planning instruments under clause 3(1)(d) of Schedule 1 of the RMA. This is different to requiring consultation during a resource consent process.
[20] Auckland Council "Resource Consents: Engaging with Iwi" on Council website http://www.aucklandcouncil.govt.nz/
[21] ibid
[22]Ministry for the Environment "Guidelines for Consulting with Tangata Whenua under the RMA: An Update on Case Law" (December 2003, ME 496) available at:

"the right of tangata whenua to be consulted does not extend to having a right of veto over the project."

46. The CIA process in the PAUP is different to obtaining reports from specialists such as engineers as it is allegedly partly in recognition of the principles of the Treaty of Waitangi. In *Beadle v Minister of Corrections* the Environment Court noted that consultation has the dual purpose of first, recognising the rights of Maori under the Treaty as a party who has a right to be consulted in certain circumstances (the recognition limb), and second, to obtain appropriate and accurate information on the potential effects and effects on affected Maori (the information limb).[23]

47. The CIA process would address the information limb if it is appropriate and accurate. The PAUP offers no quality control.

48. CIA's under the PAUP also differ from advice from experts in a number of respects primarily because of uncontrolled conflicts of interests:

    (a) They are not impartial. A CIA is not provided by an impartial expert of Maori culture such as an historian or anthropologist, it is provided by an iwi representative. They may all have a strong interest in elevating the practical impact of the cultural knowledge. Further, it is not provided by an impartial iwi. It is provided by specifically the iwi that have interests in the area they believe are likely to be affected.

    (b) There is no provision for objective review. A hydrological or engineering assessment can be assessed in terms of its adequacy on objective criteria. Groups such as the Institute of Professional Engineers New Zealand provide oversight and recourse if an assessment has been prepared negligently. By contrast, a CIA will contain subjective values and is provided by iwi who are subject to no oversight. The PAUP says they are to be "recognised" as the foremost "experts" in determining an interpreting their cultural values. That phrase seems designed to put it beyond even the Council to question or challenge expressions of opinion by iwi.

    (c) Specialist advice may directly benefit the resource consent applicant and the public. A person risking capital to develop a site is likely to be interested as the Council is in whether, say, a structure will be able to withstand earthquakes, or whether there is a risk of flooding. A CIA does not benefit the resource consent applicant or third parties or even the Council and neighbours in this way. The main group most likely to gain from a CIA is the one preparing it.

    (d) Where an engineer's or other expert's assessment is required under the PAUP, it is usually in relation to a specific use, and for the purpose of

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http://www.mfe.govt.nz/publications/rma/guidelines-consulting-tangata-whenua-under-rma-update-case-law/5-how-consultation

[23] *Beadle v Minister of Corrections* (A74/02) 8 April 2002 Judge Sheppard, Commissioner Catchpole, Commissioner Menzies paras 547, 549

ascertaining specified factual information. For example, Under Part 3 Chapter K5.48.2.5 an engineer must provide an assessment for applications where buildings are over 20m in height, to determine the wind environment conditions likely to be created. CIA's can be required for any use or development within designated areas and are for the broad purpose of documenting the potential impact on Mana Whenua cultural values.

(e) The PAUP requires other experts to declare "potential conflicts of interests". Chapter H 5.2.2.3, rule 2(b) requires an applicant applying for a resource consent for a subdivision to provide an assessment of the affect of the subdivision on any of the natural resource features identified in rule 2(a) (e.g. areas of indigenous vegetation within the significant ecological area overlay). The assessment must be undertaken by a "suitably qualified and experienced person" which is defined in Part 4 as follows: [our emphasis]

> **Suitably qualified and experienced person**
> A person who can provide sufficient evidence to demonstrate their suitability and competence, including but not limited to the following criteria:
> •demonstrated competence in the type and scale of project
> •formal qualifications
> •review of work history and relevant experience in the building industry
> •evidence of successful completion of technical courses, assignments or projects
> •membership of appropriate trade / professional affiliations
> •quality assurance policies and procedures
> •appropriate levels of professional indemnity insurance based on the value of construction
> •proven performance / historical records (i.e. previous work history for Council)
> •statements or references from industry peers
> **•confirmation that the applicant will declare any potential conflicts of interest**
> •proof of insurance
> •continued professional development.

49. Nothing in the RMA or the Local Government Act obliges the Council to put aside the common sense experience of regulations and human nature when mana whenua are involved. The Council is not required to pretend to have an unfounded belief that iwi representatives are above the normal known drivers to advance one's family or group cultural and spiritual values at the expense of others, or even the simple satisfaction of sharing the capacity to exercise power or influence over others. The PAUP provides no protection against abuses of power.

Immediate effect?

50. Under s 86B(3)(d) of the RMA a rule in a proposed plan has immediate legal effect if the rule "*protects historic heritage."* According to the Council the Mana Whenua provisions came into immediate effect on the date the PAUP was publically notified. We think this is likely to be incorrect for the following reasons.

51. First, there needs to be some 'historic heritage' to protect for s 85B(3)(d) to apply. As the Council did not evaluate the 3600 sites before adding them to the Overlay this is unknown. We understand there is evidence from the Council's CHI (cultural heritage inventory) that some of these sites no longer exist. However, the term 'historic heritage' is widely defined in s 2 of the RMA and includes "sites of

significance to Maori, including wahi tapu". It could be argued that though the structure or place may have been destroyed that memory of it still is of significance to Maori.

52. Even if there is something of heritage value at the centre of the circle, there is by definition likely to be nothing relevant within most of the buffer zone if it commences at the boundary of the actual site. The 'historic heritage' is likely to be limited to the actual site and not extend to the large buffer zone.

53. Secondly, some of these sites are already protected under the Heritage New Zealand Pouhere Taonga Act 2014 ("the HNZPT Act").. It is arguable that if a site is already protected it cannot, or does not need to be protected further. On the other hand the PAUP has different (and potentially wider) restrictions than under the HNZPT Act. That would argue against disqualifying the application of s 86B(3)(d) because of the parallel protections of the HNZPT Act.

54. Thirdly under section 75(4) (b) of the RMA a district plan rule must not be inconsistent with "*a regional plan for any matter specified in section 30(1)".* Section 30(1) includes *"(b) the preparation of objectives and policies in relation to any actual or potential effects of the use, development, or protection of land which are of regional significance*."

55. In our opinion the only operative regional plans are those of the legacy Councils, not this PAUP.

56. Objectives and policies of regional significance include the regional policy statement. The RPS establishes the framework for the rules and will have a significant role in the resource consent making processes. It follows that district plan rules within the PAUP cannot be inconsistent with the regional policy statement so far as its objectives and policies deal with the actual or potential effects of the use, development, or protection of land.

57. According to the Court of Appeal in *Auckland Regional Council v North Shore City Council, Rodney District Council and The Minister for the Environment*[24] district plans "*shall not be inconsistent with the regional policy statement, or any regional plan of its region in regard to any matter of regional significance or for which the regional council has primary responsibility under Part IV*."

58. This would include, for example, Chapter B 5.4 "Protection of Mana Whenua culture and heritage" which includes policies to schedule and protect land designated significant to Mana Whenua.

[24] *Auckland Regional Council v North Shore City Council*, *Rodney District Council*, *and The Minister for the Environment* [1995] (CA)

59. Auckland Council noted in a Fact Sheet:[25]

> *While many of the rules in the Proposed Auckland Unitary Plan do not have immediate legal effect, the objectives and policies of the Proposed Auckland Unitary Plan have effect at the point the plan is notified.*
> *The objectives and policies of the Proposed Auckland Unitary Plan will be weighted against the relevant operative district and regional plan objectives and policies. The weighting of objectives and policies in the Proposed Auckland Unitary Plan relates to the degree that they have been subject to challenge through the submissions and appeal process.*

60. We have not found the legal authority for this statement. There is a strong emphasis on consultation with any RMA planning process and it is unclear why the Council say the "policies and objectives" of the PAUP have immediate effect on notification.

61. There is nothing in the RMA or the Local Government (Auckland Transitional Provisions) Act 2010 which would give the RPS immediate effect. Section 115 of the transitional legislation states "*once all appeals are determined, the Council must then publicly notify the operative date of the proposed plan."* Section 160 of the same Act states:

> ***[160 Auckland Council to notify when plan operative***
> *The Auckland Council must notify the date on which the plan, or each part of the plan, as the case may be, will become operative in accordance with clause 20 of Schedule 1 of the RMA.]*

62. Clause 20 of Schedule 1 of the RMA states:

> ***20 Operative date***
> *[(1) Subject to subclause (2), an approved policy statement or plan shall become an operative policy statement or plan on a date which is to be publicly notified.]*

63. If the RPS in the PAUP does not have immediate effect, then in accordance with the Local Government (Auckland Transitional Provisions) Act 2010 section 78(2):

> *"On and from November 2010, any regional plans or district plans of existing local authorities are deemed to be the regional plans and district plans of Auckland Council. These plans remain until replaced by an operative regional plan or district plan, as the case may be, made by Auckland Council."*

64. It appears that the regional policy statements in the transitionally adopted legacy council plans are not overridden by that of the PAUP at this stage.

65. This creates the legal risk that the district plan level rules pertaining to Mana Whenua in the PAUP are invalid because of section 75(4) (b) of the RMA.

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[25] Proposed Auckland Unitary Plan Legal effect: Fact Sheet
http://www.aucklandcouncil.govt.nz/EN/planspoliciesprojects/plansstrategies/unitaryplan/Documents/Key%20topics%20in%20detail/upkeytopicslegaleffect.PDF

66. For example, the Auckland Regional Council's Regional Policy Statement, that became operative on 31 August 1999, in Chapter 3 (Matters of Significance to Iwi) makes no mention of Mana Whenua or Mana Whenua groups and instead talks of Tangata Whenua. More substantively, the Auckland Council Regional Policy Statement at Chapter 3, 3.4.8 Method number (11) states:

> *"The ARC and TAs will, where Tangata Whenua are affected, encourage applicants to consult the appropriate Tangata Whenua groups prior to submitting their applications for resource consents."*

67. By contrast, the PAUP's CIA provisions in Chapter G 2.7.4 make CIAs mandatory, in certain circumstances, where iwi require it. A CIA can be triggered under the PAUP by a wide range of generic activities such as "discharges to air" (ChG 2.7.4, 4.a.), "drilling to construct a bore" (ChG 2.7.4, 4.f.), and "mineral extraction". Forced consultation with iwi even when their interests may not be affected is inconsistent with a policy that resource consent applicants should be simply encouraged to consult with Tangata Whenua, and only when their interests are at stake.

68. There is therefore an appreciable legal risk that the Mana Whenua provisions that are operative at present contravene the RMA section 75(4) (b) and are therefore illegal.

69. The Mana Whenua provisions have been challenged heavily throughout the submissions process to date. Applying the Council's advice, even if the RPS has some effect, it should be given less weight than the regional policy statements of the adopted legacy council plans that are operative by dint of s 78(2) of the Local Government (Auckland Transitional Provisions) Act 2010.

70. The Supreme Court in *King Salmon*[26] placed substantial emphasis on the consultation and testing process of development of a Policy Statement in giving it determinative authority. The PAUP's regional policy statement has manifestly not yet benefitted from such a process. It appears to be the wish list of the only side consulted.

Void for lack of certainty

71. Some of the policies and rules regarding CIAs and Mana Whenua values are so vague and uncertain they could be deemed by a court to be void for lack of certainty. As Westfield said in their submission to the Hearings Panel "*it is a well established principle that rules in plans developed under the RMA must be sufficiently certain that a potential applicant is able to assess on the face of the rule whether or not that rule applies to their application*"[27].

72. If the rule is "get a CIA", it is clear enough to achieve that. But the requirement for certainty is unlikely to be satisfied by that superficiality. The purpose of the law's requirement for certainty is to uphold the rule of law objective. Citizens are entitled

[26] *Environmental Defence Society Inc v New Zealand King Salmon Company Ltd* [2014] NZSC 38
[27] Westfield submission to PAUP at p 56.

to know how they will be affected by a rule, and what conduct enables them to gain to resource consent. The CIA requirement does not enable that. They cannot know what the CIA will say.

73. In addition it is difficult to link particular rules of the substantive provisions of the PAUP to policies and objectives in the RPS.

74. Chapter B5.4 provides Mana Whenua almost unfettered discretion over which sites should be listed as sites and places of value to Mana Whenua. Policy 1 is:

> *"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."*

75. Policy 8 is

> *"recognise that Mana Whenua are specialists in determining their values and associations with their cultural heritage".*

76. Another example is the rules regarding CIAs. Rule G2.7.4, information requirements 7(d) requires a CIA to include a description of the effects of the activity on Mana Whenua values.

77. As Dr Palmer states in his advice:[28]

> *The applicant is required to obtain a "cultural impact assessment", and by terms of the rules the owner may be obliged to contact one or more iwi or hapu. The rules prescribe extensively the cultural considerations that must be addressed. These essentially require a comprehensive consideration of tikanga, which is the cultural view taken by the particular tribe, iwi or hapu. This obligation raises broad and indeterminate values which in the context of traditional RMA regulation could well be seen as unreasonable due to vagueness, uncertainty as to outcomes, and cost to the applicant.*

78. Policy 3 in Chapter E5.2 Sites and Places of Value to Mana Whenua require subdivision and earthworks to:

    a. *"avoid adverse effects on the values and associations of Mana Whenua with their sites and places of value" and*
    b. *"incorporate matauranga, tikanga and Mana Whenua values"*

79. The word "avoid" was interpreted in the Supreme Court *King Salmon* decision[29] as effectively imposing a requirement that would not permit the listed outcomes to occur at all. This could be difficult to implement.

80. The definition of "Mana Whenua" values in Part 4 Definitions is not exhaustive and provided only as a guide. Because "Mana Whenua values" is so broadly defined it is

[28] Dr Kenneth Palmer *Summary legal view – sites and places of value to mana whenua* (advice to Democracy Action, 29 September 2014).
[29] *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* SC 82/2013, 19 November 2013.

impossible for property owners to determine whether their activity will adversely affect these values.

81. Although courts tend to apply different approaches when determining evidence on Maori values and traditions, the Environment Court generally requires 'probative evidence'.[30] The use of technical Maori evidence is common in courts including the use of anthropologists. These evidence requirements contrast with the lack of methodology or requirements for CIAs and selection of sites and places of value in the PAUP.

Process flawed

82. We understand that some councillors were not aware of the CIA requirements in the PAUP until after notification. Councillor Mike Lee wrote to Stephen Town, Chief Executive of the council on 24 March 2014 and said

> *"I am therefore curious to know why I was not aware of these far-reaching changes until I began to receive emails in January this year".*

83. He goes on to say:

> *"I have found no explicit authorisation by resolution in any of the minutes of any meeting dealing with the Unitary Plan for:*
> *1. Cultural Impact Assessments;*
> *2. The requirement for resource consent applicants to first approach iwi for such Cultural Impact Assessments; and*
> *3. The requirement for Cultural Impact Assessment from iwi for consent within 'Significant Ecological Areas'."*

84. And in a further letter to Mr Town on 21 June 2014 Cr Lee wrote:

> *…the manager(s)….are trying to make the case that a normal process of regulatory decision making took place. By which is meant clear and explicit draft proposals, 'in depth' consideration of those proposals, albeit by a small group of representatives, a briefing of the Governing Body, followed by the normal discussion and debate, and final formal assent."*

85. The Local Government Act 2002 provides a number of principles and requirements to ensure there is sufficient rigour and transparency in the decision-making processes. Local authorities are required under s 39 Governing Principles to "*ensure that the governance structures and processes are effective, open and transparent*". When making decisions, a local authority should take account of (s 14(1)(c)):

> *(i) the diversity of the community, and the community's interests, within its district or region; and*
> *(ii) the interests of future as well as current communities; and*
> *[(iii) the likely impact of any decision on the interests referred to in subparagraphs (i) and*

[30] *Ngati Hokopu ki Hokowhitu v Whakatane District Council* C168/2002 (EC).

86. In the course of the decision-making process a local authority must: (s 77(1)(a) and (b)):

> *(a) seek to identify all reasonably practicable options for the achievement of the objective of a decision; and*
> *[(b) assess the options in terms of their advantages and disadvantages; and]*

87. The Harrison Grierson/NZIER review confirms the view generated by a straightforward reading of the PAUP and the section 32 evaluation. There was no such identification of "all reasonably practicable options". The assessment of advantages and disadvantages was formulaic and superficial, so weak as to be nominal only.

88. It is difficult to see how the Council could have followed these principles and requirements in its decision-making if many councillors were not even aware of the CIA requirements until after notification.

89. The lack of obvious substantive compliance was noted in the NZIER/Harrison Grierson review of the Council's section 32 analysis of the PAUP. It questioned the absence of background information on the Mana Whenua provisions particularly the iwi workshop summary reports. It also noted that the benefits and costs had not been monetised and there was no justification for this. It indicated lack of intention to consider real alternatives, or to take the evaluation into account in finalising the proposals.

90. In the course of its decision-making process a local authority must give consideration to the "*views and preferences of persons likely to be affected by, or to have an interest in, the matter*" (s 78(1)).

Partnership, joint management arrangements

91. Chapter B5.1 "Recognition of Te Tiriti o Waitangi partnership and participation" is part of the Regional Policy Statement and provides the overarching framework for the rules. Chapter B5.1 Policy 3 is:

> *"Recognise and take into account partnership arrangements and agreements between Mana Whenua and the council when making resource management decisions."*

92. B5.1 Policy 4 is:

> *Enable the transfer of powers and/or establishment of joint management agreements for certain functions relating to the development and management of ancestral lands, water, air, coastal sites, wāhi tapu and other taonga, and the sustainable management of natural and physical resources, where an iwi authority:*
> *a. has an ancestral connection or mana over a resource*
> *b. has a clear mandate to represent the interests of that iwi or hapū*
> *c. can demonstrate the ability to fulfill the requirements of the RMA, whether directly or by outsourcing.*

93. The term 'partnership' suggests partnership under the treaty or 'treaty partners'. Environment Court has confirmed that local authorities are not subject to the Crown obligations under the Treaty.[31]

94. The RMA does require substantive and procedural recognition of Maori customary values. This is reflected in provisions regarding consultation with iwi over proposed plans, joint management agreements, and requirements to take into consideration iwi planning documents. Sections 6, 7 and 8 requires that persons exercising functions under the RMA

    (a) shall recognise and provide for the… relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga (s 6(e));

    (b) have particular regard to Kaitiakitanga (s 7(a); and

    (c) take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi) (s 8).

95. The Council has justified many of the new rules and policies (e.g. CIA, greater participation in RMA processes) in the PAUP by reference to ss 6, 7 and 8 of the RMA.

96. There are no guidelines in the RMA as to how to take account of the principles of the Treaty of Waitangi or other requirements in ss 6 and 7. However, all of these matters are subordinate to the single overarching purpose of the RMA in s 5(1) which is to promote the sustainable management of natural and physical resources. Sustainable management is defined in s 5(2) as

    "managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety while—

    (a) Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
    (b) Safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
    (c) Avoiding, remedying, or mitigating any adverse effects of activities on the environment.

97. This means the Council should have taken a balancing approach and considered the effect of Mana Whenua provisions on the social, economic, and cultural wellbeing of the entire community, not just Maori. As the Environment Court said in *Living Earth Limited v Auckland Regional Council*[32]:

    The Court has to weigh all the relevant competing considerations and ultimately make a value judgement on behalf of the community as a whole. Such Maori dimension as arises will be important but not decisive, even if the subject matter is seen as involving Maori

[31] *Seatow Limited v Auckland Regional Council* [1994] NZRMA 204 (EC); Hanton v Auckland City Council [1994] NZRMA 289 (EC)
[32] *Living Earth Ltd v Auckland Regional Council*, EC, A126/06 (4 October 2006) para 281

issues. Although the Maori dimension, whether arising under s 6(e) or otherwise, calls for close and careful consideration, other matters may in the end be found to be more cogent when the Court, as the representative of New Zealand society as a whole decides, whether the subject matter has an adverse effect. In the end a balanced judgement has to be made."

98. In addition the Council is required to take into account the principles of the Treaty of Waitangi under section 8 of the RMA. The principles of the Treaty are not exhaustive but generally include the principle of "mutual benefit" and "mutual obligations to act reasonably and in good faith". Given that many of them are clearly directly applicable only to the "partners" they cannot be simply extended to Councils, which clearly are not partners. The statutory direction is only to "take account" of the principles affecting the Crown. These suggest a balancing approach.

99. The High Court[33] has extracted principles from Waitangi Tribunal decisions and superior courts for incorporation into the RMA context. Some principles include:[34]

- *Partnership.*
- *Mutual obligations to act reasonably and in good faith.*
- *Active protection – Under this principle, the Crown has an obligation to actively protect Mäori interests.*
- *Mutual benefit – This incorporates enabling aspects for both Mäori and non-Mäori.*
- *Development – The Treaty is to be adapted to modern, changing circumstances.*
- *Rangatiratanga – Recognising iwi and hapü rights to manage resources or kaitiakitanga over, their ancestral lands and waters.*

100. In 1989 the Government announced the following principles would be used when dealing with issues arising from the Treaty of Waitangi:[35]

- *(a) The principle of government or the kawanatanga principle:*
- *(b) The principle of self-management (the rangatiratanga principle):*
- *(c) The principle of equality:*
- *(d) The principle of reasonable cooperation:*
- *(e) The principle of redress:*

101. The Principle of Equality was further described as follows:

(c)The principle of equality: Article 3 constitutes a guarantee of legal equality between Maori and other citizens of New Zealand. This means that all New Zealand citizens are equal before the law. Furthermore, the common law system is selected by the Treaty as the basis for that equality, although human rights accepted under international law are also incorporated. Article 3 has an important social significance in the implicit assurance

[33] For example, *Carter Holt Harvey v Te Runanga o Tuwharetoa ki Kawerau* [2003] 2 NZLR 349 (HC).
[34] Ministry for the Environment *Mäori Values Supplement: A Supplement for the Making Good Decisions Workbook* (December 2010) p 49.
[35] New Zealand Parliament, *The Crown & The Treaty of Waitangi: A Short Statement of the Principles on which the Crown Proposes to Act*. These are also in an appendix compiled by Dr Janine Hayward *The Principles of the Treaty of Waitangi*, available at http://www.justice.govt.nz/tribunals/waitangi-tribunal/treaty-of-waitangi/tribunals/waitangi-tribunal/documents/public/treaty-principles-appendix-99

that social rights would be enjoyed equally by Maori with all New Zealand citizens of whatever origin. Special measures to attain that equal enjoyment of social benefits are allowed by international law.

102. The Council has a different version of the principles in its Long Term Plan 2012-2022. It mentions "equality" under "ōritetanga (and mutual benefit)" : [our emphasis]

- rangatiratanga – *the duty to recognise Māori rights of independence, autonomy and self-determination, including the capacity of hapū, Mana Whenua and Mataawaka to exercise authority over their own affairs. This principle enables the empowerment of Māori to determine and manage matters of significance to them*
- shared decision-making – *a balance of the kāwanatanga role in Article 1 and the protection of rangatiratanga in Article 2*
- partnership – *the duty to interact in good faith and in the nature of a partnership. There is a sense of shared enterprise and mutual benefit where each partner must take account of the needs and interests of the other*
- active protection – *the duty to proactively protect the rights and interests of Māori, including the need to proactively build the capacity and capability of Māori*
- ōritetanga (and mutual benefit) – *to recognise that benefits should accrue to both Māori and non-Māori, that both would each participate in the prosperity of Aotearoa giving rise to mutual obligation and benefits. Each needed to retain and obtain sufficient resources to prosper, and each required the help of its Treaty partner to do so.* ***This includes the notion of equality (for example, including education, health and socio-economic considerations)***
- options – *recognising the authority of Māori to choose their own direction, to continue their own tikanga (customary practice) as it was or to combine elements of both and walk in two worlds. This principle includes recognition of Māori self-regulation*
- the right of development – *Te Tiriti o Waitangi/the Treaty of Waitangi right is not confined to customary uses or the state of knowledge as at 1840, but includes an active duty to assist Māori in the development of their properties and taonga (a treasured item)*
- redress – *the obligation to remedy past breaches of Te Tiriti o Waitangi/the Treaty of Waitangi. Redress is necessary to restore the honour and integrity of Te Tiriti o Waitangi/the Treaty of Waitangi partnership, and the mana and status of Māori, as part of the reconciliation process. The provision of redress must also take account of its practical impact and the need to avoid the creation of fresh injustice. While the direct obligation to redress grievances sits with the Crown, council has an important role in implementing the principle of redress at the regional and local level, particularly where the redress includes resources within the region*

103. It is noteworthy that the Council has not mentioned the element of equality before the law, instead claiming that it drives toward equality of socio-economic outcomes.

104. The Council now proposes the following amendments to the principles in Chapter B5.1 of the PAUP

- ~~a. reciprocity~~
- ~~b. rangatiratanga~~

- ~~d. partnership~~
- ~~c. shared decision-making~~
- ~~e. active protection~~
- ~~f. mutual benefit~~
- ~~h. the right of development~~
- ~~i. redress~~
- a. reciprocity and recognition of the essential bargain
- b. rangatiratanga
- c. shared decision-making
- d. partnership
- e. active protection
- f. oritetanga
- g. options
- h. the right of development
- i. redress.

105. It's disturbing that the equality principle in the PAUP appears to have been transformed into a justification for unequal treatment by the law. We think higher courts could welcome a chance to determine the question whether a so-called principle can evolve to appear to contradict clear words of the treaty. Article 3's guarantee to Maori of all the rights and privileges of British Subjects is generally recognised to be an example of the kind of non-discrimination clauses that are common in commercial agreements as well as treaties. It is usually treated as a promise of equality before the law. The PAUP institutes permanent inequality.

106. Courts might decide to avoid confronting the contradiction, which is now widespread in New Zealand approaches to the Treaty. They may instead seek to justify invalidation of the offending PAUP provisions by citing the "duty to act reasonably and in good faith" and "equality before the law" which have been omitted. A court could read these principles in to the PAUP when interpreting vague policies and rules.