

Local Authority Decision-Making and the Consideration of Community Views: Obligation and Observance

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I Introduction: Local Government as Grassroots Democracy

Local government is, at least in aspiration terms, all about "the peoples". The very *raison d'être* of local government is the facilitation of citizen participation and local self-government. The famous Widdicombe report – United Kingdom's parliamentary inquiry into the conduct of local authority business – marked out "participation" as one of the three valuable attributes of local government, along with pluralism and responsiveness:¹

Local government offers two kinds of participation; participation in the expression of community views and participation in the actual delivery of services. It does so both through the process of electing representatives as councillors and through the opportunity to influence local government more directly through consultation, co-option, and local lobbying.

In a similar vein, an earlier inquiry emphasised the importance of the democratic feature of local government, reminding us that local authorities are a crucial element of "government" and should not be regarded as merely a provider of services:²

The importance of local government lies in the fact that it is the means by which people can provide services for themselves; can take an active and constructive part in the business of government; and can decide for themselves, within the limits of what national policies and local resources allow, what kind of services they want and what kind of environment they prefer.

Nowadays the reference to "government" (the formal institutions of the state) has been replaced with the more fashionable term "governance" (the latter to the wider collaborative process of decision-making) in order to reinforce the centrality of the citizenry to the affairs of the

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¹ *Report of the Committee of Inquiry on the Conduct of Local Authority Business* (1986) at [3.11] and [3.20], referred to in Kenneth A Palmer *Local Government Law in New Zealand* (2nd ed, Law Book Company, Sydney, 1993) at 23 [*Local Government Law*].

² *Report of the Royal Commission on Local Government in England 1966-69* (1969) at 10, referred to in Palmer *Local Government Law*, *ibid*, at 25.

local state.³ Framed in this way, local governance better captures the idea that governance is "the joint work of government and civil society" and governance "cannot be done by government alone".⁴

The democratic essence of local government is sometimes expressed in more colloquial terms: "grassroots" or "flaxroots" decision-making.⁵ The neighbourhood is identified as a "site of democracy".⁶ Some suggest there is much greater potential for political participation by citizens at a local, rather than central, level.⁷

Recent reforms in New Zealand's local government framework have also placed the notion of citizen participation at its heart, with a new statement of the very purpose of local government. In addition to the substantive goal of promoting community well-being,⁸ local government is charged with enabling "democratic local decision-making and action by, and on behalf of, communities".⁹ This lodestar is buttressed by a number of more specific principles, and processes which aim to facilitate interaction between the citizen and the local state.¹⁰ Most significantly, the regime imposes a specific obligation on local authorities to take into account community views when making decisions.¹¹

The purpose of this paper is to explore this newly invigorated process of local governance and democracy. First, the *obligation*; I identify the key elements of the new statutory scheme that enable citizen contribution and require local authorities to have regard to community views. In highlighting the attempt to codify the processes of participation and associated judgements imposed on elected member, I attempt to place those new provisions within their broader context. Second, *observance* of that obligation; by reference to two recent case-studies, I examine how

³ See Robin Hambleton and Jill Gross (eds) *Governing Cities in a Global Era* (Palgrave Macmillian, New York, 2007) at 215, adopted by Royal Commission on Auckland Governance *Auckland Governance Report* (2009) at 45. See also Ali Memon and Gavin Thomas "New Zealand's Local Government Act: A Paradigm for Participatory Planning or Business as Usual?" (2006) 24 *Urban Policy and Research* 135 at 135.

⁴ Robert J Oakerson "The Governance Effects of Metropolitan Reform: A Theoretical Inquiry" (Florida State University Symposium, October 2002) at 2, also endorsed by the Royal Commission above n 2.

⁵ Local Government and Environment Committee, *Report on the Local Government Bill*, (10 December 2002).

⁶ Michael Farrelly "Citizen Participation and Neighbourhood Governance: Analysing Democratic Practice" (2009) 35 *Local Government Studies* 387 at 388.

⁷ Geraint Parry, George Moyser and Neil Day *Political Participation and Democracy in Britain* (Cambridge University Press, Cambridge, 1992) ; Colin Corpus "Re-Engaging Citizens and Councils: The Importance of the Councillor to Enhanced Citizen Involvement" (2003) 29 *Local Government Studies* 32 at 36.

⁸ Local Government Act 2002, s 10(b), namely, "to promote the social, economic, environmental, and cultural well-being of communities, in the present and for the future".

⁹ Local Government Act 2002, s 10(a).

¹⁰ See below at n 15

¹¹ Local Government Act 2002, ss 14(1)(b) and 78.

compliance with the obligation to take into account community views has been supervised by the courts and other external bodies.

The scope of the paper is reasonably modest and comes with a number of caveats. First, the focus is on the legislative opportunities for participation and engagement. It is not a sociological study of whether these opportunities are realised. Indeed, there is probably reason to be sceptical about the actual practice of participation by citizens; but that is a project beyond the scope of this paper. While other have explored the *input* end of the local authority—citizen dynamic,¹² there is little written on the *output* end, focusing on what local authorities do – or are legally required to do – with community views.

Secondly, this paper does not capture all the opportunities that exist for participation and engagement in local decision-making. My focus is on generic decision-making principles under the Local Government Act 2002 – the particular area that was enhanced in the most recent reforms of local government. I do not address the particularised process for citizen participation in environmental rule-making and decision-making under the Resource Management Act 1991.¹³ While it must be recognised the resource management framework represents a large portion of local authority decision-making (and, indeed, is still subject to constraints of the generic decision-making and participation principles under the Local Government Act 2000),¹⁴ there has already been much written on that process of participation.¹⁵ That said there is some analogy between the two regimes, particular the attempt to set up a bald framework, only given life through the judgements of local authorities and application of higher-order purposes and principles.¹⁶

Thirdly, this paper deals with the local government decision-making regime in its present form. The government has announced an intention to review and sharpen the framework.¹⁷

¹² See below n 15

¹³ Similarly, I do not address other regulatory regimes which impose specific participatory requirements. See however Christopher Mitchell and Dean Knight *Local Government (Reissue 1)* in McGrath (ed) *The Laws of New Zealand* (LexisNexis, Wellington, 2008) at [140].

¹⁴ See Local Government Act 2002, s 16.

¹⁵ See Jean Drage *Empowering Communities?: Representation and Participation in New Zealand's Local Government* (Victoria University Press, Wellington, 2002); Local Government Commission *Review of Local Government Act 2002 and Local Electoral Act 2001* (Wellington, 2008); Rhys Andrews, Richard Cowell, James Downe, Steve Martin "Supporting Effective Citizenship in Local Government: Engaging, Educating and Empowering Local Citizens" (2008) 34 *Local Government Studies* 489-507; Michael Farrelly "Citizen Participation and Neighbourhood Governance: Analysing Democratic Practice" (2009) 35 *Local Government Studies* 387-400; Colin Copus "Re-Engaging Citizens and Council: The Importance of the Councillor to Enhanced Citizen Involvement" (2003) 29 *Local Government* 32-51; UMR Research *Barriers & Enablers to Participate in Local Government* (Department of Internal Affairs 2007).

¹⁶ See Janet McLean "New Zealand's Resource Management Act 1991: Process with Purpose" (1992) 7 *Otago LR* 538.

¹⁷ See Hon Rodney Hide "Reforms to help keep rate rises under control" (press release, 28 October 2009) and Cabinet Paper "Local Government Transparency, Accountability, Financial Management: Improving Transparency and Accountability" (16 October 2009) EGI (09) 209.

However, the dynamics of coalition governance means it may be difficult to predict the ultimate form of any amendments to the present regime. Similarly, I do not address any of the peculiarities associated with the development of locality-specific legislation with the creation of an uber-Council for Auckland.¹⁸

To foreshadow my conclusions. First, it is fair to say that the Local Government Act 2002 regime represents an ambitious attempt to locate the citizen and communities at the heart of local government decision-making. Community views are expected to inform the full gamut of neighbourhood decision-making, from the statement of desired outcomes for the locality to its strategic direction, from law-making to operational decision-making. The more significant the decision, the greater expectation that the community will participate in its development.

The empowerment of citizen-input comes with an important gloss though. The extent to which it is sought, and relied on, remains a matter of judgement. The general principles approach obligating local authorities to consider community views can only work in an effective and efficient manner if the particular context of decision-making is acknowledged. The responsibility for that call has been ultimately delegated by Parliament to local politicians. That presents an awkward conundrum. Is the new legislative framework only meant to capture and codify the existing nature of deliberation by local politicians? Or is it intended to go further, to mandate greater public participation and to fundamentally alter the nature of deliberation by local authorities. I suggest the former.

Secondly, the courts have struggled with this conundrum. Presented with a regime that seeks to codify the obligation to have regard to community views, along with moderating judgements about the extent of observance, so far the courts have taken differing approaches to the degree of intensity to bring to this task. There is not yet a clearly developed method of judicial supervision which both gives effect to the community views imperative but which is still sensitive to the democratic pedigree and autonomy of local authorities as public functionaries. The question is important. Aggressive supervision of these obligations and moderating judgements risks juridifying this complex, dynamic evaluation. Juridification of the deliberative exercise risks judges, lawyers and technocrats dominating the process – to the exclusion of the political instinct of those who we elect to, and ultimately hold accountable for, decisions made on our behalf.

¹⁸ Royal Commission on Auckland Governance *Auckland Governance Report* (2009), Local Government (Tamaki Makaurau Reorganisation) Act 2009, Local Government (Auckland Council) Act 2009, Local Government (Auckland Law Reform) Bill 2009 (112-1).

II The Statutory Scheme

A Introduction

The Local Government Act 2002 introduced a new decision-making framework for all decisions made by local authorities.¹⁹ The purpose of the reform was to "[modernise] the way local authorities make their decisions, and to [enable] local authorities to work with their communities to meet the changing needs and aspirations of communities in the 21st century".²⁰ The Bill modernises the way local authorities make their decisions,²¹

The framework is multi-layered, incorporating the following:

- an overarching purpose and high-level principles governing the performance of the role of local authorities;
- community outcomes and strategic planning processes;
- individual decision-making principles, including the specific obligation to take into account community views.

B Purpose and High Level Principles

At the highest level, local authorities are charged with giving effect, in relation to their region or district, to the "purpose" of local government.²² As mentioned earlier, the purpose of local government is codified in the following terms:²³

The purpose of local government is—

- (a) to enable democratic local decision-making and action by, and on behalf of, communities;
- and
- (b) to promote the social, economic, environmental, and cultural well-being of communities, in the present and for the future.

¹⁹ This section is partly based on the publication: Christopher Mitchell and Dean Knight, *Local Government (Reissue 1)* in McGrath (ed) *The Laws of New Zealand* (LexisNexis, Wellington, 2008). See also Grant Hewison *The Local Government Act 2002 – Rationalisation or Reform* (PhD Thesis, Auckland University, 2008), Dean Knight, "Local authority decision-making, community views, and Stadium Aotearoa" [2007] NZLJ 354, Sally Dossor, "Local Government Act 2002 – Issues for RMA Lawyers" in *Environmental Issues - insight and inspiration* (New Zealand Law Society, 2005), Christopher Mitchell and Dean Knight, *LexisNexis Local Government* (LexisNexis NZ, Wellington, 2003-) para [LGA75.1]-[LGA121.1].

²⁰ Local Government Bill 2001 (191-1) (explanatory note) at 2.

²¹ For a historical account of local authority decision-making and participation frameworks, see Christine Cheyne "Public Involvement in Local Government in New Zealand: A Historical Account" in Jean Drage (ed) *Empowering Communities? Representation and Participation in New Zealand's Local Government*, (Victoria University Press, Wellington 2002) 116.

²² Local Government Act 2002, s 11(a). The role of a local authority also includes the obligation to perform the duties, and exercise the rights, conferred on it by the Local Government Act 2002 or any other enactment: Local Government Act 2002, s11(b).

²³ Local Government Act 2002, s 10.

This is the first formal attempt in New Zealand to clearly articulate a general vision for local authorities in the form of a purpose clause in a way that captures the essence of the local participation. Local government reforms in the late 1980s contained a more operational set of expectations about how local authorities would conduct their affairs,²⁴ but only with weak, passive recognition of citizen participation (local authorities were directed to conduct their business in a manner "open to the public" and to ensure "local communities ... [were] adequately informed about [their] activities").²⁵ The commanding placement of the views of communities in the modern-version is to be commended.

At the next level down, local authorities are directed (viz, they "must" and "should") comply with the following rather indeterminable imperatives:²⁶

- (a) to conduct their business in an open, transparent, and democratically accountable manner and give effect to their identified priorities and desired outcomes in an efficient and effective manner;²⁷
- (b) to take account of community views;²⁸
- (c) when making decisions, to take account of the diversity of the community and its interests, the interests of future communities, and the impact on the four well-beings;²⁹
- (d) to provide opportunities for Māori to contribute to decision-making processes;³⁰
- (e) to collaborate and co-operate with other local authorities and make efficient use of their resources;³¹
- (f) to undertake commercial transactions in accordance with sound business practices;³²
- (g) to ensure prudent stewardship and efficient and effective use of their resources;³³
- (h) in taking a sustainable development approach, to take account of the four well beings; the need to maintain and enhance the quality of the environment, the reasonable foreseeable needs of future generations.³⁴

Some of these principles require closer examination.

²⁴ Local Government Act 1974, s 223C(1).

²⁵ Local Government Act 1974, s 223C(1)(a) and (f).

²⁶ The introductory wording of s 14(1) speaks in mandatory terms: "In performing its role, a local authority must act in accordance with the following principles".

²⁷ Local Government Act 2002, s14(1)(a). See also Local Government Act 2002, ss 77 and 91-92.

²⁸ Local Government Act 2002, s14(1)(b). See also Local Government Act 2002, s 78.

²⁹ Local Government Act 2002, s14(1)(c). See also Local Government Act 2002, s 77.

³⁰ Local Government Act 2002, s14(1)(d). See also Local Government Act 2002, s 81.

³¹ Local Government Act 2002, s14(1)(e). See also Local Government Act 2002, ss 15-17.

³² Local Government Act 2002, s14(1)(f). See also Local Government Act 2002, ss 100-101.

³³ Local Government Act 2002, s14(1)(g). See also Local Government Act 2002, ss 10.

³⁴ Local Government Act 2002, s14(1)(h). See also Local Government Act 2002, ss 10 and 77.

The community views directive is expressed to capture the importance of local authorities being cognisant of the views of its people, as well as acknowledging that existence of peoples, plural:

(b) a local authority should make itself aware of, and should have regard to, the views of all of its communities;

Pluralistic communities – both current and future – are also specifically recognised in the following directives:³⁵

(c) when making a decision, a local authority should take account of—

(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 each aspect of well-being referred to in section 10

The principles also mark a particular place for the views of Māori, albeit being expressed in a structural and procedural fashion:³⁶

(d) a local authority should provide opportunities for Māori to contribute to its decision-making processes:

Notably, this obligation is expressed in more general terms. It does not limit the participation opportunity to tangata whenua,³⁷ nor does it incorporate a trigger based on the relationship of Māori with ancestral land and other taonga.³⁸

Unsurprisingly, given the impossibility of achieving compliance with this extensive – and potentially countervailing – set of principles, a moderating mechanism is contemplated. If these principles or the elements of the four well-being conflict, local authorities are directed to resolve the conflict in accordance with the open and accountable process principle expressed in section 14(1)(a)(i).³⁹ Thus the regime adopts a process solution – and one that ultimately hinges on the accountability to citizen electors – to resolve the inevitable problem of multiple objectives.

While local authorities must comply with these "high-level" principles, it is reasonable to expect that how they are observed and achieved will remain a matter of discretion and judgement for each local authority. The courts are unlikely to want to be drawn into the conundrums involved in trying to resolve the myriad of overarching principles. It is expected that they will fence off these principles as basically being non-justiciable and point to the processes of political accountability as being the central control mechanism to enforce compliance. This deferential

³⁵ Local Government Act 2002, s 14(1)(c).

³⁶ Local Government Act 2002, s14(1)(d).

³⁷ See discussion of the Select Committee on this point: Local Government Bill 2001 (select committee report, 10 December 2002)

³⁸ Compare Resource Management Act 1991, s 6(e). But see Local Government Act 2002, s 77(1)(c) which is tied to such relationships.

³⁹ Local Government Act 2002, s 14(2).

approach was deployed most famously in *Mercury Energy*, where the Privy Council dismissed efforts to overturn decisions of a State-owned enterprise based on similar a high-level statement of general, but conflicting, principles.⁴⁰

These principles, therefore, set out some common themes which should inform local authority decision-making and actions. But they are framed at a level of abstraction which means the ability for citizens to rely on them to facilitate participation is limited. However, these principles are connected with a number of other more tangible participation injunctions which are integrated into the relevant decision-making processes and specific powers throughout the Act.⁴¹

C Community Outcomes and Strategy Planning

At the next level down, the Local Government Act 2002 translates the hortatory set of principles into a set of strategic planning process which seek to embrace the community aspirations. The long-term strategic focus is one of the central features of the Local Government Act 2002,⁴² although some longer-term financial planning processes were evident in the new public management reforms in the mid-1980s.⁴³ The Local Government Act 2002 requires the production of a number of specifically mandated planning documents in collaboration with a local authority's community. The product of this reflective planning exercise – the long-term council community plan – is then adopted as the blue-print for the future activities of the local authority.

At the most general level, local authorities are required every 6 years to carry out a process to identify community outcomes for the immediate and long-term future of their region or district.⁴⁴ The long-term council community plan is required to describe the community outcomes of a local authority's region or district. A local authority must monitor and, at least every 3 years, must report on progress made by the community in achieving these community outcomes. In general terms, "community outcomes" are the community's desired outcomes in terms of its current or future social, economic, environmental, or cultural well-being.⁴⁵ In particular, they are defined as the "priorities for the time being" that are identified through the community outcomes process, along with any additional outcomes subsequently identified through community consultation as being important to the current or future community well-being.⁴⁶ Memon and Thomas convey the purpose of the community outcomes process:⁴⁷

⁴⁰ *Mercury Energy Ltd v Electricity Corporation of New Zealand Ltd* [1994] 2 NZLR 385

⁴¹ See, Local Government Act 2002, s 79(2)(a).

⁴² See Memon and Thomas, above n 3 at 136.

⁴³ See Local Government Act 1974, Part 7A-7C, Palmer *Local Government Law*, above n 1, at 294-311; Janet McLean "New Public Management New Zealand Style" in Paul Craig and Adam Tomkins *The Executive and Public Law* (Oxford University Press, Oxford, 2006) 124

⁴⁴ Local Government Act 2002, s 91(1).

⁴⁵ Local Government Act 2002, ss 5(1) and 91(2).

⁴⁶ Local Government Act 2002, s 5(1).

⁴⁷ Memon and Thomas, above n 3 at 137.

The strategic cornerstone of the community plan is the set of community outcomes identified by communities. ... Community outcomes are expected to provide a mean to guide priorities in relation to the activities of the local authority, central government and other service delivery organisations, to promote more effective deployment of resources and coordination amongst service providers and a basis to measure progress towards achieving outcomes.

The Local Government Act 2002 does not prescribe a specific process for the identification of community outcomes; instead it leaves it to the local authority itself to determine the best process to facilitate the identification of community outcomes.⁴⁸ It has been suggested, though, that most local authorities have seen process of identifying community outcomes as belonging to the community – a bottom-up process to be facilitated, not dominated, by the local authority itself.⁴⁹ This is consistent with the legislative indications that the purpose of the identification of community outcomes process is broader than simply the identification of outcomes per se; the process and discussion of outcomes is also important in its own right.⁵⁰

The long-term council community plan is the cornerstone of local authority governance. Produced once every triennium⁵¹ and mandatory,⁵² the long-term council community plan sets out a local authority's vision (that is, "community outcomes") and its proposed activities for the next 10 years.⁵³

In general terms, the purpose of the long-term plan is two-fold. First, the description of the proposed activities over the next 10 years is intended to encourage a long-term focus, enable public participation in the setting of priorities and to provide a basis for accountability. Secondly, the long-term plan is intended to be a "one-stop" shop for many governance matters, incorporating a suite of policies addressing operational and organisational matters and financial documents such as budgets, assessments and assumptions. While the Local Government Act 2002 requires the inclusion of this broad set of information, the degree of detail is subject to a local authority's moderating judgement.⁵⁴

⁴⁸ Local Government Act 2002, s 91(3).

⁴⁹ Memon and Thomas, above n 3 at 137.

⁵⁰ Local Government Act 2002, ss 91(2) and (3).

⁵¹ Local Government Act 2002, s 93(3)

⁵² Local Government Act 2002, s 93(1).

⁵³ Local Government Act 2002, s 93(7) and Sch 10, Part 1.

⁵⁴ A local authority is only obliged to include such details on these matters as it considers on reasonable ground to be appropriate (Local Government Act 2002, s 93(8)); having regard to various other decision-making provisions (Local Government Act 2002, s 93(9)(a), namely ss 77 (requirements in relation to decisions), 78 (community views in relation to decisions), 79 (compliance with procedures in relation to decisions), 80 (identification of inconsistent decisions), 81 (contributions to decision-making processes by Maori), 82 (principles of consultation), 83 (special consultative procedure), 84 (special consultative procedure in relation to long-term council community plan), 96 (effect of resolution adopting long-term council community plan or annual plan), 97 (certain decisions to be taken only if provided for in long-term council community plan) and 101 (financial management); the significance of any matter (Local Government Act 2002, s 93(9)(b)); and its resources (Local Government Act 2002, s 93(9)(c)).

The requirement to adopt the long-term council community plan through the special consultative procedure provides the community with the opportunity to participate in the agenda-setting process of the local authority.⁵⁵ Once adopted, the plan operates as the "formal and public statement of the local authority's intentions".⁵⁶ However, a local authority is not obligated to undertake activities in its plan;⁵⁷ with some notable exceptions,⁵⁸ it can make decisions inconsistent with it provided it identifies the inconsistency and resolves to later amend the plan.⁵⁹ Effectively, the long-term council community plan authorises the listed activities and allows a local authority to undertake those activities as if they were an ordinary decision without any further enhanced public participation.

Significantly, certain "significant" decisions cannot be undertaken unless they are "expressly provided for" in the local authority's long-term council community plan.⁶⁰ If they are not, the requirement to amend the long-term council plan triggers the opportunity for public participation through the special consultative procedure.

On a year by year basis, the long-term plan is supported by the annual plan. The significance of the annual plan under earlier legislation has been overtaken by the long-term council community plan. An annual plan must be adopted for each financial year,⁶¹ although for the first year of the long-term council community plan period, the long-term council community plan operates as the annual plan.⁶² The purpose of the annual plan is to provide a yearly framework for the fiscal appropriation of funds for a local authority.⁶³ An annual plan must be prepared in accordance with the fiscal principles and procedures from the long-term council community plan.⁶⁴ The annual plan is teamed with an annual report, which must compare the

⁵⁵ Local Government Act 2002, s 95.

⁵⁶ Local Government Act 2002, s 96(1).

⁵⁷ Local Government Act 2002, s 96(2).

⁵⁸ These include changes to the mode of delivery of a significant activity (s 88), decisions to commence or cease a significant activity or to otherwise significantly alter the intended level of service provision for a significant activity (s 97(a)), decisions about strategic assets, such as decisions to construct, replace, abandon a strategic asset or to transfer ownership or control of a strategic asset (s 97(b) and (c)), and decisions which will significantly affect the capacity of, or cost to, the local authority in relation activities identified in the long-term council community plan (s 97(d)).

⁵⁹ Local Government Act 2002, ss 80 and 96(3).

⁶⁰ Local Government Act 2002, s 97. The Act provides significant scope for matters deemed to be significant decisions; to change to the mode of delivery of a significant activity, that is, outsourcing (s 88); to commence or cease a significant activity, or to otherwise significantly alter the intended level of service provision for a significant activity (s 97(a)); use of strategic assets, such as decisions to construct, replace, abandon a strategic asset or to transfer ownership or control of a strategic asset (ss 97(b) and (c)); decisions which will significantly affect the capacity of, or cost to, the local authority in relation activities identified in the long-term council community plan (s 97(d)).

⁶¹ Local Government Act 2002, s 97(1).

⁶² Local Government Act 2002, s 95(4).

⁶³ See Local Government Act 2002, s 95(5).

⁶⁴ Local Government Act 2002, s 95(6)(a).

actual activities and performance of the local authority against its intended activities and performance.⁶⁵

The long-term plan stands as the central strategic planning document and is expected to operate as a blue-print for individual local authority decision-making. It can be seen as the social contract between citizens and local politicians, incorporating the community's (or perhaps communities'?) aspirations by way of community outcomes process and containing the portfolio of proposed activities which have been endorsed by the community through the special consultative procedure. Importantly, significant activities not identified cannot be undertaken without an amendment to the long-term plan, triggering an ad hoc participatory process where the views of the community on the proposal must be sought through the special consultative procedure.

The long-term plan therefore is another of the key procedural gate-keepers for the provision of community views. But this is a particular area where the theory may not align with the practice. Many long-term plans contain volumes of financial data. The long-term plan can be an intimidating document for citizens to navigate and understand. While there is a great deal of work being done to improve the long-term plan documents and processes to enhance citizen participation, doubts remain about whether it provides a meaningful mechanism for citizens to contribute to the activities of local authorities. Further, the complex nature of the documentation means it is easy for some projects to get lost in the minutiae – and therefore subject only to tacit, not real, endorsement from the community.⁶⁶ Once an activity is "expressly provided for" in the long-term plan, the law regards the obligation of community input on the proposal as having been observed.

D Individual Decision-making Principles

The basic decision-making framework has two distinct tiers of decision making:

- ordinary decisions; and
- significant decisions.

Although the Local Government Act 2002 does not expressly demarcate decisions in these terms, the nature and content of requirements that must be observed are greater for significant decisions.

1 Ordinary decisions

The Local Government Act 2002 prescribes a number of decision-making principles and judgements for *any* decision made by a local authority.⁶⁷ These principles and judgements apply

⁶⁵ See Local Government Act 2002, s 98(1); Local Government Act 2002, s 98(3); Local Government Act 2002, s 98(2).

⁶⁶ See particularly Local Government Commission *Review of Local Government Act 2002 and Local Electoral Act 2001* (Wellington, 2008) at 51.

⁶⁷ Local Government Act 2002, ss 76-81.

to *all* decisions, including a decision not to take any action.⁶⁸ The comprehensiveness of these principles and judgements is notable and can easily be lost sight of.

Much of the focus on local authority is on decisions made by the governing body of the local authority; however, the provisions apply equally to decisions made by committees, subcommittees, officers or other delegates. Further, these decision-making processes and judgements must be followed for decisions regardless of the magnitude (or, rather, triviality) of the decision. The framework itself allows the magnitude of the decision to be taken into account in a quite nuanced manner and only demarcates "significant" decisions for special treatment. Finally, these processes and judgements also apply, to the extent not inconsistent, to decisions made under other regimes,⁶⁹ also capturing regulatory decisions made under the Resource Management Act, Building Act, Reserves Act, and the multiplicity of other legislation administered by local authorities.

The applicable principles operate in two different ways. First, every *decision* a local authority makes must be made in accordance with the enumerated principles.⁷⁰ This is the instant obligation in the case of each and every decision and it is typically the obligation which forms the target for those who seek to impugn any particular decision. But there is also a second obligation. A local authority must ensure its *processes* promote compliance with the various requirements.⁷¹ This systematic obligation is framed in more aspirational terms.⁷² Its impact has not yet been measured. However, if its promise is fulfilled, this obligation may serve as more powerful injunction for improving local decision-making and democracy.

The enumerated principles, in general terms, require a local authority to:

- (a) seek to *identify* all reasonably practicable options;⁷³
- (b) *assess*:
 - (i) the costs and benefits of those options (in terms of the four community "well-beings");⁷⁴
 - (ii) the extent to which they promote or achieve community outcomes;⁷⁵

⁶⁸ Local Government Act 2002, s 76(1) and (4).

⁶⁹ Local Government Act 2002, s 76(5). The provisions regulating decision-making under the Local Government 2002 do not limit any duty or obligation imposed under other legislation which impose decision-making obligations: Local Government 2002, s 76(6).

⁷⁰ Local Government Act 2002, s 76(1). Section 76(3)(b) also directs that a local authority must ensure, before making a significant decision, that the requirements are "appropriately observed". Query, however, whether this addition requirements adds to the principal requirement under s 76(1).

⁷¹ Local Government Act 2002, s 76(3)(a).

⁷² Compare, Resource Management Act 1991, s 5.

⁷³ Local Government Act 2002, s 77(1)(a).

⁷⁴ Local Government Act 2002, s 77(1)(b)(i).

⁷⁵ Local Government Act 2002, s 77(1)(b)(ii).

- (iii) the impact of each option on the local authority's capacity to meet present and future needs;⁷⁶
- (iv) any other relevant matters;⁷⁷
- (c) if any option involves a significant decision in relation to land or a body of water, **take account** of the relationship of Māori and their culture and traditions with ancestral land, water sites, waahi tapu, valued flora and fauna and other taonga;⁷⁸
- (d) **consider** the views and preferences of people likely to be affected by, or who have an interest in, the matter (ie, consider community views).⁷⁹

A number of points can be made about the nature of obligations created by these principles.

First, community participation is captured in this critical obligation in a number of ways. Obviously there is the specific obligation to have regard to community view generally.

78 Community views in relation to decisions

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

The language of s 78 is perhaps somewhat odd. The operative language ("affected" and "have an interest in") hints at a narrow construction, but the breadth of the obligation is reinforced by the reference in the title to community views. However, community views are also added into the decision-making mix in other ways. The relevance of the views of Māori are emphasised, but only for "significant" decisions affecting land or bodies of water. The statutory language has a strong pedigree in the Resource Management Act 1991,⁸⁰ but is deployed in this context with the strong "shall recognise and provide for" injunction that suggested a strong degree of weight be given to the interests of Māori.⁸¹ The procedural requirement to assess the proposal in terms of its promotion or achievement of community outcomes also augments the centrality to the (previously expressed) aspirations of citizens to particular decisions.

Secondly, a local authority must consider community views at various different stages of the decision-making process,⁸² including the stage at which problems and objectives are defined,⁸³ the stage at which reasonably practicable options are identified,⁸⁴ the stage those

⁷⁶ Local Government Act 2002, s 77(1)(b)(iii).

⁷⁷ Local Government Act 2002, s 77(1)(b)(iv).

⁷⁸ Local Government Act 2002, s 77(1)(c).

⁷⁹ Local Government Act 2002, s 78.

⁸⁰ Resource Management Act, 1991 s 6(e).

⁸¹ See for example *Takamore Trustees v Kapiti Coast District Council* [2003] 3 NZLR 496.

⁸² Local Government Act 2002, s 78(2).

⁸³ Local Government Act 2002, s 78(2)(a).

⁸⁴ Local Government Act 2002, s 78(2)(b).

options are assessed and proposals adopted,⁸⁵ and the stage those proposals are adopted.⁸⁶ The temporal nature of the obligation is therefore extraordinary far-reaching.⁸⁷

Thirdly, the principles generate a number of mandatory relevant considerations. These impose procedural, not substantive, constraints on the decision-making process. Nothing particularly hinges on the slightly different injunctions used ("identify", "assess", "take account of", "consider"). It is axiomatic that the weight to be given to these considerations and whether they materially influence the ultimate decision remains a matter for the local authority itself.⁸⁸ As a simple example, if a local authority's entire community is against a project, the local authority may still proceed with the project – all it needs to do is be cognisant that it is acting contrary to the wishes of its community.

Fourthly, even though there enumerated principles are expressed only in terms of relevancy, the Local Government Act 2002 places a further (and significant) gloss on their impact. The principles are subject to explicit moderating judgements. That is, local authorities are entitled to make judgements about how to achieve compliance with these principles:⁸⁹

79 Compliance with procedures in relation to decisions

- (1) It is the responsibility of a local authority to make, in its discretion, judgments—
- (a) about how to achieve compliance with sections 77 and 78 that is largely in proportion to the significance of the matters affected by the decision; and
 - (b) about, in particular,—
 - (i) the extent to which different options are to be identified and assessed; and
 - (ii) the degree to which benefits and costs are to be quantified; and
 - (iii) the extent and detail of the information to be considered; and
 - (iv) the extent and nature of any written record to be kept of the manner in which it has complied with those sections.

The factors relevant to the judgement made about the degree of compliance are also expressly identified:⁹⁰

- (2) In making judgments under subsection (1), a local authority must have regard to the significance of all relevant matters and, in addition, to—
- (a) the principles set out in section 14 [ie, the high-level principles] ; and
 - (b) the extent of the local authority's resources; and

⁸⁵ Local Government Act 2002, s 78(2)(c).

⁸⁶ Local Government Act 2002, s 78(2)(d).

⁸⁷ See the analysis of the stages of decision-making in the *Council of Social Services* and *Whakatane District Council* cases below.

⁸⁸ See *Scott v Auckland City Council* (High Court, Auckland, CIV 2006-4004-7226, 23 November 2006, at [26]. See also Office of the Controller and Auditor General *Turning principles into action: A guide for local authorities on decision-making and consultation* (Wellington, 2007) at [3.39] and [5.27].

⁸⁹ Local Government Act 2002, s 79(1).

⁹⁰ Local Government Act 2002, s 79(2).

(c) the extent to which the nature of a decision, or the circumstances in which a decision is taken, allow the local authority scope and opportunity to consider a range of options or the views and preferences of other persons.

The statutory language is relatively generous, allowing realistic judgements to be made in order to ensure administrative efficiency and effectiveness. The only (curiously phrased) substantive constraint is that that any judgements made about how to achieve compliance should be "largely in proportion" with the significance of the proposal.

These moderating judgements operate as a powerful regulator on the realisation of the community view imperative. The propriety of moderating judgements made by local authorities is therefore the key focus for those seeking to challenge decisions of local bodies and the extent to which they have taken onboard the views of their community – indeed the effect of these judgements seems to have being vexing for courts supervising local authority decisions.

Fifthly, these specific decision-making principles are, of course, augmented by the high-level principles of local democracy, arising from the various foundational statements about the purpose and nature of local authorities. The high-level principles apply both directly (through the generic obligation on a local authority to "act in accordance with" them in performing its role)⁹¹ and indirectly (through the obligation to have regard to them when making judgements about the degree of compliance with decision-making principles).⁹²

As has been emphasised, the principles of local democracy place much emphasis on openness, public participation and community views. However, the public participation is not a singular concept. The Local Government Act 2002 speaks to a general, overarching principle: the obligation to take into account community views. The obligation to have regard to community views is, in many respects, a passive one. No process, method or mode for taking account of community views is prescribed, although the local authority is elsewhere obliged to ensure that its decision-making processes promote compliance with obligation to take account of community views.⁹³ The legislation expressly disavows that notion that the community views imperative translates into a general obligation to consult:⁹⁴

(3) A local authority is not required by this section alone to undertake any consultation process or procedure.

The Auditor-General has reiterated that it is up to a local authority to "use its judgement about how it informs itself of community views".⁹⁵ Ascertaining community views may be achieved through formal and informal means:⁹⁶

⁹¹ Local Government Act 2002, s 14(1).

⁹² Local Government Act 2002, s 79(2)(a).

⁹³ Local Government Act 2002, s 76(3)(a).

⁹⁴ Local Government Act 2002, s 78(3).

⁹⁵ Office of the Controller and Auditor General, above n 88 at [3.40].

Small local authorities generally feel that they know their community, often through elected member and staff networks. Some use e-technology to assist community interaction and engagement, particularly where communities are spread over a large area. Bigger local authorities usually use more formal methods and often have ongoing relationships or formal partnerships with ethnic or interest groups.

There remains, however, some fixation with the formal opportunities by which community views are channeled into the decision-making process. Common opportunities include ordinary consultation processes,⁹⁷ the special consultative procedure,⁹⁸ the processes developed to provide opportunities for Māori to contribute to decision-making,⁹⁹ a referendum or poll of electors,¹⁰⁰ the opportunity for public delegations to addresses local authority meetings,¹⁰¹ the right for a person affected by a decision to make written or oral submissions to the local authority under ordinary administrative law principles.¹⁰²

A local authority is only required to consult about decisions if it is directed to under the Local Government Act 2002 or other legislation;¹⁰³ as mentioned earlier, the obligation to take into account community views does not in itself impose such an obligation.¹⁰⁴ However, a local authority may still elect to consult on a matter, even though it is not obliged to do so, in order to

⁹⁶ Ibid, at [3.42].

⁹⁷ Local Government Act 2002, s 82.

⁹⁸ Local Government Act 2002, s 83.

⁹⁹ Local Government Act 2002, s 81. For a decision of the particular issues relating to consultation with, and participation of Māori, see Janine Haywood (ed) *Local Government and the Treaty of Waitangi* (Oxford University Press, Oxford, 2003), especially Haywood "Is Local Government a Treaty Partner" 3; Maguire "Consultation: A Case Study of Local Experience" 119, and Haywood "Realising Potential: The Ways and Challenges Ahead" 173, and Christine Cheyne and Veronica Tawhai *He Wharemoa Te Rakau, Ka Mahue. Maori Engagement with Local Government: Knowledge, Experiences and Recommendations* (Massey University, 2007). Cheyne's evaluation is grim: "There is still considerable disenchantment among Māori with local authority decision-making processes and there is serious under-representation of Māori elected members. The provision of the Local Electoral Act 2001 appear to be inadequate and those in the Local Government Act 2002 are far from being fulfilled." Christine Cheyne "Local Government" in Raymond Miller (ed) *New Zealand Government and Politics* (4th ed, Oxford University Press, Oxford, 2007) at 292; Local Government Commission *Review of Local Government Act 2002 and Local Electoral Act 2001* (Wellington, 2008) at 78.

¹⁰⁰ Local Electoral Act 2001, s 9. A binding referendum, with variable prescribed majorities, is mandatory in relation to decisions to close down or transfer the ownership of small water services; Local Government Act 2002, s 131.

¹⁰¹ The opportunity for delegations to address local authorities is usually governed by standing orders. See Local Government Act 2002, s 27.

¹⁰² See GDS Taylor *Judicial Review* (Butterworths, Wellington, 1991) at [13.04]–[13.06].

¹⁰³ See, for example, decisions to adopting certain planning documents, significant decisions, and the disposal of parks (Local Government Act 2002, s 138). Decisions under other legislation may also provide for enhanced participation, such as decisions on applications for resource consent under the Resource Management Act 1991 or decisions to alter the classification of reserve land under the Reserves Act 1977. In the case of the latter, these additional requirements are preserved by virtue of the Local Government Act 2002, s 76(6).

¹⁰⁴ Local Government Act, s 78(3).

ascertain the views of its community. In either case, when undertaking a mandatory or voluntary consultation process, a local authority is obliged to undertake that consultation in accordance with the prescribed principles of consultation,¹⁰⁵ subject to discretionary judgements about the degree of compliance.¹⁰⁶ The principles of consultation largely codify the common law consultation principles,¹⁰⁷ although, again, a local authority is entitled to exercise a degree of judgement about the extent of compliance with these principles.¹⁰⁸ Further, these principles may be supplemented by any consultation policies adopted by the local authority.¹⁰⁹

The special consultative procedure is a prescribed process of formal consultation that must be following when making certain decisions.¹¹⁰ A local authority may also elect to follow the special consultative procedure when making a decision, even if it is not obliged to do so.¹¹¹ The special consultative procedure subsumes the previous two formal consultation processes under previous legislation (special consultative procedure and special order).¹¹² Various aspects of this "notice and comment" procedure are tightly prescribed.¹¹³ First, the local authority must prepare a "statement of proposal", the content of which is prescribed depending on the nature of the proposal.¹¹⁴ Generally this incorporates the proposed new provisions, plan or rules, along with supporting explanation and evaluation. All proposed changes, along with a summary, must be made publicly available ahead of the decision.¹¹⁵ The public are then entitled to make written and

¹⁰⁵ Local Government Act, s 82. For a challenge made to a decision based on a truncated consultation process, see *Scott v Auckland City Council* (High Court, Auckland, CIV 2006-4004-7226, 23 November 2006, Priestley J). Although the Court accepted that there was an arguable case, it declined to grant injunctive relief because of uncertainties about the nature of the decision to be made.

¹⁰⁶ Local Government Act, s 82(3)-(4).

¹⁰⁷ See *Wellington International Airport v Air New Zealand* [1993] 1 NZLR 671

¹⁰⁸ Local Government Act, s 82(3).

¹⁰⁹ Local Government Act, s 40(1)(h).

¹¹⁰ These decisions include the adoption or amendment of the long-term council community plan or annual plan (ss 84 and 85); the making, amendment or revocation of bylaws (s 86); changes to the mode of delivery of a significant activity (s 88); decisions to significantly alter the intended level of service provision for a significant activity (s 97(a)); decisions to construct, replace, abandon, or transfer ownership of a strategic asset (s 97(b) and (c)) and decisions which will significantly affect the capacity of, or cost to, the local authority in relation activities identified in the long-term council community plan (s 97(d)); in the case of the last four, only if not otherwise explicitly provided for in the long-term council community plan.

¹¹¹ Local Government Act, s 87.

¹¹² See Local Government Act 1974, ss 716A (special consultative procedure) and 716B (special order).

¹¹³ Consultation about different decisions or matters under the special consultative procedure may (but does not need to) be carried out at the same time or combined, except where this is expressly provided otherwise in the Local Government Act 2002 or other enactment: Local Government 2002, s 83A.

¹¹⁴ See Local Government Act 2002, s 83(1)(a)(i); Local Government Act 2002, s 88(1) and (2); Local Government Act 2002, s 84(4); Local Government Act 2002, s 97; Local Government Act 2002, s 84(3)(a), (b), (c), (d) and (e); Local Government Act 2002, s 88(1) and (2); Local Government Act 2002, s 88(4)(a), (b), (c), and (d); Local Government Act 2002, s 85(1); Local Government Act 2002, s 85(2)(a), (b), (c) and Sch 10, cl 2(2).

¹¹⁵ See Local Government Act 2002, s 83(1)(c). Making a document "publicly available" is defined as taking reasonable steps to ensure the document is accessible to the general public and publicising the fact that

oral submissions on the proposal.¹¹⁶ Following a hearing, a decision is made to adopt, modify or reject the proposal.¹¹⁷ As the special consultative procedure amounts to consultation, the principles of consultation must also be complied with.¹¹⁸ Compliance with the prescribed requirements of the special consultative procedure is mandatory; however, as noted earlier, provision is made for moderating judgements about the extent of compliance with the principles of consultation.¹¹⁹

The special consultative procedure operates as an "off-the-shelf" model for consultation. Sometimes it is treated as being the "gold-standard" for consultation, but it is clear that consultation may be much more proactive and aggressive than the effective "notice and comment" approach of the special consultative procedure.¹²⁰

The most formal mechanism for ascertaining community views is provided by the ability to hold a poll on a particular proposal. The Local Electoral Act 2001 allows a local authority to direct its electoral officer to conduct a referendum on any matter relating to the service that are to be provide by the local authority, any policy of the local authority, any proposal relating to current or future activities or objectives of the local authority or the current or future well-being of its region or district and certain matters relating representation.¹²¹ In addition, a few decisions can only be taken following a poll or referendum,¹²² and electors may demand polls on certain electoral matters.¹²³ Such referenda or polls must be conducted in accordance with the requirements in the Local Electoral Act 2001.¹²⁴

2 *Significant decisions*

The Local Government Act 2002 treats significant decisions differently than ordinary decisions, with significant decisions being subject to a range of enhanced obligations and processes. The Local Government Act regime effectively dictates that such decisions only be

the document is available and the manner in which it may be obtained: see Local Government 2002, s 5(1) and (3); Local Government Act 2002, s 5(1) and (3).

¹¹⁶ Local Government Act 2002, ss 83(1)(e), (f), (g), and (h) and 83(2).

¹¹⁷ Compare the with express provision for this step in Local Government Act 1974, s 716A(g).

¹¹⁸ Local Government Act 2002, s 82(1) and (5). For an unsuccessful pre-emptive challenge to a process of consultation under special consultative procedure on the basis that the outcome had been predetermined and consultation would be "a waste of time and money", see *Easton v Wellington City Council* [2009] NZCA 513.

¹¹⁹ Local Government Act 2002, s 82(3).

¹²⁰

¹²¹ Local Electoral Act 2001, ss 9(1) (proposals generally), 19ZD (Māori wards or constituencies), and 31 (electoral systems).

¹²² See Local Government Act 2002, s 131 (decisions to close down or transfer the ownership of small water services).

¹²³ Local Government Act 2002, ss 19ZB (Māori wards or constituencies), and 29 (electoral systems).

¹²⁴ See Local Electoral Act 2001, Parts 2-4.

taken following specific consultation with the community, through the specific consultative procedure.

Decisions relating to key planning or regulatory instruments are effectively treated as significant decisions (although not expressly identified as such by the Local Government Act 2002) and can only be made through the special consultative procedure.¹²⁵ These decisions include:

- the adoption or amendment of the long-term council community plan,¹²⁶
- the adoption or amendment of an annual plan,¹²⁷
- the making, amendment or revocation of bylaws,¹²⁸

Certain decisions which can be characterised as significant can only be taken if explicitly provided for in the long-term council community plan;¹²⁹ if not, the long-term council community plan must be amended through the special consultative procedure to provide for the decision.¹³⁰

The term "significance" is partially defined in the Local Government Act 2002:¹³¹

significance, in relation to any issue, proposal, decision, or other matter that concerns or is before a local authority, means the degree of importance of the issue, proposal, decision, or matter, as assessed by the local authority, in terms of its likely impact on, and likely consequences for,—

(a) the current and future social, economic, environmental, or cultural well-being of the district or region:

(b) any persons who are likely to be particularly affected by, or interested in, the issue, proposal, decision, or matter:

(c) the capacity of the local authority to perform its role, and the financial and other costs of doing so

In addition to this didactic definition, local authorities are obliged to adopt their own policies on significance, through the special consultative procedure.¹³² The policy on significance must set out that local authority's general approach to determining the significance, including applicable

¹²⁵ Local Government Act 2002, 83.

¹²⁶ Local Government Act 2002, ss 84 and 93(2).

¹²⁷ Local Government Act 2002, ss 85 and 95(2).

¹²⁸ Local Government Act 2002, ss 86 and 156.

¹²⁹ Local Government Act 2002, s 97. For an unsuccessful attempt to injunct a stadium project on the basis that it was not expressly provided for, following changes to funding arrangements and costs, see *Stop the Stadium Inc v Dunedin City Council* [2009] NZCA 370 and *Walker v Otago Regional Council* (High Court, Dunedin CIV 2009-412-352, 11 June 2009, Lang J).

¹³⁰ Local Government Act 2002, ss 93(4)-(5) and 97(2).

¹³¹ Local Government Act 2002, s 5. See also the definition of "significant" in s 5: "significant, in relation to any issue, proposal, decision, or other matter, means that the issue, proposal, decision, or other matter has a high degree of significance".

¹³² Local Government Act 2002, s 90(1) and (4).

thresholds, criteria, or procedures to be used when assessing significance, as well as listing the assets considered by the local authority to be strategic assets.¹³³ Based on the model promulgated by Local Government New Zealand, many local authorities have adopted significance policies that predominately express significance in terms of quantitative financial thresholds, along with minor reference to the qualitative degree of controversy of a proposal.¹³⁴

Undoubtedly the assessment of the significance of any decision will be one of the dominating – if not the most dominating – ingredient in the various judgements to be made about the degree of community input and compliance with other decision-making principles. Significance is expressly mandated as being relevant to every key judgement. But the assessment of significance involves a complex and contextual factual evaluation. It is a judgement, par excellence. Its centrality to the statutory scheme means it has also caused some angst for supervising judges, a point discussed later.¹³⁵

E Conclusion

By and large, the Local Government Act 2002 represents an ambitious attempt to codify the means and extent to which community views should inform the decisions of local authorities. The community view imperative is set amongst an innovative and modern legislative scheme, where the elements of old-fashioned discretion and judgement are committed to writing.

Some people, including myself, have suggested it is the "quid pro quo" for the more generalised purpose of local government and the power of general competence.¹³⁶ But while the legislative text is now more complex and littered with directives, I am not necessarily convinced that the decision-making principles were intended to materially alter the essence of local democracy and decision-making. The decision-making principles and community views imperatives need to be set in their broader context.

In my view, the statutory scheme simply codifies the existing elected member or officer thinking processes and the values of public office seen throughout local and central government. It tries to capture the very *raison d'être* of local government that has – at least by way of a "vibe"¹³⁷ – guided elected member and local authority bureaucrats.

Further, the regime seeks to make explicit the basic administrative law standards and doctrines that applied through the common law. Administrative law courts have always required

¹³³ Local Government Act 2002, s 90.

¹³⁴ See Local Government New Zealand *Local Government Knowhow Guide: Decision Making* (LGNZ, Wellington 2004) at 120 and, for example, Wellington City Council *Policy on Significance* (2006) <www.wellington.govt.nz/plans/annualplan/0607/pdfs/v2-s09.pdf>.

¹³⁵ See below at Illustrative Examples.

¹³⁶ See Dean R Knight "Local authority decision-making, community views, and Stadium Aotearoa" [2007] NZLJ 354 and Memon and Thomas, above n 3 at 136.

¹³⁷ *The Castle* (movie, Working Dog and Village Roadshow Entertainment, 2006) <www.imdb.com/title/tt0118826>.

decision-makers to act consistently with their statutory purpose,¹³⁸ identify all relevant considerations to any decision, disregard irrelevant matters,¹³⁹ have adequate information before them before they make a decision,¹⁴⁰ and to act logically, in a deliberative, reasoned manner.¹⁴¹ In many respects, the statutory list of decision-making principles is reflective of established practice and values.

While the Local Government Act 2002 introduced some new terms and a couple of new processes and documents (most notably the long-term council community plan), the essence of established local democracy and deliberation has not actually changed dramatically, save for the attempt to record these deliberative and participatory processes in a singular blue-print.

Budget documents and rule-making still go through a formal process of public participation. For other decisions, the continuum of deliberative formality and participation remains – a judgement needs to be made about how important the issue is. The most serious change is the formalisation of the few categories of most important decisions, requiring a community mandate through participatory processes.¹⁴² I suspect that in days gone by most local authorities would have regarded those as having falling at the high-end of the formality continuum and would have expected that there would need to be a reasonable degree of public participation in their development.

III Observance of the statutory scheme

A Introduction

The focus so far has been on the legislative scheme and the extent to which it obligated local authorities to have regard to community views. Equally important is the approach adopted by supervising bodies in the task of monitoring and enforcing the observance of this statutory scheme.

First, there is the question of *who* is responsible for holding elected members, officers, and local authorities accountable. In a formal sense, there are a number of external public functionaries like the courts, Auditor-General, Ombudsman, and ultimately the relevant Minister.¹⁴³ But in this context, there are other equally important, informal judges of compliance: ratepayers, media, fellow elected members, etc. In this paper, I concentrate on the former, although I acknowledge that the latter may be more powerful watch-keepers than their formal counterparts.

¹³⁸ *Unison Networks Ltd v Commerce Commission* [2008] 1 NZLR 42 at [53], adopting *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997.

¹³⁹ *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172.

¹⁴⁰ *Discount Brands Ltd v Westfield (New Zealand) Ltd* [2005] 2 NZLR 597.

¹⁴¹ *Wellington City Council v Woolworths (NZ) Ltd (No 2)* [1996] 2 NZLR 537.

¹⁴² See above Individual Decision-making Principles.

¹⁴³ See the various intervention powers of the Minister of Local Government under Part 10 of the Local Government Act 2002.

Secondly, there is the question of the standard adopted by these different bodies. The fact that Parliament has mandated and legislated certain requirements does not, by itself, answer the question of the degree of compliance expected by reviewing bodies.

The supervision of local authority decision-making forms an important part of administrative law. While the Rule of Law requires the courts to enforce compliance with the law, competing theories recognise the limitations of judicial supervision and place more faith in other control mechanisms in ensuring compliance. Sometimes associated with the "red light", some like Sir William Wade emphasise the role of the courts to be vigilant:¹⁴⁴

[T]he primary purpose of administrative law is ... to keep the powers of government within their legal bounds, so as to protect the citizen against their abuse. The powerful engines of authority must be prevented from running amok.

This focus is on ex post facto judicial control focused on legality, interpreted narrowly.

On the other hand, others emphasise the importance of facilitating the operations of the state and to improve the effectiveness and efficiency of governance. Associated with the "green light", this school places more value on the need for constitutional comity or respect (ie, amongst other things, acknowledging the constitutional allocation of power by the legislature to public bodies or officials and the "secondary" or "review" role of the courts). It recognises the limitations of the judicial function and places more value on other ex ante, informal, internal controls of administrative power.

The differences can be illustrated through a simple example, say, the question of whether a local authority has properly assessed the significance of a decision to construct a sports arena in a particular location. The red-light school would suggest that Parliament has mandated this legislative threshold. In some cases, it is trigger for consultation. In other cases, it one of the overarching factors in the moderating judgement. It is the job of the courts to ensure the law is followed. Therefore, the courts will examine whether local authorities have "correctly" assessed whether something is significant. If the courts view is different from the local authority, then the decision may be overturned. But the green-light school would emphasise that Parliament has principally delegated the task of assessing whether something is significant to local authority members. Matters of significance are better assessed by people at the coal-face, with expertise on such matters – not by ill-equipped judges in sterile court-rooms. There are other processes and checks-and-balances within the system which ensure promote compliance with the principles such as the local community (immediately through their reaction and ultimately at the ballot box), the fourth estate, the bureaucratic processes internal to local authorities like officer analysis and recommendation, the deliberative processes of the Council chamber, etc.

¹⁴⁴ HWR Wade and C Forsyth *Administrative Law* (7th ed, Clarendon, Oxford, 1997) at 507.

B Illustrative Examples

The differing approaches can be illustrated by examining two decisions of local authorities, and the manner which recently reviewed by the High Court. The first is a successful challenge to the increase in Council housing rentals; the second an unsuccessful complaint about the relocation of council offices. The two case-studies demonstrate two different approaches to assessing compliance.

1 Council of Social Services v Christchurch City

The *Council of Social Services v Christchurch City*¹⁴⁵ arose after the Christchurch City has been reviewing the ends for its housing portfolio for the last 10 years. For several years, there were no increases. More recent increases were in line with the Consumer Price Index. The Council was concerned that continued increases in line with the CPI would not cover upkeep construction costs. A review in 2006 suggested an increase of 18% which the Council rejected, preferring instead to peg the upkeep costs to the Capital Goods Price Index – Residential Buildings, which would provide a more accurate indicator of upkeep costs. However, in 2008 the Council increased rent by 24% and refused to later revoke it. The Council had projected that the current regime was insufficient to deal with future costs and wanted to ensure that the maintenance and provision of the housing portfolio was financially self-funding and sustainable. Local groups opposed the increase and the Council of Social Services sought to judicially review the decision in the High Court, arguing that the process by which the decision was made was deficient. It was their contention that the Council had based their decision off flawed information, had failed to apply their own policy regarding rent increases and furthermore, that the Council had failed to follow the statutory requirements found in the Local Government Act 2002. Given the focus of administrative law, they did not, and could not realistically challenge the merits of the decision itself, that is, whether it was good or bad. But the new regime gave them many more targets when challenging the decision-making process.

The High Court upheld the challenge for a number of reasons. First, the Court ruled that the Council had either failed to consider whether the decision was significant or that the Council erroneously concluded it was not significant.¹⁴⁶ Council reports at the time did not record the significance of the proposed decision, but the Council had argued that if councillors had taken a different view, they would have been able to, and regularly did, raise that at the meeting itself.¹⁴⁷ This was not a case of failing to have regard to the matter – the proper inference was that the Council's conclusion was that the decision was not significant. The Court's approach was effectively to apply a correctness standard to the evaluation of significance, which is inconsistent

¹⁴⁵ *Council of Social Services in Christchurch/Otautahi Inc v Christchurch City Council* [2009] 2 NZLR 123.

¹⁴⁶ *Ibid*, at [38] and [40].

¹⁴⁷ *Ibid*, at [37].

with local authority autonomy, particularly in the light of the partly self-setting approach to the evaluation of significance.

Secondly, the Court ruled that the Council failed to assess all reasonably practicable options, because they failed to explore plausible alternative options such as seeking government assistance.¹⁴⁸ In the light of the Court's conclusion that the decision was significant, the Court said "a thorough analysis" of the reasonably practicable options was required. A rudimentary assessment, and one that omitted reference to the plausible option of government assistance, was inadequate.¹⁴⁹

Finally, the Court ruled that the Council did not adequately consider community views or the views of affected persons before taking making the decision.¹⁵⁰ In previous reviews there had a history of views being provided by tenants and other groups, both formally and informally. Some addressed the meeting itself, wrote letters to councillors, and signed a petition that was presented to the Council. But the Court said the Council failed to obtain the views of people affected at other critical stages of the process: particularly when options were identified and assessed, and proposals developed. The judge said the Act mandated public participation *throughout* that process, particularly given the Court's view of significance of the proposed decision.¹⁵¹

This case illustrates a very vigilant approach. Basically, the Court substituted its view for the view of the local authority on the critical factors, particularly the evaluation of whether the proposal was significant or not. In doing so, the judge failed to give any real room for the crucial moderating judgements to operate.

Despite evidence of a history of engagement by the local authority, where the views of the affected community were well-known by the local authority, the Court insisted on greater community participation in the formal process. Even though the Court acknowledged the Council was not obliged to formally consult about the decision,¹⁵² the expectations set by the Court mean the Council could have only discharged of its obligation to take account of community views after completing a consultation process. With respect, that cannot have been the intention of the new regime.

¹⁴⁸ Ibid, at [64].

¹⁴⁹ Ibid, at [62].

¹⁵⁰ Ibid, at [93].

¹⁵¹ Ibid, at [96].

¹⁵² Ibid, at [78].

2 *Whakatane District Council v Bay of Plenty Regional Council*

The approach in the *Council of Social Services* case can be contrasted with Duffy J's approach in *Whakatane District Council v Bay of Plenty Regional Council*.¹⁵³ Both cases were heard at a similar time, with the *Council of Social Services* case coming out after the hearing of the *Whakatane* case but before judgment was issued. Duffy J pointedly notes that Chisholm J "interpreted [the provisions] differently" and records that she "must respectively disagree with the interpretation it expresses".¹⁵⁴

The *Whakatane* case arose after the Bay of Plenty Regional Council decided to move its headquarters from Whakatane to Tauranga. The Regional Council had been located in Whakatane since its inception in 1989. For many years the Council questioned the appropriateness of this location, with it doubting whether it could effectively fulfil its regional functions from this location. A number of accommodation reviews over the last decade or so had investigated the possibility of relocation, but suggested no changes. In 2006, the Regional Council undertook another review and commissioned the consultancy firm Deloitte New Zealand to reassess the ideal location. Deloitte consulted with the regional councillors and mayors, and in November issued a report suggesting that the Council should relocate from Whakatane to Tauranga. The reasons given was not financial; rather Deloitte indicated was strategically sensible to be located in Tauranga due to Tauranga's growing size, its status as the region's main urban hub and inevitability of the need for a significant presence in the Bay of Plenty's western regions. The Regional Council agreed in principle to move and organised a number of workshops and meetings with staff, affected interest groups and local iwi. With the realisation that the proposal would need to be incorporated in the long-term plan, the Regional Council then formally consulted on the proposal through the special consultative procedure. Ultimately, in June 2007 the Regional

¹⁵³ *Whakatane District Council v Bay of Plenty Regional Council* [2009] 3 NZLR 799. A similar, more deferential approach to reviewing compliance with the community views obligation, particularly acknowledgement of previous engagement with the community on similar issues and prior knowledge of community views, is also evident in the Auditor-General's Inquiry in Christchurch City Council's July 2008 decision to purchase four central city properties. See Auditor-General *Inquiry into Christchurch City Council's five property purchases* (2009) <www.oag.govt.nz/2009/christchurch>. The decision to purchase the properties was made at a Council workshop and subsequent (public excluded) Council meeting in less than 3 days, without particular public participation, as the Council took the view that the integrated development of these properties were crucial to its Central City Revitalisation strategy and it was necessary to move quickly to avoid them being sold to third parties for unsympathetic development. The Auditor-General said the Act "clearly expects those decisions to be informed by the political and democratic context within which elected members operate"; there is "a clear parliamentary direction that there should be substantial deference to appropriate judgements that a local authority makes on" information and evidence standards; and "the appropriate assessment of significance in a given case is a subjective judgement by the local authority". The Auditor-General found no reason to interfere with the assessment of significance and accepted the proposal did not need specific, lengthy, and additional formal consultation.

¹⁵⁴ *Ibid*, at [105].

Council amended its long-term plan to provide for relocation, as well as formally making the decision to relocate.¹⁵⁵

The Whakatane District Council challenged the Regional Council's decision. Various complaints were made about the decision-making procedure and compliance with the myriad of obligations, including flawed problem-definition and option-identification stages of the decision-making process. In particular the District Council alleged that there was a failure to consider community views during these stages and a failure to record having done so – arguing that once the decision in principle was made, "the die was cast".¹⁵⁶ A complaint about the later stages of the decision making process could not be maintained because the Regional Council, accepting the decision was significant, then consulted on the proposal through the special consultative procedure.

In reviewing the observance of the decision-making matrix, Duffy J adopted a much more benevolent or deferential approach. She spoke of the Local Government Act 2002 requiring a local authority to "create a procedure template" but noted that "the form it takes is left to the local authority's discretion".¹⁵⁷ While, the construction of the procedural template was reviewable according to usual common law requirements, particularly relevancy (enumerated considerations), proportionality and reasonableness, greater weight was placed on a local authority's discretion as to the ultimate form of decision-making.¹⁵⁸ Notably, she put significant emphasis in her judgement on moderating judgements. Importantly, she rejected any particular obligation to expressly record these moderating judgements in the decision making process, consistent with the legislative gloss in section 79(1)(b)(iv) (although she did suggest it might be "wise" for local authorities to do so because a lack of written record places the decision making process at risk, especially for complex substantive decisions).¹⁵⁹

Ultimately Duffy J concluded that the Regional Council did take account of community views at these stages (albeit as a matter of inference from the reports) and did consider reasonably practicable options at these stages (albeit implicitly or accidentally).¹⁶⁰ This holistic approach was necessary because an officer's report (or "Checklist for Decision-making") tendered at the time the decision in principle was made was flawed. The report had said no information was held about community views, which was clearly inconsistent with the content of the Deliottes report and other information available to the Council at the time.¹⁶¹ The officer's report also suggested the decision was only of medium significance, would have had a minor impact and was not deemed to

¹⁵⁵ Ibid, at [27].

¹⁵⁶ Ibid, at [61].

¹⁵⁷ Ibid, at [46].

¹⁵⁸ Ibid, at [51].

¹⁵⁹ Ibid, at [55].

¹⁶⁰ Ibid, at [76].

¹⁶¹ Ibid, at [79].

be controversial.¹⁶² The judge accepted that the report contained "mistaken assessments" and was not "a reliable indicator of what was know to the [Regional Council] at the time."¹⁶³ In taking this approach Duffy J was willing to look beyond the formal record and to reflect the reality of the community views known to elected members and officials, and the moderating judgements that had been made by them.

Further, as an alternative to her other findings, Duffy J considered whether the decision-making obligations under the Local Government Act 2002 were "directory", not "mandatory".¹⁶⁴ In basic terms, if obligations are of only directory, then non-compliance might not necessarily invalidate decisions.¹⁶⁵ Duffy J concluded:

I am not able, therefore, to read s 76(3)(b) as having the effect of imposing mandatory compliance requirements on local authority decision making under s 76 and its associated provisions. It follows that if I am wrong on finding that the respondent has implicitly complied with s 76 and its associated provisions, or that implicit compliance is sufficient to meet the provisions' requirements, none the less, I do not consider non-compliance will invalidate the decision.

Her conclusion on this point was based on the different injunctions adopted by Parliament in critical provisions imposing the obligation to comply with the decision-making principles. For ordinary decisions, the obligation on the local authority is to ensure decision-making processes "promote" compliance¹⁶⁶ Here, she suggests the purpose of the provision is to create "performance standards for achievement", rather than obligations which local authorities are "compelled to achieve".¹⁶⁷ For significant decisions the legislative obligation is to ensure that obligations are "appropriately observed".¹⁶⁸ Even here, Duffy J was open to the view that this did not create an inviolable obligation. While there was the "ring of mandatory requirements" and Parliament appeared to have set "a stricter standard of non-compliance", "a requirement for absolute observation was not an absolute".¹⁶⁹ It was more a "value judgement", involving an element of reasonableness.

Overall, Duffy J's approach to the supervisory exercise is one tempered by reality. She adopts an approach to reviewing the observance of the decision-making matrix which is relatively deferential and recognises that the legislative requirements are first and foremost intended to speak to local politicians, not to create a judicially-enforceable culture of perfection.

¹⁶² Ibid, at [79].

¹⁶³ Ibid, at [79].

¹⁶⁴ Ibid, at [94].

¹⁶⁵ Ibid, at [96].

¹⁶⁶ Ibid, at [96].

¹⁶⁷ Ibid, at [96].

¹⁶⁸ Ibid, at [97].

¹⁶⁹ Ibid, at [98].

IV Conclusion

The new decision-making and participation framework in the Local Government Act 2002 presents a new legislative vision for sub-national decision-making and community engagement. Community preferences and views are expressly situated as the centre of all local authority decision-making. This makes explicit that which has always been implicit. Local government is an ideal vehicle for community participation in decision-making.

Mandating community views as a critical factor in decision-making has been a challenge. Faced with the fact that the generic principles apply to the full range of decisions – from building stadiums, to buying staplers; from law-making to regulatory approvals – and the subject is an autonomous, democratically-elected and accountable body, the framework needs to be flexible and contextual. The ability to temper the aspirational principles, including the receipt of community views, is achieved by allowing local authorities to make discretionary moderating judgements about the extent of compliance. It falls on local authorities to take responsibility for the culture of participation and deliberation within their community – something they will no doubt be held accountable for at the ballot box.

This innovative framework – one not seen at central government level – has presented problems for the supervising administrative law courts. Should they be vigilant, and intervene whenever there is an apparent failure to live up to the principles? Or should they exercise restraint, and adopt a more nuanced and deferential approach?

I have doubted whether it was the purpose of Parliament that strict scrutiny was meant to be brought to the task of judicial supervision. It is often argued that the need for strong judicial supervision only arises when there are limited or weak political controls on the exercise of power.¹⁷⁰ Significantly, the Local Government Act 2002 creates a procedural template or framework which empowers informal, political controls. It encourages bureaucratic discipline, provides councillors with a language to grapple with questions of participation and deliberation, and gives the media and the general public anchors on which they can seek to hold elected members accountable. In short, the framework empowers political judgement and accountability.

Strong legal accountability, in contrast, comes with at a significant cost – most significantly it has the potential to undermine the democratic pedigree of elected local representatives. Judges can never replicate the intimacy of local decision-making, where the representatives live and breathe the dynamics of the neighbourhood. While public participation obviously has its benefits, governmental efficiency and effectiveness is also important. As Thomas J in *Waitakere City Council v Lovelock* reminds us, there is a cost in over-juridifying and strictly enforcing decision-making obligations:¹⁷¹

¹⁷⁰ See for example Peter Cane *Administrative Law* (4th ed, Oxford University Press, Oxford, 2004) 407.

¹⁷¹ *Waitakere City Council v Lovelock* [1997] 2 NZLR 385, at 414.

A fifth, and possibly more figmentary factor, is the possibility that overly indulgent judicial intervention will inhibit administrators' efficiency in the performance of their statutory responsibilities. Administrators will constantly be looking over their shoulders apprehensive at the prospect of judicial review. The constant threat of such proceedings will make them over-cautious or lethargic. Justice O'Connor of the United States Supreme Court has made this point with a short and entertaining fable in "Reflections on Preclusion of Judicial Review in England and the United States" (1986) 27 Wm & Mary L Rev 643 at p 655:

"The centipede was happy, quite,
until a toad in fun
Said, 'Pray which leg goes after which?'
This worked his mind to such a pitch,
He lay distracted in a ditch,
Considering how to run."

One would not willingly wish this fate upon administrators.

Juridification also leads to elected members seeing the decision-making framework as merely a source of risk, rather than as empowering their instincts and judgements. Presented with this legal risk, decisions about the nature and degree of public participation are then delegated, to those with legal and technocratic skills: the lawyers and officials. Lawyers are invited to express opinions on the degree of significance. Officers tick boxes on compliance sheets. If we are serious about the purpose of local government to enhance community well-being then we should be concerned about the out-sourcing of these functions by local politicians. In my view it is better that elected members be empowered to take responsibility for judgements about the degree of public participation in decision-making – civic engagement is one of the well-beings that elected members ought to be held accountable for politically, not legally. Excessive judicial intervention muddles that accountability dynamic. At the end of the day, it is about letting local politician be exactly that: local politicians.