

Local authority decision-making, community views, and Stadium Aotearoa

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uses the Auckland stadium debacle to illustrate the new procedures

Public participation in local authority decision-making has undergone somewhat of a renaissance, with the 2002 reform of local government legislation placing greater emphasis on “grass-roots” decision-making. There now seems to be greater understanding of the importance of community views to the decisions made by local authorities. And the range of participation processes employed by local authorities has grown: from traditional submission processes, to mechanisms such as public referenda, focus groups, and the like.

This change of culture brings with it greater frustration from the community when it feels shut out of decisions. A failure to consult may also present a new and more direct mechanism to attack a decision of the local authority. An example is last year’s (ultimately aborted) proposal to construct a national sports stadium on Auckland’s waterfront. The decisions – and the process by which the decisions were made – led to vociferous debate and polarised the city. The decisions also led to the one of the first direct challenges to a decision of a local authority under the decision-making processes and principles under the Local Government Act 2002 (LG Act 2002).

In this article, I describe and discuss the salient decision-making and consultation obligations that apply to decisions of local authorities and use the recent stadium decision to illustrate how they work. The purpose of the discussion is two-fold: first, to identify and navigate the complex decision-making framework for local authorities imposed in the recent reforms, and, second, to make some observations about the special circumstances which arose in the stadium selection decisions.

THE DECISION-MAKING FRAMEWORK

The LG Act 2002 introduced a new decision-making framework for all decisions made by local authorities. The regime is notable for its attempt to largely codify existing common law decision-making principles and the adoption of a monolithic long-term planning document: the long-term council community plan.

There are two distinct tiers of decision-making: ordinary decisions and significant decisions. The LG Act 2002 does not expressly demarcate decisions in these terms but the nature of the decision-making processes and obligations means it is useful to distinguish between these types of decision.

Tier 1: ordinary decisions

The LG Act 2002 prescribes the various decision-making processes and judgments for any decision made by a local authority. The requirements apply to all decisions, including a decision not to take any action. (s 76(4)) That is, these processes and judgments must be followed for decisions regardless of the magnitude of the decision and apply to the full gamut of decisions, such as decisions to construct a sewage treatment plant, not to dispose of council housing, or to purchase miscellaneous office supplies, and so forth. Under s 76(5) these processes and judgments also apply, to the extent not inconsistent, to decisions made under other regimes, capturing regulatory decisions made under the Resource Management Act 1991, Building Act 2004, Reserves Act 1977 and the multiplicity of other legislation administered by local authorities.

In general terms, ss 77 and 78 require the local authority to:

- seek to identify all reasonably practicable options;
- assess:
 - the costs and benefits of those options (in terms of the four community “well-beings”);
 - the extent to which they promote or achieve community outcomes;
 - the impact of each option on the local authority’s capacity to meet present and future needs;
 - any other relevant matters;
- if any option involves a significant decision in relation to land or a body of water, take account of the relationship of Maori and their culture and traditions with ancestral land, water sites, waahi tapu, valued flora and fauna and other taonga;
- consider the views and preferences of people likely to be affected by or have an interest in the matter (ie consider community views).

The generality of the decision-making obligations require that these “Rolls-Royce” requirements be tailored and tempered for the particular context. Under s 79, local authorities are entitled to make judgments about:

- how to achieve compliance with these requirements (largely in proportion to the significance of the decision); and
- the extent of each assessment, the details quantified and considered, and the extent to which any written record is kept of these assessments.

In making such judgments, local authorities are required to have regard to the significance of the decision, the codified list of general “principles” applicable to local authorities in s 14, the extent of their resources, and the extent to which the nature and circumstances of the decisions allows consideration of these matters. The degree of compliance expected is therefore greater for a decision to construct a sewage treatment plant than for an urgent decision to close a unsafe building or a routine and trivial decision to purchase a stapler.

Legislation generally confers the decision-making function (either an express decision-making function or implicit decision-making function arising from the power to undertake an action) on the “local authority”. These decisions may be made by the elected members, that is, by majority vote of its governing body. (cl 24, Sch 7) Alternatively, efficiency and effectiveness may dictate that the decision be delegated. Decisions may be delegated to committees, community boards, officers, or other subordinate decision-making bodies. (cl 32, Sch 7) If delegated though, decisions are still made in the name of the local authority and all the decision-making obligations continue to apply. It is important to remember that the decision-making obligations apply not just to “formal” decisions appearing on the agenda of the council and its committees, but also decisions made by the office clerk or the building inspector out and about on building sites.

For ordinary decisions, the relevant injunction in relation to community views is the passive requirement to “give consideration” to them:

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.

Consideration must be given at various stages of the decision-making process: when problems and objectives are defined, when reasonably practicable options are identified and developed, and when options are adopted. (s 78(2)) As noted earlier, this obligation is subject to the gloss of the various judgments that can be made by local authorities about the degree of compliance. (s 79)

Notably, the obligation to give consideration to community views does not require that local authorities consult. Local authorities are only required to consult about decisions if otherwise directed to under the LG Act 2002 or other legislation. (s 78(3)) The section leaves open the means by which the local authority assesses the views of those affected or interested in the matter. The members of the local authority may identify the views of the community, simply asking themselves what they as citizens would think. In other cases, the local authority could ascertain community views by other means, such as from focus groups or public meetings, opinion polls or other surveys, informal dealings between elected members and members of the community, or hearing from delegations or representative bodies. Or the local authority may formally consult through written submissions and/or

formal hearings. The decision about the mode by which the views and preferences of affected or interested persons are identified is a matter of judgment for the local authority.

The only way to challenge a failure to consult under this section is to argue that the local authority made a bad judgment. This is difficult and would generally require that the decision be manifestly unreasonable or “irrational”. However, there remains some prospect that this high threshold

might be triggered, particularly because local authorities are required, amongst other things, to comply with this obligation “largely in proportion to the significance of the matter affected by the decision”. (s 79)

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Tier 2: significant decisions

Enhanced consultation processes are required for significant decisions. The adoption of key planning and regulatory documents are par excellence significant decisions and are expressly required to be adopted through the special consultative procedure. For example, a local authority’s long-term council community plan can only be adopted or amended through the special consultative procedure, as is also the case with bylaws. (s 93(2) and (5), s 156(1))

The long-term council community plan is the cornerstone of local authority governance. Produced once every triennium, the long-term council community plan sets out a local authority’s vision (eg “community outcomes”) and its proposed activities for the next ten years. Greater financial detail is required for proposed activities for the first three years, and, in the year it is produced, the plan operates as the local authority’s annual plan. The long-term council community plan must also contain a number of other governance policies, such as funding and financial statements, policies on significance, and policies on enhancing the contribution of Maori to decision making. Overall, the long-term council community plan is intended to “provide integrated decision-making and co-ordination of the resources of the local authority”, as well as to “provide an opportunity for participation by the public in decision-making processes on activities to be undertaken by the local authority”. (s 93(6))

The requirement to adopt the long-term council community plan through the special consultative procedure provides the community with the opportunity to participate. Once adopted, the plan operates as the “formal and public statement of the local authority’s intentions”. (s 96(1)) However, the local authority is not obligated to undertake activities in its plan (s 96(2)) and, with some notable exceptions, can make decisions inconsistent with it provided it identifies the inconsistency and resolves to amend the plan later. (ss 80 and 96(3)) In short, the 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.

Under s 97, certain “significant” decisions cannot be undertaken unless they are “explicitly provided for” in the local authority’s long-term council community plan, namely decisions:

- to change the mode of delivery of a significant activity, that is, outsourcing; (s 88)
- to commence or cease a significant activity, or otherwise significantly alter the intended level of service provision for a significant activity; (s 97(1)(a))
- 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(1)(b) and (c))
- 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(1)(d))

Critical to the operation of these caveats is the assessment of what is significant and what are strategic assets. Section 5 contains a definition of significance, namely the “degree of importance” of a decision in terms of its likely impact on and likely consequences for community wellbeing, people affected, and local authority capacity, although this definition is largely self-evident and borders on being otiose. Local authorities are also required to adopt a policy on determining significance in their long-term council community plan, setting out that local authority’s general approach to determining the significance, including applicable thresholds, criteria, or procedures to be used when assessing significance. (s 90) The method of assessing significance and relevant thresholds therefore vary widely amongst local authorities.

Also important is any degree of latitude in the meaning of “explicitly provided for”. The phrase does not deal with the materiality of changes, for example, whether a change of location or other variation to the proposal takes the project outside any provision in the plan. Such an assessment is naturally context-specific, but I suggest that local authorities should be reluctant to adopt an interpretation which immunises significant projects, or material variations to projects, from public scrutiny.

The decision-making process for significant decisions also contains an external, prophylactic control: the LG Act 2002 requires that the long-term council community plan (s 94) and amendments to the long-term council community plan (s 84(4)) be audited by the Auditor-General. This audit examines, in general terms, compliance with the processes required under the LG Act 2002 and the robustness of forecast information in the plan, rather than the merits of the proposal in the plan.

Consultation

As can be seen, the two-tiered decision-making framework contemplates consultation with the community in relation to some decisions, either voluntarily, to ascertain community views in relation to an ordinary decision, or obligatorily, in relation to the adoption of the long-term council community plan or amendment to provide for a significant decision. The LGA 2002 addresses the process of consultation in two distinct ways.

First, s 82 attempts to codify common law consultation principles, setting out general requirements about the consultation process (eg reasonable access to information, encouragement to participate, clear information about options and scope, reasonable opportunity to be heard, requirement of an open mind, information about the outcome). The principles must be observed whenever consultation is undertaken, regardless of whether the decision to consult was voluntary or compulsory. However, as with other procedural elements, s 82(4) allows the local authority to exercise a degree of

judgment about the extent of compliance with these principles, in the light of the extent to which the community views are known by the local authority, the nature and significance of the decision, and the costs and benefits of the consultation process.

Secondly, s 83 sets out a formal public participation and decision-making procedure – the special consultative procedure – that must be followed when consulting on some decisions. Specific details about the procedure are prescribed, including mandatory information requirements (statement of proposal, summary of information, and public notice), a one month period for written submissions, and an entitlement to make oral submissions directly to the local authority. In contrast to the principles of consultation, compliance with these requirements is mandatory.

STADIUM AOTEAROA

The background to the decisions by the Auckland City Council and Auckland Regional Council is well known. In early November 2006, the Minister for the Rugby World Cup announced a plan for a 60,000 seat stadium on the Auckland waterfront as an alternative to the existing proposal to upgrade Eden Park for the 2011 Rugby World Cup. The Minister gave the two local authorities a fortnight to indicate their support or opposition to this proposal. Over the next fortnight, the local authorities scrambled to assess the proposal and to ascertain the views of their communities. Ultimately, Auckland City voted to endorse the waterfront stadium option, while the Regional Council rejected it. As a result, the government withdrew the waterfront stadium proposal.

On the eve of the meetings to consider the options, an application by five residents was filed seeking an injunction to defer the decisions. (*Scott v Auckland City Council* (HC, Auckland CIV 2006-404-7226, 23 November 2006, Priestley J)) The application for interim relief was unsuccessful, although the Court accepted that the residents had made out an arguable case and adjourned the case for a substantive hearing. The challenge was based on non-compliance with the decision-making procedures, the gist of the allegations being a failure to consult.

Priestley J accepted that the plaintiffs had established an arguable case, in particular “that the procedures which Part 6 requires [were] truncated and in some cases arguably ignored”. (para 35) Unfortunately, in the context of an urgent oral judgment, little further comment was given on the nature and merits of the plaintiffs’ challenge. However, it is possible to augment the Court’s discussion with elements of the generic discussion above and to extrapolate the likely set of considerations.

First, there is the question of whether there was any legal obligation on the part of the local authorities to consult the community. As noted above, the requirement to take account of community views does not, by itself, give rise to an obligation to consult, as with any ordinary or “tier 1” decision. In this case, though, there was a strong argument that the decision was a significant or “tier 2” decision that required it be specifically consulted on as part of its inclusion in the long-term council community plan. The principal assessment is whether the decision amounted to a decision either to commence a significant activity or to construct a strategic asset. In both cases the decision would need to have been included in the long-term council community plan before it could be undertaken.

Auckland City's policy on significance was relatively open-textured, mandating an overall evaluation of significance in every case. The only additional guideline was that the suggestion of significance if a decision either creates a new activity or "output", increases expenditure on any output by 40 per cent or reduces it by more than 25 per cent. It also listed a number of strategic assets, although – as is common practice with other local authorities – aggregated as networks of assets rather than as individual assets.

In the ordinary course, a decision to construct a large sports stadium costing around \$500m would readily satisfy the test of significance. The level of financial expenditure would undoubtedly lead to a conclusion that the decision represented the commencement of a significant activity. The analogy with other nominated strategic assets reinforces this conclusion and suggests the sports stadium would properly have been regarded as a strategic asset. The problem in this case though was there was great uncertainty about the nature of the city's (financial) participation in any construction project, especially because it was not proposed the cities themselves own the stadium if it was constructed. This uncertainty was the main reason the Court was reluctant to grant interim relief. (para 36)

In my view, though, even if any financial contribution to the project was disregarded, the decision was still capable of being treated as being significant. If the decision is treated not in terms of a construction project per se but instead as a decision to convey a community preference for a project, the decision must still have been regarded as being a decision to commence a significant activity. The relevant activity being the conveying of the preference; the intangible decision was commenced and implemented at the instant the resolution of the local authority was made. The enormous regional and national public interest in the project was obvious. Given the government's position that the community's preference would dictate whether the project would proceed, the preference conveyed by the city (and the Regional Council) became crucial. The action of the city was therefore the first domino to fall, potentially setting off a string of other dominos (ultimately though the Regional Council's contrary decision prevented any chain reaction). When assessed on any credible basis, the decision must have been regarded as being significant. Accordingly, the preference should not have been conveyed unless it was provided for in the long-term council community plan.

The Court was not oblivious to these arguments. Priestley J accepted that "the mere decision to offer such comment is clearly a decision" and recorded submissions from the plaintiffs that the decisions would represent "the point of no return" or "some form of political Rubicon". (paras 17, 32 and 37) However, in my view, the Judge placed too much emphasis on the ambiguous nature of the local authorities' formal involvement and wrongly ignored the unavoidable reality that the fate of the proposed stadium hung on the decisions of the local authorities.

Some of the difficulty may arise from a particular mindset being adopted in relation to assessing significance. The traditional focus of the planning documents that preceded the long-term council community plan was financial; questions

of significance tend to arise in the context of the budgeting or annual planning process. However, the legislation does not restrict significance to financial significance. Of course, it will be rare for a non-financial decision or intangible action to attract a finding of significance but the stadium selection decisions seem to fall in that class.

So far I have concentrated on Auckland City's support for the stadium. But, in principle, the question of significance is

no different if the decision was to reject the proposal, as did the Regional Council. The LG Act 2002 makes it clear that a decision includes a decision not to take any action. (s 76(4)) There may be some subtle differences in the assessment of the impact of the decision on commu-

nity well-beings and affected people. However, it is difficult to see how a negative answer to the question posed by the government was any less significant in the light of the significant public interest in the proposal and the possible effects flowing from the abandonment of the waterfront proposal.

Second, assuming a conclusion that the decision was significant, the next question is whether the decision was explicitly provided for in the long-term council community plan. Consultation was only required if the decision was not already provided for in the long-term council community plan. Obviously, decisions about the proposed waterfront stadium or the conveying of a preference for such a project were not mentioned in the long-term council community plan – the idea coming from government well after the long-term council community plan was finalised. However, this aspect of the analysis was complicated by the fact that the city had made some reference to involvement in such a project. Under the heading "contribut[ing] to regional, national and international facilities", the city identified the redevelopment of Eden Park to cater for 60,000 patrons and joint funding of an international-scale convention centre. Funding of \$50m, and possibility of a further \$100m, was ear-marked for "international facilities for the city, such as the redevelopment of Eden Park and/or an international convention centre".

When assessing the decision purely in terms of a financial contribution, it is arguable the "such as" reference meant there was pre-existing approval for such a financial contribution to the waterfront stadium. However, in my view, this reading is dubious and adopts a myopic, solely financial perspective to local authority planning not mandated by the Act. Even if the financial contribution is the same, the location of the project to which that project relates affects the assessment of significant. When viewed in those terms, any holistic reading of the long-term council community plan points to only one option being on the table: namely Eden Park. Alternatively, any purported provision for an international stadium may have breached the requirements of s 93(8) and (9), requiring "appropriate" detail being included in the plan.

On the basis therefore that the decision was, first, a significant decision and, second, not already provided for in the long-term council community plan, the local authorities were, in my view, obliged to amend their long-term council community plan to provide for the decision. It must be

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acknowledged that there is a degree of artificiality in incorporating the decision to convey a preference in the long-term council community plan because at the same time a local authority makes the decision to provide for such a decision in its plan, the decision is simultaneously implemented. However, such a decision can readily be noted in narrative sections of the long term council community. And it must be remembered that the principle reason for the inclusion is to trigger the formal consultation requirements under the special consultative procedure.

The amendment process would have required the revision of the government's decision-making agenda. The process would have required at least a one month period for public submissions, along with further time for oral hearings. And time would also need to have been allowed for audit by the Auditor-General (anecdotal reports in relation to other amendments to plans suggest that the time required for audit is not insignificant). Having said that, if the process was fully resourced and prioritised, this process could theoretically have been completed within seven to eight weeks. Concerns expressed that public participation would derail the construction programme therefore appear to have been scaremongering.

Finally, putting questions of any obligation to amend the long-term council community plan or to consult aside, it is arguable the local authorities were required to comply with the general principles regulating the quality of the consultation process; although the city asserted the process was simply seeking "community views" or "public input" under s 78 (not "public consultation"), these subtle distinctions in terminology seem unlikely to avoid the reach of s 82. The truncated participation processes appeared to fall below the standards expected.

Although the Court did not get as far as completing its analysis of these issues, there is some suggestion the Judge was not very sympathetic to pleas that circumvention of public participation rights was justified by the government's desire for a speedy decision: (para 41)

I am sure that the defendants and their advisors will be well aware of the high degree of public interest and concern which the Auckland region has over the site of the stadium. I would be surprised if the time-lines and the reasons for them ... have not caused the two defendants and their advisors legitimate concern.

Ultimately, though, the Judge considered that the plaintiffs' rights would still be available after the decisions were made and injunctive relief was therefore unnecessary. The abandonment of the proposal following the Regional Council's adverse resolution means we do not know whether that assessment was correct, as further litigation became unnecessary. From a legal perspective, it is a pity these issues were not able to be developed further and resolved in the subsequent litigation.

CONCLUSION

The LG Act 2002 emphasises the role of community views in local authority decision-making, with a strong theme of public participation infusing the regime. However, the complex, codified processes for decision-making means some care needs to be taken when analysing whether this theme translates into a legal obligation to consult and, if so, the particular form of this consultation. An examination of the decision-making processes for the proposed waterfront stadium demonstrates that the resolution of these questions is not simple or straight-forward. □

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