

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKĀURAU ROHE**

**CIV-2025-404-001826
[2026] NZHC 3302**

UNDER the Judicial Review Procedure Act 2016

BETWEEN DOG LOVERS OF MONTE CECILIA
INCORPORATED
Applicant

AND AUCKLAND COUNCIL
Respondent

Hearing: 24 & 25 February 2026

Appearances: G Barton and M K Phillips for Applicant
K Anderson KC and K Morrison for Respondent

Judgment: 22 October 2026

JUDGMENT OF BECROFT J

*This judgment was delivered by me on 22 October 2026 at 4.30pm
pursuant to r 11.5 of the High Court Rules 2016*

Registrar/Deputy Registrar

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What this application is about

[1] The policies and rules for the walking and control of dogs in public spaces are fraught with tension. A balance is to be struck between the public exercise and recreational needs of dogs and their owners while minimising distress, danger, nuisance and intimidation caused by dogs to the public.¹

[2] Even the process of formulating appropriate rules often arouses considerable emotion and passion, particularly among dog owners. This case exemplifies all these issues and more.

[3] In the suburb of Hillsborough/Mt Roskill in Auckland, there is an iconic public park known as Monte Cecilia Park (the park). Within the park, there is a concave “bowl” approximating in size to the area within a 400-metre running track (the bowl). The exact delineation of the bowl’s boundary is not marked out, although it is generally understood as being reasonably geographically obvious to those frequenting it.

[4] Since 2016, the bowl has been an official “off-leash area” for dogs, while the remainder of the park is “on-leash”. The bowl is apparently well-known to dog owners and dog lovers in Auckland and is substantially used by them.

[5] The park falls within the authority of the Puketāpapa Local Board (the Board) in the Auckland Council area.

[6] In December 2024, the Board resolved to publicly consult about changing the bowl to an on-leash area, consistent with the rest of the park. The feedback received was overwhelmingly in opposition. Despite this, the Board voted on 17 April 2025 to make the entire park an on-leash area. On 19 June 2025, following a motion to rescind the April decision, the Board voted not to reverse course. Its initial decision stood.

¹ Dog Control Act 1996 s (10)(4).

[7] The decision to make the bowl “on-leash” prompted a strong response. The dog owners who used the bowl area claimed to be flabbergasted and could not understand it, given the opposition and the alternative options of strengthened signage and more focussed enforcement by dog control officers from Auckland Council.

[8] As a result, the Dog Lovers of Monte Cecilia Society (the Society) was incorporated in July 2025. It commenced this judicial review proceeding shortly afterwards.

[9] The Society’s application is a wide-ranging challenge to virtually all aspects of the Board’s decision, generally asserting that it was unlawful. The Society seeks an order quashing the April 2025 substantive decision.

How the parties got here

[10] On 15 December 2023, the Auckland Council Regulatory Practice Team (Regulatory Practice Team) informed all local boards that they would have the opportunity to consider and to put forward amendments to dog access rules for their local parks.² The Regulatory Practice Team manages the processes relating to changes to dog policies.

[11] Local boards were advised that a two-stage process would be adopted: that in the first instance the Regulatory Practice Team would evaluate all change requests and would then only recommend to a local board for consideration those change requests that showed evidence of “structural problems”.

[12] On 5 February 2024, Ms Ella Kumar, the chair of the Board, wrote to a Senior Policy Advisor in the Regulatory Practice Team requesting that Monte Cecilia be made an entirely on-leash park. She said:

The Puketāpapa Local Board have been discussing the Monte Cecilia Park. It is a Park that has had many issues with off leash dogs not been controlled by owners, commercial use.

² Local boards and their functions are described in more detail at [51].

This Park is one for everyone to use, many members of the community have raised issues, feeling very unsafe and won't go to walk, the best way to make this a park for all-community is to make it an on leash Park. Can this be part of the discussions for Puketāpapa Monte Cecilia please.

[13] In a later phone conversation, Ms Kumar said that the Board had received emails from the community about how “unsafe” it felt to have dogs running around the park.

[14] On 13 February 2024, Ms Kumar provided the Regulatory Practice Team with six complaints/requests about off-leash dogs, in addition to another complaint of her own. In it, she said:

Further to our phone conversations I am following up with an email. I have sent the community emails. These complaints were first received via facebook or verbally [at] events so I asked for them to email me. Some don't want [to] send as they feel they may get targeted. I had a personal interaction walking through the park and a dog jumped onto me, they were not near bowl either so many are not following rules, therefore if we do have rules in place it does need to be monitored. The Puketāpapa Local Board have discussed this and feel this park would be one that needs to be enjoyed by everybody and everyone needs to feel safe. The only way to achieve this is if we make the full park on leash so members of the community with dogs can still enjoy [as well] as community who are [frightened] of dogs. The calibre of this park is changing with beautiful art around the park. It was very sad to hear from the [residents] living on the park verge, she said she will not walk on the park as the dogs are running around very loose. We do have a seniors village backing onto the park [as well] as a school. If you require anything else from me to put this park into consideration do let me know.

[15] Following receipt of that information, the Regulatory Practice Team began evaluating whether a rule change was warranted and would be recommended. This process involved evaluating the complaints and requests received; analysing the dog incident data received by Animal Management;³ and seeking the advice and views of specialist staff across Auckland Council.

[16] On 31 October 2024, the Regulatory Practice Team gave its preliminary assessment to the Board. The report concluded that the regulatory criteria for changing the status quo for Monte Cecilia Park were not met. It observed that of the requests/complaints referred to by Ms Kumar: two were for more off-leash access;

³ Auckland Council's Animal Management team is the regional unit responsible for enforcing animal bylaws, managing dog registration and safety, and operating animal shelters across Auckland.

four were for more penalties, enforcement and better signage; and only one was to make the whole park on-leash. The assessment recommended that efforts should instead be focused on increased compliance and signage.

[17] The Regulatory Practice Team provided a further report. It was substantially the same as the preliminary report but with greater elaboration. In summary, the report concluded that no structural changes, structural problems, or significant risks had been identified for the park.

Meeting of 5 December 2024

[18] On 5 December 2024, the six-member Board met to decide whether to advance a proposal for public consultation changing the bowl from off-leash to on-leash.

[19] Two individuals addressed the Board that day: Iain Bremner and Jill Cooper. Mr Bremner spoke in favour of getting rid of the off-leash bowl area, while Ms Cooper spoke in favour of keeping it. Mr Bremner was one of the original complainants.

[20] The vote to propose getting rid of the off-leash bowl area was unevenly split amongst Board members: four votes in favour from Ms Kumar, Ms Lai, Ms Hay and Mr Pervan and two votes against from Mr Turner and Mr Shen.

[21] The Board's recorded reasons for having proposed to end the off-leash bowl area were "that the complaints from members of the community about off-leash dogs at Monte Cecilia Park is sufficient evidence that the decision to change the dog access rules in 2015 has created a significant risk to people".

Consultation with the public

[22] The proposal to end the off-leash bowl area officially went out for public consultation (along with all other proposed local dog access rule changes through Auckland) from 20 January to 23 February 2025.

[23] It generated considerable feedback. 900 "feedback responses" were received from the wider Auckland area about the proposal and 223 responses from the Puketāpapa area specifically. One of those responses was a petition with 1,065 signatures in opposition to removing the off-leash bowl area, submitted by Ms Nicole Braganza.

[24] On 20 February 2025, the Board held both its regular business meeting and a "Have Your Say" event for the public to provide feedback on its proposed changes to dog access rules. The minutes of the Board's meeting on 20 February 2025 show that Ms Braganza presented her petition at that meeting. The record confirms that a significant majority of those who attended were opposed to the proposed change.

[25] To assist all local boards with their deliberations, the Regulatory Practice Team provided them with deliberation tables summarising the key themes in the public feedback, staff advice in response, and a separate column (with proposed wording) for local boards to set out their reasons.

[26] Based on the feedback received, the Regulatory Practice Team's advice to the Board was that it had to consider the following criteria before deciding to end the off-leash bowl area:

- (a) whether there was a significant risk of conflict between users;
- (b) whether there were practicable alternative solutions to address that conflict (other than the proposed change) — for example, considering the use of enhanced operational measures like unobtrusive boundary markers; signage and online maps;
- (c) whether (to the extent practicable) displaced dog owners and their dogs had access to other areas; and
- (d) whether the proposed rule change was easy to understand.

[27] The Regulatory Practice Team also advised the Board to consider whether any decision should be made (effectively postponed) until after the completion of the masterplan which was being developed for the park. The masterplan, which was

expected to be completed in late 2027, would consider the future use and structure of the park, including the location of any off-leash area.

Meeting of 17 April 2025

[28] On 17 April 2025, the Board voted by majority, four votes to two, to adopt the proposal and require dogs to be on-leash throughout the park.

[29] The Board populated the deliberation table provided by the Regulatory Practice Team. The full decision, as set out in the deliberation table, was as follows:

That the proposal to require dogs to be on leash at all times on Monte Cecilia Park be adopted as publicly notified. Reasons include to protect users as the current off-leash in the bowl area creates significant risk of conflict between people and dogs in the surrounding areas of Monte Cecilia Park. Request through the Chief Executive to the manager responsible for animal management to increase monitoring of Monte Cecilia Park. In order to mitigate the impact of this decision the board would like to request through the Chief Executive to the parks manager responsible for Monte Cecilia Park with urgency, investigate the location for a fenced dedicated dog exercise area that clearly defines the boundaries and associated costs. Allocate up to \$1,000 from the relevant local board budget for costs to update signage. Members Turner and Shen would like to record a minority view to keep the off leash area and to instead more clearly define the boundaries using improved operational measures such as signage and better enforcement in the on leash area.

[30] As to the further evidence before this Court, the decision is recorded in the Board's minutes. There is also a transcript of the Board's meeting, which was surreptitiously recorded by a member of the Society, and affidavits from each of the four Board members who voted in favour of the proposal and an affidavit from a member who voted against. There are other affidavits filed by the Society. In addition, there is email correspondence sent to the Board before the meeting by individual Auckland Council staff members, which effectively urged the Board to reject the proposed rule change in respect of the bowl area.

Response to the decision

[31] Following its decision to end the off-leash bowl area, the community of dog owners that now sits behind the Society came together to challenge it.

[32] On 25 May 2025, a protest to the Board’s decision — Poochella⁴ — was held, during which hundreds of dogs and dog owners attended the bowl.

[33] On 12 June 2025, the Board received what was described as urgently sought advice in relation to its request to Auckland Council staff to investigate the location of a fenced dog exercise area. The effective recommendation was that a fenced dog exercise area could not be installed given the Board’s decision to make the park on-leash. And there would also be resource consent complications given the heritage status of the park. On that basis, Auckland Council officers recommended that the Board rescind its April 2025 decision.

Motion to rescind

[34] On 19 June 2025, Mr Turner, a member of the Board who voted against the 17 April motion, put forward a motion for the Board to rescind its earlier decision putting an end to the off-leash bowl area.

[35] The motion was defeated four votes to two, along the same lines as the earlier substantive decision.

Events following

[36] The Society was incorporated on 11 July 2025. The Court understands that it now has about 900 members.

[37] The Society initiated this proceeding on 17 July 2025.

[38] This Court then granted interim orders by consent, preserving the off-leash bowl area. As a result, the bowl has remained and continues to be off-leash.

Whether this hearing was necessary?

[39] At the start of the hearing, I referred the parties to the foreshadowed master plan for the future of the park, expected to be completed by late 2027. Given that the

⁴ This is understood to be a play on words of the famous Californian annual music and arts festival held within the Coachella Valley, known as “Coachella”.

future of dog access at the park would be comprehensively reconsidered as part of the masterplan process, I encouraged the parties to consider whether the present dispute could be adjourned or otherwise resolved pending completion of that process.

[40] I indicated that it might be thought premature and unnecessary (not to say costly) for a judicial review hearing to take place, when in 12-18 months' time the issue would be debated all over again. The parties could not agree. Following this hearing, the Board indicated (as was its right) that it wished the Court to determine the legality of its decision rather than defer determination pending completion of the masterplan.

The grounds of judicial review

[41] Mr Barton, for the Society, presented its argument attractively and persuasively.

[42] The Society's statement of claim challenges three decisions made by the Board in this proceeding:

- (a) the decision of 5 December 2024 in which it proposed ending the off-leash bowl area;
- (b) the decision of 17 April 2025 in which it adopted its proposal to end the off-leash bowl area; and
- (c) the decision of 19 June 2025, in which it decided not to rescind its decision to end the off-leash bowl area.

[43] The challenge to the decisions is particularised into nine causes of action. There is a significant degree of overlap with all causes of action. It is agreed that I do not need to set these out in detail.

[44] Mr Barton helpfully distilled the causes of action against first, the decision to propose the change, and second, the decision to adopt the proposal, into questions for the Court, which I summarise as follows:

- (a) Did the Board proceed on an improper basis in deciding to propose the removal of the off-leash bowl area? In particular did it do so to address the actions of irresponsible dog owners which is said to be contrary to the relevant Dog Policy 2019 and contrary to a “legitimate expectation” that it would not act on this basis, such that the proposal (and the subsequent decision) was ultra vires the Board’s delegated authority?
- (b) Did the Board fail to properly take into account and genuinely consider:
 - (i) all practicable alternative solutions; and
 - (ii) whether the displaced dogs and dog owners would have access to other places?
- (c) Did the majority approach the question of altering the access rule with an open mind? In substance, the issue is whether the decision was the result of pre-determination.
- (d) Was the decision to end the off-leash bowl area “unreasonable” in the administrative law sense of that word?

[45] In respect of the decision not to reverse the removal of the off-leash “bowl” area, Mr Barton raised the following questions:

- (a) Did the Board fail to consider the views and preferences of persons likely to be affected by the decision, or otherwise fail to approach the question whether to reverse the decision with an open mind?
- (b) Was the decision not to reverse the removal of the off-leash “bowl” area predetermined?
- (c) Was the decision not to reverse “unreasonable” in the sense above described?

[46] In essence, the real issue before the Court (accepted by counsel) is whether the April 2025 decision — the substantive decision, is lawful (as is strongly argued by Auckland Council), or unlawful, (as strongly argued by the Society). It is on this issue

that this judgment focusses. I accept, as do counsel, that the challenge to the “proposal decision”, and the decision not to rescind, are second-order issues which cannot deliver the substantive outcome that the Society seeks. However, those decisions may have a bearing on the argument as to pre-determination.

[47] All these issues need to be addressed separately and independently. First, however, some matters of legal context require explanation.

Decision making at the local government level

[48] Auckland Council, the respondent in this proceeding, was established in November 2010 under the Local Government Act 2002. Auckland Council is the local authority responsible for all local government decisions in the Auckland region.

[49] There are two classes of decision-makers and decision-making within Auckland Council. Auckland Council, as the governing body, is a unitary authority. Second, and more proximate to Auckland’s communities, local boards are responsible for local decision-making.

[50] The governing body is the entity comprising members of Auckland Council, being the elected Mayor and Auckland Council members. Certain decisions are reserved for the governing body. In the present context, they include the power to make bylaws and regulatory decisions.

[51] Other decisions are reserved for local boards of which there are 21 across Auckland. Local boards consist of a Chair, Deputy Chair and its other members. Their positions are remunerated. Chairs receive the equivalent of fulltime remuneration while the remaining members are compensated on an effective part-time basis. Gone are the days when local boards, especially their forerunners, known as community boards, could be considered (I hope not unfairly) as a group of highly committed and well-intentioned “amateurs”.

[52] This Board has responsibility for an area of 60,000 people. Like other local boards, it has its own budget. It is expected to understand and comply with the law. In its role it is assisted by Auckland Council officials who are either local board

advisers akin to political advisers or subject matter advisers. One such team of subject matter policy advisers is the Regulatory Practice Team which, here, managed the amendment process to the dog access rules.

[53] It is accepted that the Board in this case was exercising delegated authority from the governing body and that its decisions are amenable to judicial review. The terms of the delegated authority this Board was acting under, were promulgated in 2012 as follows:

Local boards will be responsible for:

1. Amendments (including preparation, approval and review) to the Policy on Dogs in relation to any dog access rules in local park, local beach, or local foreshore areas in their local board area (or jointly with other local boards) subject to these being:
 - (a) consistent with the Policy on Dogs policy, principles and criteria for making dog access rules; and
 - (b) not inconsistent with any decision in relation to region-wide dog access rules.
 - (c) in accordance with legislative requirements in particular the Local Government Act 2002 and Dog Control Act 1996.

[54] All this organisational structure is helpfully set out by Moore J in *Chamberlain Park v Auckland City Council*.⁵ There is no need for me to further repeat the details of his analysis, which counsel in this case accepted. *Chamberlain* repays further reading.

[55] I now turn to the relevant legislation which, at this point, I only summarise.

Dog Control Act 1996 and policies on dogs

Dog Control Act 1996

[56] The Dog Control Act 1996 (the Act) is the primary legislation for the control of dogs. This Act is central to the issues before this Court. The high-level purpose of the Act is to make better provision for the care and control of dogs and to make provision for the damage caused by dogs.⁶

⁵ *Chamberlain Park v Auckland City Council* [2018] NZHC 1462 at [28]-[37].

⁶ Dog Control Act 1996, s 1.

[57] The Act imposes responsibilities on territorial authorities including the Auckland Council. The most relevant of these responsibilities and/or powers are the requirements on territorial authorities to have and maintain a policy on dogs and to give effect to that policy by making bylaws in relation to where dogs are allowed to be, and under what conditions. Such conditions include whether dogs are prohibited at certain public places, allowed to be on-leash but under control, or allowed to be exercised at large — that is off-leash but under control.

[58] In adopting a policy on dogs, s 10(4) of the Act provides that territorial authorities must have regard to:

- (a) the need to minimise danger, distress and nuisance to the community generally;
- (b) the need to avoid the inherent danger in allowing dogs to have uncontrolled access to public places that are frequented by children, whether or not the children are accompanied by adults;
- (c) the importance of enabling, to the extent that is practicable, the public (including families) to use streets and public amenities without fear of attack or intimidation by dogs; and
- (d) the exercise and recreational needs of dogs and their owners.

[59] It is also important to note that every territorial authority must give effect to every Dog Policy adopted under s 10 of the Act by making the necessary bylaws.

[60] In the context of Auckland Council's shared government structure, its governing body delegated to the local boards the regulatory responsibility for one aspect of the Act's requirement to adopt a policy on dogs. Local boards are to make decisions on matters relating to specific dog access rules for local parks, beaches and foreshore.⁷

⁷ See the terms of this delegated authority described at [53] above.

[61] Changes to the policy can only be made using the special consultative procedure set out in s 83 of the Local Government Act 2002. It is accepted the prescribed consultation occurred in the present case.

[62] The Act also imposes many responsibilities on dog owners, chief of which is to ensure their dog is “under control” at all times. The Act defines this by exclusion — that is, by when a dog shall be deemed not to be under control.

Auckland Council Policy on Dogs 2019

[63] At the time the decisions under review were made, the Dog Policy 2019 (Dog Policy) applied. That Dog Policy has since been replaced by the Policy on Dogs 2025. The essential framework and wording of how dog access rules are to be changed has continued into the new policy.

[64] The objective of the Dog Policy was to “keep dogs as a positive part of the life of Aucklanders” by:

- (a) maintaining opportunities for owners to take their dogs into public places;
- (b) adopting measures to minimise the problems caused by dogs; and
- (c) protecting dogs from harm and ensuring their welfare.

[65] The Dog Policy comprises general principles in relation to registration and classification of dogs, principles of responsible dog ownership and dog access principles. The policy also contains two schedules, relating to and setting out general dog access rules. Responsibility for decisions under the second schedule relating to dog access rules in areas as discussed above has been delegated to local boards. The schedule is very detailed and relates to specific rules throughout each of the 21 local board areas.

[66] The key provisions of the Dog Policy in this case are contained in clauses 5, 6 and 7 in the section related to dog access rules. Those clauses provided that Auckland Council would:

5. Consider the following before making any change to a dog access rule on parks and beaches that would provide more dog access:

(a) identify and assess current and future use of the place and whether there may be any potential conflicts to ensure the change would not result in any significant risk to any:

- (i) person (in particular children or vulnerable adults);
- (ii) protected wildlife vulnerable to dogs (in particular ground nesting birds)
- (iii) protected flora vulnerable to dogs (in particular kauri dieback) stock, poultry, or domestic animal
- (v) property (in particular natural habitat and public amenities).

6. Consider the following before making any change to a dog access rule on parks and beaches that would provide less dog access:

- (a) Consider whether there are practicable alternative solutions to address the conflict between uses of the place
- (b) Ensure, to the extent that is practicable, that displaced dog owners and their dogs have access to other places or that such access is provided as part of the same decision.

7. Before making any change or developing a park or beach as a designated dog exercise area, ensure that the –

- (a) matters contained in section 5 above are satisfied
- (b) the area is well-located with vehicular and pedestrian access
- (c) area has clearly visible boundaries. This may be achieved through transition zones, vegetation, topography and fencing. Boundary treatment will vary depending on the risks identified.
- (d) area is of sufficient size to provide dog owners with adequate space to exercise their dogs
- (e) area has sufficient sight lines that enable dog owners to be aware of the presence of other dogs and their owners
- (f) area has adequate signage which clearly specifies the access rule
- (g) provision of dog owner and dog amenities has been considered.

Such amenities may include, but are not limited to, seats, bins and bag dispensers for dog faeces, water stations and water play areas.

[67] Against that brief summary, the grounds of review can now be addressed.

First ground of review – was ending the off-leash bowl area ‘ultra vires’?

[68] The first ground of review is directed to the Board’s decision to end the off-leash bowl area at the park.

[69] The Society says the Board acted unlawfully because it relied on irresponsible dog ownership and risks to public safety as the reason for changing the dog access rule. In its submission, those were matters which the Dog Policy did not permit the Board to consider when determining whether to change an existing dog access rule. Alternatively, the Society says that Auckland Council's Statement of Proposal, which was issued for public consultation, gave rise to a legitimate expectation that dog access rules would not be changed to address simply the conduct of irresponsible dog owners.

[70] In essence, Mr Barton's submission is that the Board strayed from its lawful role and based its decision on the one thing that it was not entitled to consider — that is, irresponsible dog owners and danger to the public.

[71] As Mr Barton developed this submission, he placed considerable emphasis on the interpretation of the Dog Policy adopted by the Regulatory Practice Team.⁸

[72] In Mr Barton's submission, the Regulatory Practice Team came to interpret the Dog Policy so that any changes to dog access rules within the policy, should only be made where evidence associated with a change request (as had been initiated in this case), related to what it called "structural problems".

[73] That approach, said Mr Barton, reflected the history of Auckland's dog access rules, which had been established since 1996 and had been subject to a comprehensive local board review between 2013 and 2016. The focus thereafter was said to be on managing change in a way that supported responsible dog ownership. One example included identifying new opportunities for dog-friendly access in neighbourhoods with limited off-leash areas. Another was restricting access where there were new park developments, increased numbers of people, an increased presence of protected wildlife, or new threats to natural habitat, where dogs created a significant risk to people, stock, poultry, domestic animals, protected wildlife, natural habitat or property.

[74] Importantly, the Regulatory Practice Team explained that this approach meant that changes to local dog access rules were not to be used to address the actions of irresponsible dog owners or to reconsider previous decisions. The conduct of

⁸ See [10] above for a discussion of the role of the Regulatory Practice Team.

irresponsible owners, such as failing to control a dog, was instead to be addressed through animal management officers, including by patrols, education and infringement notices.

[75] Mr Barton concedes that the Dog Policy does not specifically state those principles. But he submits that the Regulatory Practice Team's interpretation or enumeration of the Dog Policy's principles should apply in this case because, properly construed, those principles are what the Dog Policy required. He submits that the Court should give considerable weight to the Regulatory Practice Team's interpretation. He says there is an analogy with the similar approach taken by the Courts when considering the interpretation of legislation by an administrative agency with particular expertise and familiarity with the history and purpose of the legislation.

[76] Two issues arise from Mr Barton's central submission:

- (a) The first, and more narrow issue, is that assuming changes to the dog access rules should only be made where there is evidence of "structural problems" (rather than actions of individual irresponsible dog owners) was there such evidence in this case? In other words, did the Board actually make a decision contrary to the Regulatory Practice Team's interpretation?
- (b) The second, and more fundamental issue is whether the Regulatory Practice Team's approach/interpretation is correct and consistent with the law?

First issue – was the decision contrary to the Regulatory Practice Team's interpretation?

[77] In approaching the first issue, I accept that the Regulatory Practice Team's interpretation should be respected. However, it should not necessarily be followed slavishly, word for word. It is a suggested approach, based on the Practice Team's interpretation, and should be approached pragmatically.

[78] Ms Anderson KC, for Auckland Council, submitted that the expressed focus on "structural problems" begged the question as to what actually constituted "structural problems." She submitted that essentially a realistic and practical approach

should be taken. On that basis, she argued that irresponsible dog ownership, if it were considered by the Board to be widespread, or if it was leading to significant problems, could well amount to and constitute a “structural problem”.

[79] I agree. I accept that a change in the dog access rules (using the structural change approach) should not be occasioned by isolated instances of irresponsible dog behaviour. I use the qualification “isolated” deliberately. There is no specific “bright line” between instances of irresponsible dog owner behaviour and so-called structural problems. Individual incidents of dog owner irresponsibility or rule breaches may, by their number, frequency, consistency or seriousness, develop into a wider or structural problem. It would be artificial to treat every complaint about irresponsible dog ownership as either wholly irrelevant or, conversely, as sufficient in itself to justify a change in dog access rules. In my view, the question is fact specific and a question of degree in each case.

[80] Applying that approach here, there were a number of formal complaints to the Council. On top of that, all the Council members who provided affidavits refer to the many members of the public who mentioned to them problems with dogs and encounters they had experienced with off-leash dogs.

[81] The Society’s own web page recorded several instances of aggressive dog encounters with the public, some of which were captured by Auckland Council staff and attached to their affidavit. That website has now been closed to the public. I mean no criticism of the Society. It is not under a duty to provide that material to Auckland Council, although as Ms Anderson fairly emphasised, it could have done so had it wished.

[82] Animal Management data showed that between 2019 and 2024 there were 63 dog-related incidents at the park, including attacks, aggressive behaviour and reports of roaming dogs. Of those incidents, three people were attacked by dogs in the on-leash areas of the park. There were 12 further dog attacks on animals, only one of which happened in the off-leash area. However, all of those attacks involved a dog who was off-leash at the time.

[83] The point is that the material before the Board went well beyond a handful of unrelated and isolated incidents. The Board was confronted with evidence of complaints, recorded attacks (noting, only one happened in the off-leash area), and wider concerns about interactions between dogs and members of the public.

[84] In my view, there was sufficient evidence for the Board to conclude that the number and nature of the received complaints amounted to a “structural problem”, however that phrase be interpreted. I find that the Board was able to legitimately consider the issue and to make a decision about it, including the decision to discontinue the bowl as an off-leash area.

Second issue - was Regulatory Practice Team’s interpretation correct in law?

[85] The more fundamental question is whether the Regulatory Practice Team’s suggested interpretation was right? In other words, was the Board entitled to take into account the actions/behaviour of dog owners, contrary to the Regulatory Practice Team’s interpretation and suggested approach?

[86] Mr Barton’s submission under this ground was carefully developed. He submitted that, with respect to the decision the Board made, it was restricted to considering *only* the matters identified in cl 6 of the Dog Policy, particularly:

- (a) whether there were practicable alternative solutions to address the conflict between uses of the place; and
- (b) ensuring, to the extent practicable, that displaced dog owners and their dogs had access to other places, or that such access was provided as part of the same decision.

[87] The Society therefore says that matters contained in s 10(4) of the Dog Act,⁹ which a territorial authority, in adopting a dog policy, must have regard to, (such as danger to members of the public, complaints about aggressive dogs, and attacks arising from irresponsible dog ownership), were not matters available to the Board.

⁹ Previously referred to at [58].

[88] Mr Barton placed particular emphasis on the distinction between Auckland Council's adoption of the Dog Policy (and the making of the necessary bylaws) and the Board's subsequent consideration of a proposed change to a dog access rule under that Dog Policy. In his submission, the mandatory matters in s 10(4) of the Dog Act arise only when the territorial authority adopts the policy.

[89] Mr Barton's further point is that, given s 10(3) of the Act, it is at the stage when the rules are ratified and become the subject of a formal bylaw, that Auckland Council is required to consider s 10(4) and the matters listed therein, and not before. That would then envisage a two-phase approach to amendment of the dog access rules. First, preparation, consultation and recommendations made by the Board which is restricted to the Dog Policy's cl 6(a) and (b) matters and then further consideration and ratification by Auckland Council leading to the making of a bylaw at which point ss (4) considerations are triggered.

[90] On this construction, the Board's consideration is confined to the narrower matters in cl 6, thus restricted to situations where there are "structural change" issues. The Society says this was important because the whole point of the Dog Policy was to ensure that such conduct was dealt with through animal management and enforcement, rather than by progressively restricting dog access.

[91] While I understand Mr Barton's construction with respect, I do not accept it. I agree with Ms Anderson on this point. In my view her submissions provide a complete answer to Mr Barton's argument.

[92] The Dog Policy must be considered as a whole. The dog access rules are part of that policy. They cannot sensibly be severed from the general principles and statutory considerations which inform the Dog Policy.

[93] This conclusion is reinforced by s 10(8) of the Dog Control Act. Section 10(8) provides that a territorial authority may, at any time, adopt an amended policy under the special consultative procedure and that s 10 applies, with the necessary modifications, to the adoption of that amended policy. The statutory scheme therefore

contemplates that a policy, including its dog access rules, may be amended and that the statutory requirements continue to inform that process.

[94] It would be artificial to conclude that Auckland Council must consider the matters in s 10(4) when formulating the policy, but that a local board considering a proposed amendment to a rule forming part of that policy must disregard those same matters. Here the Dog Policy is the mechanism through which Auckland Council determines how the statutory considerations are to be balanced. A local board considering a proposed change to one of the rules is necessarily engaged in applying the Dog Policy itself.

[95] I add that were Mr Barton's submissions to be accepted, the two-phase approach to amendment of dog access rules would be problematic in practice.

[96] First, it unduly confuses and elongates the process. It assigns different responsibilities and roles to local boards and Auckland Council. In practice, it would become unmanageable.

[97] Second, it would require a local board to artificially ignore matters relating to public safety and the like, and it would oblige Auckland Council at a later stage to effectively reconsider the matter again but on a different basis.

[98] There is no doubt in my mind that a local board in this case must consider s 10(4) matters. Indeed, this was the advice it received from Auckland Council officers before its April 2024 meeting. And, in its minutes, the Board confirmed that it had been aware of the s 10(4) matters and had considered them.

[99] Before I leave this issue, I understand that usually a local board's rule recommendations are accepted with little debate at the Auckland Council bylaw level. The recommendations are typically "rubber stamped" by Auckland Council on the understanding that a local board will have fully and appropriately considered the matter. This approach, to the extent it is common, rather suggests that it is a local board, as Auckland Council's delegate, that is understood to have an obligation and authority to consider all relevant factors — not just a subset of those factors. This is

far from determinative of the issue. But it is relevant in that it highlights Auckland Council's understanding of the law submitted at the hearing, which is the same as this Court has reached.

[100] It follows that the Board was entitled to consider matters of public safety, including the risk of danger, distress and intimidation caused by dogs including that caused by the actions of irresponsible dog owners. To that extent, the Regulatory Practice Team's interpretation and approach is incorrect. I understand Ms Anderson accepts that the approach and interpretation will need to change.

[101] Of course, that does not, however, mean that every individual instance of irresponsible dog ownership can properly be treated as a reason for changing a dog access rule. The question remains whether the evidence before the Board disclosed a sufficiently substantial problem to justify consideration of a rule change. An unduly technical approach is not required. The issue needs to be looked at as a whole. I have already concluded that there was ample evidence relating to dog owner behaviour and public safety justifying the Board reconsidering and amending the dog access rules for the park.

[102] On that point, I see no basis for the suggestion that in relying on tabulated complaints, and the Board members own experience of complaints about dog behaviour, that the decision was unlawful. Consideration of complaints, their number and nature, both recorded by Auckland Council and received in their capacity as elected local board members, was entirely appropriate and, in my view, necessary. It was not a decision based on isolated instances of irresponsible dog owners. It had well surpassed that level. I see no basis in this challenge to the Board's decision and I dismiss it.

Legitimate expectation?

[103] The concept of legitimate expectation is well known in public law. The Court of Appeal has summarised the principle as follows:¹⁰

¹⁰ *Comptroller of Customs v Terminals (NZ) Ltd* [2012] NZCA 598, [2014] 2 NZLR 137 at [121]–[127]. Footnotes omitted.

[121] The concept of legitimate expectation may be viewed as an aspect of the administrative law principle that requires governments and public authorities to act fairly and reasonably. The general principle was formulated by the *Privy Council in Attorney-General (Hong Kong) v Ng Yuen Shiu*:

... when a public authority has promised to follow a certain procedure, it is in the interests of good administration that it should act fairly and should implement its promise, so long as it does not interfere with its statutory duty.

[122] This general principle was affirmed by the Privy Council more recently in *New Zealand Maori Council v Attorney-General* but with the qualification that a successful challenge to an assurance of this type would depend in part on whether there was any “satisfactory reason” for the Crown not to comply with it.

[123] Establishing a legitimate expectation in administrative law is not dependent on the existence of a legal right to the benefit or relief sought. The expectation might be engendered by promises that a particular authority will act in a certain way or by the adoption of a settled practice or policy which the claimant can reasonably expect to continue. A promise of the kind alleged may be express or implied.

[124] Legitimate expectation is to be distinguished from a mere hope that a cause of action will be pursued or a particular outcome gained. To amount to a legitimate expectation, it must, in the circumstances (including the nature of the decision-making power and of the affected interest) be reasonable for the affected person to rely on the expectation.

[125] Where legitimate expectation is raised, the inquiry generally has three steps. The first is to establish the nature of the commitment made by the public authority whether by a promise or settled practice or policy. This is a question of fact to be determined by reference to all the surrounding circumstances. A promise or practice that is ambiguous in nature is unlikely to be treated as giving rise to a legitimate expectation in administrative law terms.

[126] The second is to determine whether the plaintiff’s reliance on the promise or practice in question is legitimate. This involves an inquiry as to whether any such reliance was reasonable in the context in which it was given.

[127] The third, and often most difficult part of the inquiry, is to decide what remedy, if any, should be provided if a legitimate expectation is established.

[104] Mr Barton’s argument is that Auckland Council (and through its delegated responsibility, the Board) created a legitimate expectation that when a local board considers changing the dog access rules, the behaviour of irresponsible dog owners would not be taken into account. In his submission the Board had effectively bound itself to act in this way. Given the conclusions I have already reached on the two issues above, this argument is easily dispensed with.

[105] First, if there was a legitimate expectation, the Board met that expectation. As I have already concluded, the isolated actions of individual dog owners were not relied on to change the dog access rules. There was a significant issue with the number and nature of incidents which could constitute, and was considered by the Board to constitute, a structural problem. In other words, the Board did not act contrary to the expectations it had created.

[106] Second, if it were the Board's view that the behaviour of dog owners could not be taken into account, that was a wrong interpretation and approach. Section 10(4) of the Dog Control Act applied to the Board's consideration of the rule change. That provision mandated considerations of dog behaviour, harm and public safety issues. A legitimate expectation which arises from a fallacious understanding of the law cannot be relied upon.

Second ground of judicial review – failure to take into account relevant considerations

[107] The Society's challenge under this ground raises two of the questions identified by Mr Barton:

- (a) Did the majority genuinely consider all practicable alternative solutions before getting rid of the off-leash bowl area?
- (b) Did the majority genuinely consider whether displaced dogs and dog owners would have access to other places before getting rid of the off-leash bowl area?

[108] The Society says the consideration by the Board was inadequate.

[109] Auckland Council submits that both questions should be answered in the affirmative. It submits that the evidence does not come close to establishing that the elected members ignored or overlooked those considerations nor approached the decision with closed minds or merely rubber-stamped a predetermined outcome.

[110] It is well established that a decision-maker must give genuine and not merely token or superficial regard to mandatory relevant considerations.¹¹

[111] The inquiry into whether or not this has in fact occurred is context specific. As the Supreme Court recently explained in *Climate Change Clinic Aotearoa Incorporated v Minister for Energy and Resources*:¹²

The obligation on the decision maker is to engage with the mandatory consideration with due awareness of its content and with a genuinely open mind. What is sufficient to amount to this engagement is responsive to context, including the nature of the decision and the process surrounding it.

The court will assess whether this engagement has occurred in respect of a mandatory consideration. However, leaving to one side reasonableness review, the court will not inquire into the weight ultimately given to a mandatory consideration by the decision maker. Generally, courts defer to the decision maker with regards to matters of weight.

[112] The mandatory considerations that impose the need for consideration here are said to be a need to identify “practicable alternative solutions” to address the “conflict between uses” between dogs and users in the surrounding areas of the park — to use the language of the cl 6(a) and (b) of the Dog Policy. Or, put another way, to identify and assess all reasonably practicable alternatives to keeping dogs on-leash in the surrounding areas of the park — to use the language of s 77 of the Local Government Act. In essence, it is accepted by Auckland Council that the need for consideration under the Dog Policy is equivalent to discharging the obligation in ss 77 of the Local Government Act.

[113] Some explanation of s 77 of the Local Government Act is now necessary. That section requires a local authority to identify and assess, in terms of their advantages and disadvantages, all reasonably practicable options for achieving the objective of a decision. That obligation is mandatory by virtue of s 76(1), subject to the qualification in s 79.

¹¹ *New Zealand Fishing Industry Association Inc v Minister of Agriculture and Fisheries* [1988] 1 NZLR 544 (CA) at 552.

¹² *Climate Clinic Aotearoa Inc v Minister of Energy and Resources* [2025] NZSC 197 at [91] to [92]. Footnotes omitted.

[114] Section 79 recognises that the manner and extent of compliance with s 77 will depend upon the significance of the decision. It gives a local authority discretion as to:

- (a) the extent to which different options are identified and assessed;
- (b) the degree to which benefits and costs are quantified;
- (c) the extent and detail of the information considered; and
- (d) the extent and nature of the written record of compliance with ss 77 to 82.

[115] Section 5 defines “significance” and “significant”:

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

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.

[116] Section 82 is also relevant. It requires consultation to be undertaken in accordance with specified principles, including that views be received with an open mind and given due consideration when the local authority makes its decision.

[117] I have considerable material before me that assists in assessing whether there has been adequate consideration.

[118] First, the Board had before it comprehensive advice from Auckland Council officers before its April decision. That material addressed the matters identified in clauses 6(a) and 6(b) of the Dog Policy, including the competing uses of the relevant areas and the available options. The Board had information before it on alternative

options for dogs, including that the Maunga (Big King) in Mount Roskill within their geographic area was an off-leash space available to dog owners and their dogs, and that nearby off-leash parks outside the Board's area were relatively close (Onehunga Bay reserve, 2.7 km from the park, and the Auckland Domain, 6.6 km from the park).

[119] Secondly, there is a transcript of the Board's discussion at the relevant meeting. As previously mentioned, this was surreptitiously recorded. In fact, Ms Anderson regards it (in the sense of its evidentiary value) as "gold". In essence, I agree.

[120] The transcript shows exactly what was discussed. There is a record of what the Auckland officers presented to the Board. This is very full and comprehensive. It raises all the matters in 6(a) and 6(b). It records comments by the Board members.

[121] For instance, in the transcript, Ms Kumar is recorded saying what she was trying to achieve was a "safe place for our community, for both dog lovers and non-dog lovers. And the only way we see that is if we have a place where it is fenced ...".

[122] The transcript also shows Ms Kumar thinking aloud through what the Board's decision might be through her questions. For example, she asked a question premised on the possibility that the Board might decide to keep the bowl: "... can I get clarified, if the Board were to make a decision to make it similar to what it is at the moment where it is on-leash except the bowl, with the condition that some form of boundary area definition is placed ...". Shortly afterwards she asks a question about what might happen if the Board decided to accept the proposal: "Can I ask another question? If the Board was to go with the proposal and make it an on-leash park, and then in the, in the next part on there, they would like to form the exercised fenced area somewhere on that park. Is that something that we could do?"

[123] Ms Lai, Ms Hay and Mr Pervan all said very little throughout the deliberations. Ms Hay and Mr Pervan articulated their conclusions as follows:

Roseanne Hay: In reviewing the feedback and also public sentiment that I'm aware of as well. I support the adoption of the proposal so that dogs would be required to be on leash all times in the bowl area, as well as the park. But I am very keen to investigate with haste, a fenced in area for a dedicated dog exercise space, which could be anywhere in the park. At the most appropriate location.

Mark Pervan: My recommendation is the same thing.

[124] The transcript also records the advice provided at the meeting by two Auckland Council regulatory staff. The staff members were, Ms Nancy Chu, a Principal Policy Analyst, and Mr Paul Wilson, a Senior Policy Manager. Included in her advice, Ms Nancy Chu, while discussing the decision table which I address next, commented that “Puketapapa has limited off-leash areas. There are a number of alternatives, but they are a bit far away or not in the local board area or do not offer the same experience as Monte Cecilia Park.” And later she said, “just noting that the nearest comparative alternative is the Domain which is quite far away.” Board member, Mr Bobby Shen, during deliberations commented that “staff have also validated comments that came through in submissions around alternative off-leash areas. Our local board ... has the fewest out of all the old Auckland Council boundary local boards.”

[125] Third, there is the populated table of decision-making which sets out reasons together with the minutes. The deliberations table summarised the feedback, which included the options of “improve signage, consider fencing, install CCTV, and increase presence of animal control officers”. Staff comments included that signage could be improved, maps could be enhanced, unobtrusive boundary markers could be placed, use of fencing should be carefully considered, that CCTV at local parks is too costly to install and maintain and animal management had increased patrols in March 2025, issuing three formal rulings and five infringements.

[126] Fourth, there is the affidavit evidence. Ms Kumar in her affidavit states:

76. I strongly believe that the Local Board has a responsibility to address all community needs when making any decision, and that it needed to do so in relation to Monte Cecilia Park. Everyone should be able to use this premier park. I cannot change the feeling of a member of the community who is afraid of dogs or vice versa, the feeling of a member of the community who loves dogs. What I can try to do is make it safe for all users. Our community is growing, putting pressure on our much needed green space. Monte Cecilia is a premier park that allows social recreation opportunities and family picnics, the view of the Manukau Harbour and wider Auckland. Clearly we know use of the current off-leash area is clashing with other users, and deterring other potential users. The safety issue needed to be addressed first. Then we have the Master Plan process in which we can explore how all users can be accommodated safely. I am personally very open to that option in the future.

77. Monte Cecilia is one of Auckland's most iconic parks. It is the location of the heritage-listed Pah Homestead. It is next to a school, aged care homes, and

a cafe. It is a space used daily by people of all ages and abilities. So, we didn't vote to ban dogs. We voted to ensure they're on-leash so more people can enjoy the park without fear.

79. I consider I carried out my job as an elected member to weigh the needs of everyone. So, this decision wasn't about taking something away - dogs are still very welcome at Monte Cecilia. It was simply about making sure everyone else - from kids who go to the nearby school, to seniors who live in the nearby aged care homes, to cafe-goers and daily walkers - feel safe enough to use our most iconic and historically significant local park.

80. I also felt compelled to consider the quieter voices we have come across: elderly residents in nearby aged care facilities, parents of small children, people with small dogs, cafe patrons, and those said they have stopped using parks altogether where dogs roam freely. When people tell you they feel unsafe with a council arrangement, we are obliged to take that seriously.

81. In our local board area, plenty of off-leash spaces still exist nearby, and we're certainly open to exploring others.

82. There were so many negative emails and social media comments that did not reflect a full consideration of the full facts. The attacks on me were very personal and took their toll on me. It felt like a coordinated attack. It's been disheartening to see this issue become highly politicised.

[127] Ms Lai in her affidavit records:

12. As a local board member I think we are really putting the lens of all people, dog lovers and people who have to walk every day, people who like dogs, and people who don't mind dogs but don't like strangers' dogs coming up, or a mum with kids who wants to enjoy a park but this is one less spot for them to enjoy. So I was thinking about all these things when I voted in favour of putting the proposal to change (from under control off-leash to under control on-leash) in the bowl area.

[128] Ms Hay in her affidavit states:

[10] I understand that DLMC says that the fact that our vote was different to staff advice means that we were predetermined. At this point in time, I thought it was appropriate to find out about all the parks we proposed on as I was aware of issues in some way or other in relation to each of them, either from the advice contained in the 23 October 2024 memorandum and report to the 5 December 2024 meeting, or from other information I was aware of in my role as a Local Board member. As a Local Board member, I know that I have decision-making responsibility - this means that we can't just always follow staff advice, we have to consider the advice and make our own decisions. In some cases, we have further information or take a different view to that of officers. This is a normal part of the role and decision-making process.

[129] Mr Pervan's affidavit records:

The proposal to change the rule meant taking a different direction from what staff had recommended. It seemed to me that the staff approach was conservative. I believe it is important that the Local Board can question staff recommendations, and I thought it was important to respond to the issues that I was aware were occurring at the Park. If you want to change anything, you have to challenge what is put in front of you. In this instance, the Local Board went against staff advice.

[130] Mr Turner's affidavit states:

47. Fiona and Mark talk in their affidavits about how few people in the PLB area participated in the consultation (223, of which 194 opposed), as compared to those who live in the PLB area (some 60,000 to 70,000 people). Both seem to imply that a silent majority in fact supported the proposal and/or that this was a compelling reason to go against the overwhelming public feedback in opposition to it.

48. I completely disagree with this. The reality is that public engagement with Council consultations is often very limited. Few people engage, often because they aren't directly affected; don't know about what is being proposed or, more often, because they are simply too busy with other things.

[131] Fifth, there is communication from Mr Brad Congdon, who is Auckland Council's Principal Parks Specialist for Puketāpapa and the Waitakere Ranges, both before the April meeting and before the earlier decision to propose to end the off-leash area. This makes strong arguments for not proceeding with the decision to remove the off-leash area.

[132] The nature of the decision-making body and the circumstances in which it made the decision must also be recognised. The Board is a collective, elected body. It cannot realistically be that each member is separately required, him or herself, to articulate every relevant consideration, express an individual view on each matter, and have that process and those views all recorded before it can be concluded that the Board has properly considered the relevant matters. That is simply contrary to the way Board meetings work, and of human nature and temperament. Board members can be presumed to have read reports and meeting papers, and to have heard relevant debates and exchange of views between other members. Some members will more naturally express their views verbally and will "think out loud" as it were. Others will be more reserved and reflective. If other members articulate the same view thoughtfully held by another and more reserved Board member, that member may understandably think it unnecessary to repeat views previously expressed. The

essence of Board debate and decision-making is that views are aired, debated and considered. There is no requirement for every Board member to equally articulate all their views and their reasons for every decision-making exercise.

[133] That is particularly so where, as here, the members were presented with comprehensive material addressing the relevant considerations and the competing views were advanced during the discussion. The absence of extensive individual comment cannot, in this context, be equated with an absence of consideration.

[134] In light of all those matters, it is very hard to conclude other than that the two questions were fully and properly considered by the Board. There is comprehensive information available to the Court from which, in my view, it can readily and conclusively be inferred that all relevant matters were considered.

[135] Paradoxically, the surreptitious recording supports the Council's position on this point and undermines Mr Barton's argument. Far from supporting an inference that the relevant considerations were ignored, the transcript provides direct evidence of the matters put before the Board and the competing views expressed by its members. The evidence as a whole does not support the contention that the majority proceeded without considering the practicable alternatives or the availability of other off-leash areas.

[136] I therefore do not accept that the Board failed to take into account the considerations identified by Mr Barton. The evidence establishes that those matters were considered with the degree of engagement required in the circumstances. This ground of challenge is therefore not made out.

A word on s 79 of the Local Government Act 2002

[137] Finally, Mr Barton submits that considering alternative solutions in the manner contended for by the Society (being in much more detail than was done) would not have imposed an unreasonable burden on the Board. Mr Barton points to the Ōrākei Local Board's reasons for rejecting a proposed change to the local dog access rules at Madills Farm and Glover Park as an example of the greater level of detail that could readily have been provided in accordance with s 79 of the Local Government Act. His

point is that it would have been straightforward for the Board to have recorded its consideration of the alternatives in greater detail.

[138] I accept that this Board's minutes could have been more detailed and particularised. The Ōrākei Local Board decision provides a useful example of how the reasons for a decision can be recorded in much greater detail. But that does not mean the minutes in this case were inadequate, nor does it answer the more fundamental question of whether the relevant considerations were in fact addressed.

[139] For example, the fact that the minutes record that the relevant statutory provisions and policy requirements were considered is not, as Mr Barton suggested, merely "boilerplate" language inserted to protect the decision. That statement appears in the context of the detailed advice provided to the Board and the discussion that occurred at the meeting. In that context, it is properly understood as a shorthand record and confirmation that those matters were considered.

[140] Ultimately, the adequacy of the record cannot sensibly be divorced from the factual context in which the decision was made. Here, the minutes are only one part of the evidential picture. The comprehensive advice provided to the Board, the transcript of its discussion, the matters raised by individual members, the decision-making table and the other evidence all support the conclusion that the relevant considerations were genuinely addressed. Again, the factual context is everything. And the evidence here, in my view, makes any other conclusion, especially the conclusion that this was simply formulaic with no adequate consideration, quite untenable.

Third ground of judicial review - pre-determination

[141] The Society contends all three decisions were predetermined and that the Board did not approach them with an open mind.

[142] The standard to be reached in establishing predetermination is very high. Moore J in *Chamberlain Park v Auckland Council* helpfully set out the legal principles

which apply in cases where predetermination is alleged. I acknowledge that it is a long extract. But it is pertinent for present purposes. It provides:¹³

[175] A finding of predetermination requires that any predisposition of the decision-maker is, in effect, a fait accompli. As Tipping J stated, anyone challenging a decision on the basis of predetermination “is required to show actual predetermination or fettering rather than the appearance of the same”.

[176] This recognises a contrast with the notion of legitimate predisposition. As Kos J stated, “where Parliament determines that a decision should be made by a Minister, a person of inherently political complexion, it is unavoidable that that person will be influenced by policy and political considerations ... it must be taken to have accepted that the decision-maker will bring a policy perspective to his or her determination, and with it a probable predisposition on the merits.”

[177] In the context of local authority decision-making, Duffy J put it this way:

There is nothing objectionable about councillors holding preliminary or “in principle” views on decisions, provided when it comes to making the actual decision, they do so with an open mind to other alternatives. Indeed it is always likely to be the case that members of local authorities will hold particular views on certain issues. The effect of local body democracy is that persons are voted into office holding certain views. What is important is that when they come to make decisions they follow a thought process that recognises a change of mind may eventuate.”

[178] More generally Philip Joseph observes “some decision-makers, such as ... local authorities or planning bodies, routinely announce policy preferences and approach their decision-making so as to promote their policies. Their decisions remain unimpeachable, provided they retain an open mind, are amenable to persuasion and do not commit to a particular outcome in individual cases.” That requires, as Lord Thankerton stated in *Franklin v Minister of Town and Country Planning*, that the decision-maker’s mind was not “so foreclosed that he gave no genuine consideration” to the material before him.

[179] Baragwanath J has provided perhaps the most succinct statement of what is required:

I am satisfied that “open minded” in contexts such as the present does not mean “without predisposition” but “prepared, despite predisposition, honestly to consider whether to change its mind”.

[180] Much of this is explicable by the fact predetermination is conceptually distinct from an allegation of bias. While predetermination is concerned with “closed mind” decision-making, bias is concerned with public perceptions as

¹³ *Chamberlain Park v Auckland Council*, above n 5. Footnotes omitted.

to impartial decision- making. As the learned authors of *Administrative Law* state:

The significance of the conceptual distinction between predetermination and the apprehension of bias lies in the fact that administrative decision-makers, unlike judicial decision-makers, will often, quite rightly, be influenced, formally or informally, in their decision by policy considerations. They will naturally approach their task with a legitimate predisposition to decide in accordance with their previously articulated views of policies. The fair- minded observer knows this, appreciates that there is no question of personal interest, and does not apprehend bias where there is simply a predisposition to decide one way rather than the other in accordance with previous policies. But where the question is whether the decision-maker has closed his mind and slipped from predisposition to predetermination it seems unnecessarily complication to involve the fair-minded lay observer.

[181] In the leading case on predetermination, *CREEDNZ Inc v Governor-General*, the Court of Appeal considered a challenge to the validity of an Order in Council by- passing all statutory planning procedures under the National Development Act 1979 and fast tracking the approval process for the construction of an aluminium smelter at Aramoana Spit. It was apparent some members of the Government favoured this approach, but as Cooke J stated:

None of this means, however, that the Government was irretrievably committed to advising the necessary Order in Council. What can properly be inferred is that when the question arose in April 1981 the Government was already clearly in favour of the company's project and highly likely to decide in favour of an Order in Council.

But it is fallacious to regard that as a disqualification. The references in the amended statement of claim to a real possibility of suspicion of predetermination or bias are beside the point in relation to a decision of this nature at this governmental project. Projects of this kind for which the National Development Act is intended, whether Government works or private works, are likely to be many months in evolution. They must attract considerable public interest. It would be naïve to suppose that Parliament can have meant Ministers to refrain from forming and expressing, even strongly, views on the desirability of such projects until the stage of advising on an Order in Council.

In relation to decisions under s 3(3) I think that no test of impartiality or apparent absence of predetermination has to be satisfied. Any other approach would make the legislation practically unworkable. The only relevant question can be whether at the time of advising the making of the Order in Council the Ministers genuinely addressed themselves to the statutory criteria and were of the opinion that the criteria were satisfied.

[182] Richardson J meanwhile found:

It is not expected that Ministers will approach their consideration ... with perfect detachment. Before the decision can be set aside on the grounds of disqualifying bias it must be established on the balance of probabilities that in fact the minds of those concerned were not open to persuasion and so, if they did address themselves to the particular criteria under the section, they simply went through the motions.

[183] Finally, McMullin J found it would be “unreal to expect those concerned to maintain a lofty detachment from the matter”.

[184] There are two further comments on the legal principles which guide the analysis I shall shortly commence. First, as Tipping J made clear in *Travis Holdings* when he qualified his comments by saying “in the particular statutory and factual setting with which this case is concerned”, while the overall question is the same, whether or not predetermination is established on the facts must be decided by reference to the particular legislative and factual setting. A similar proposition is evident in Cooke J’s findings in *CREEDNZ*, cited above.

[185] Secondly, the Court can only properly rely on and examine evidence capable of objective assessment in analysing whether predetermination has been established.

[143] In the elected politician context, the Society must establish that views expressed shift beyond evidence of a lawfully and legitimately acceptable predisposition to an impermissible closed mind.

[144] As Wild J explained in *New Era Energy Inc v Electricity Commission*, genuine application of a decision-maker’s mind will be prevented if they surrender their discretion to another by effectively acting under dictation.¹⁴

[145] The requirement to have an open mind is also contained in s 82(1)(e) of the Local Government Act. The consultation that a local authority undertakes in relation to any decision must be undertaken in accordance with the principle that the views presented to the local authority should be received with an open mind and should be given due consideration. As the Court of Appeal has observed, to have an open mind, the decision-maker must be “ready to change [its mind] and even start afresh”.¹⁵

[146] The onus is on the Society to provide evidence supporting its concerns. I accept Mr Barton’s submission that it will not be often that there will be an explicit

¹⁴ *New Era Energy Incorporated v Electricity Commission* [2010] NZRMA 63 at [74].

¹⁵ *Wellington International Airport Ltd v Air New Zealand* [1993] 1 NZLR 671 (CA) at 675.

“confession” of pre-determination. There will be a matter of inference from all the available evidence. Here, I simply do not see that inference can be safely drawn.

[147] The chief criticism by the Society is against Ms Kumar as Board Chair. And that her three other members of the same political party simply fell into line behind her. It is said they simply yielded to her strong character. Mr Barton submits the documentary record overwhelmingly points to the conclusion that clearly Ms Kumar always wanted the off-leash rule change, and the majority essentially went along, uncritically and unoblingly. Mr Barton stressed there was no allegation of bad faith. He said the issue was that Ms Kumar had become so involved in the need to remove the off-leash area that she had crossed the line from pre-disposition to pre-determination.

[148] I am not at all sure that is the case.

[149] Ms Kumar certainly made her views open and public. She was certainly open that in light of all the information she had received, her view was that the off-leash area should be removed. In my view this is evidence of a lawfully and legitimately acceptable predisposition. It is not evidence of an impermissible closed mind.

[150] Relevantly, Ms Kumar then participated in the discussions, and chaired them responsibly. This was, after all, a Board decision. The Board, as a whole, takes responsibility for the decision. It was a four to two decision. I can see no evidence that the other three members simply obligingly fell into line to support Ms Kumar without exercising their own independent judgement and analysis. Indeed, the reverse seems to be the case. For instance, Ms Lye’s contribution to the meeting was thoughtful. It is quite fair to assume that all the members had read the documents, listened to all that was said by Auckland Council staff, listened to the discussion and reached their own independent view. The inference is that Mr Barton wishes me to draw is simply not justified on the evidence before this Court.

[151] Further, it might perhaps be said that even if there was something in the submission regarding Ms Kumar’s personal pre-determination (which I do not accept) the fact that there is no evidence that the other three fell into line, unthinkingly and

uncritically, means that the decision, overall, even with a three/two majority and leaving Ms Kumar to one side, could not be said to be pre-determined. This was Ms Anderson's point.

[152] I recognise a problem with this approach, and there is no need for me to rely on it. The issue has been before the Australian courts. This was drawn to this Court's attention in supplementary submissions filed by Mr Barton after the hearing. Mr Barton identified *McGovern v Ku-Ring-Gai Council*, a decision of the Court of Appeal of New South Wales.¹⁶ There, allegations of predetermination (referred to as "prejudgment" in Australia) were made against two councillors (out of a Council table of 10, where the impugned decision was made on a 7 to 3 vote). The Court of Appeal majority (Basten and Campbell JJA) held that if the allegations were substantiated, the decision should be set aside (even if the councillors' votes were not determinative of the vote), because their pre-judgment would have tainted the proceedings.¹⁷ The minority (Spigelman CJ) held that a "but for" test should be adopted — whether or not the person(s) reasonably suspected of pre-judgment decided the outcome.¹⁸ Mr Barton submitted his review identified several cases referring to *McGovern* on this issue, albeit varying in applying either the majority or minority tests. The correct approach does not need to be decided here given that I have determined pre-determination is not made out in any case.

[153] In conclusion, pre-determination requires a very high bar. Ms Anderson said it would be extraordinary if I made such a finding regarding pre-determination. In all the circumstances here, I agree with her submission.

[154] I acknowledge that Mr Barton did not make his submission lightly. It was made carefully and in a restrained and balanced way. But I cannot accept it.

¹⁶ *McGovern v Ku-Ring-Gai Council* [2008] NSWCA 209, (2008) 251 ALR 558. The decision refers to "prejudgment", which refers to predetermination as we understand it in New Zealand (see [14] to [24] and [71] to [77]).

¹⁷ The majority held that once predetermination on the part of one member was established, it was inappropriate for the Court to be drawn into an analysis on the effect of that predetermination on the decision (or other elected members) – see [84] to [103]. In doing so, the Court referred to Mahon J's comments in *Meadowvale Stud Farm Ltd v Stratford County Council* [1979] 1 NZLR 342 (SC) at 350 that the Court should engage in such speculation.

¹⁸ *McGovern v Ku-Ring-Gai Council* [2008] NSWCA 209, (2008) 251 ALR 558 at [45] to [46] and [62].

Fourth ground of judicial review – unreasonableness

[155] The Society submits that the Board’s decision to remove the off-leash bowl area at the park was “unreasonable”. Auckland Council’s position is that the decision was reasonably open to the Board in the circumstances.

[156] The orthodox approach to unreasonableness is to ask whether the decision was “so unreasonable that no reasonable authority could ever have come to it”.¹⁹ As that formulation indicates, the threshold is a high one.

[157] Mr Barton submits that it is now well-settled²⁰ that the inquiry is more helpfully approached in the way articulated by Palmer J in *Hu v Immigration and Protection Tribunal* and further elaborated in *Hauraki- Coromandel Climate Action Incorporated v Thames-Coromandel District Council*.²¹ In both cases, Palmer J identified that a decision would be unreasonable in a public law sense: if the decision was not supported by any evidence; if the evidence was inconsistent with, or contradictory to, the decision; or if the only reasonable conclusion contradicted the decision. The third category may arise where there is a material disconnect in the chain of reasoning between a factual or legal proposition and the conclusion reached.

[158] Mr Barton relies on the third category. He submits that, although there was evidence before the Board capable of supporting different conclusions, the only reasonable conclusion was one other than that reached by the Board.

[159] Both parties also rely on the decision of Cooke J in *Students for Climate Solutions*, where it was stated:²²

I also agree with Palmer J that the *Hu v Immigration and Protection Tribunal* formulation based on *Edwards (Inspector of Taxes) v Bairstow* provides a clearer test when a decision is inconsistent with the evidence before the decision maker. But the decision might still be unreasonable in other

¹⁹ *Associated Provincial Picture Houses, Ltd v Wednesbury Corporation* [1948] 1 KB 223 (CA).

²⁰ For example, Cooke J accepted this formulation in *Students for Climate Solutions Incorporated v Minister of Energy and Resources* [2022] NZHC 2116, [2022] NZRMA 612 at [84].

²¹ *Hu v Immigration and Protection Tribunal* [2017] NZHC 41, [2017] NZAR 508 at [30] and *Hauraki Coromandel Climate Action Incorporated v Thames-Coromandel District Council* [2020] NZHC 3228, [2021] 3 NZLR 280 at [44].

²² *Students for Climate Solutions Incorporated v Minister of Energy and Resources* [2022] NZHC 2116, [2022] NZRMA 612 at [84].

circumstances. I see unreasonableness as a residual ground of review. The other more precise grounds of review properly address the vast majority of successful judicial review challenges. ...

The simpler formulation – that a decision can be set aside if it was not reasonably open to the decision-maker – more accurately captures this residual ground. That is the formulation I understand to have been identified by the Supreme Court in *Minister of Justice v Kim*. It is also the standard that applies to the Court reviewing decisions of trustees, which is analogous.

[160] On the facts before him, his Honour found that the more precise ground of failure to consider mandatory relevant considerations was the more appropriate ground of challenge and so there was no place for the residual ground of unreasonableness.

[161] Both counsel agree that what these authorities indicate is that the circumstances where there can be effective reliance on unreasonableness are apparently being narrowed by the courts in favour of consideration of precisely articulated grounds.

[162] Auckland Council submits that the position is the same in the present proceeding. The specific grounds of review advanced by the Society mean that there is no place for the residual ground of review in this proceeding.

[163] I agree with Auckland Council. Given that the precise grounds of challenge have been rejected I consider it is very hard, virtually impossible, to conclude that the decision was nevertheless not one that was reasonably open to the Board or is so irrational as to be unsustainable. The decision here as to the continuing status of the bowl as being an off-leash area was unquestionably a highly contentious and emotional matter. But in the end, it was a decision that they were, as elected representatives applying the law, entitled to, and could, make.

[164] The Board was exercising a delegated regulatory function in relation to the control of dogs in public places. Its decision would ultimately be perfected and confirmed by a bylaw. The Board members were elected representatives charged with making that decision in light of the information and views available to them. That does not relieve them of the statutory requirements governing their decision-making. But within those requirements, the court must recognise the legitimate role of an elected body in making a regulatory decision that necessarily involves competing

community interests and views. As the Court of Appeal said in *Wellington City Council v Woolworths New Zealand Limited (No 2)*:²³

... there are constitutional and democratic constraints on judicial involvement in wide public policy issues. There comes a point where public policies are so significant and appropriate for weighing by those elected by the community for that purpose that the Courts should defer to their decision except in clear and extreme cases. The larger the policy content and the more the decision-making is within the customary sphere of those entrusted with the decision, the less well-equipped the Courts are to reweigh considerations involved and the less inclined they must be to intervene.

This is a relevant but far from decisive principle here. In this case, while the policy content might be considered limited, changes to dog access rules are certainly within the customary sphere of local boards who have been entrusted with the requisite decision-making responsibility. The local board's democratically elected decision-making role requires some, but not absolute, respect.

[165] That members of the public do not agree with the decision, simply goes to show that there are different and legitimate views on the same point. Reasonable minds may differ. But the Board had all the information that could possibly be made available to it, representing the competing views. It considered all the information. In my view it did not err in its decision. And it was certainly not unreasonable in the administrative law sense. In this context, any continuing concern is a matter to be addressed at the ballot box, when Board membership falls for re-election.

[166] In my view, while obviously perplexing to the Society, and from its point of view hard to understand, the Board's decision, in the round, cannot be judged as unreasonable in the circumstances. It was certainly a conclusion that was perfectly open to the Board to make.

Conclusion

[167] The judicial review application must be and is dismissed.

²³ *Wellington City Council v Woolworths New Zealand Ltd (No 2)* [1996] 2 NZLR 537 (CA) at 546.

Costs

[168] The parties are directed to endeavour to agree costs. Failing agreement, Auckland Council is to file submissions as to costs within 20 working days thereafter. The Society may file submissions in reply within a further 20 working days. Submissions must not exceed three pages, excluding any attachments.

[169] A decision as to costs will then be made on the papers.

Becroft J