IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
KIRIKIRIROA ROHE

CIV-2019-419-173
[2020] NZHC 3228

UNDER	the Judicial Review Procedure Act 2016
IN THE MATTER	of an application for judicial review of a decision of the Thames-Coromandel District Council
BETWEEN	HAURAKI COROMANDEL CLIMATE ACTION INCORPORATED Applicant
AND	THAMES-COROMANDEL DISTRICT COUNCIL Respondent

Hearing: 31 August 2020

Appearances: A W McDonald for the applicant
D J Neutze for the respondent

Judgment: 8 December 2020

JUDGMENT OF PALMER J

This judgment was delivered by me on Tuesday 8 December 2020 at 11.00am.
Pursuant to Rule 11.5 of the High Court Rules

……
Registrar/Deputy Registrar

Counsel/Solicitors:
LeeSalmonLong, Auckland
Brookfields, Auckland

Summary

[1] On 2 April 2019, the Thames-Coromandel District Council (the Council) decided not to approve the Mayor, Ms Sandra Goudie, signing the Local Government Leaders' Climate Change Declaration (the Declaration). Hauraki Coromandel Climate Action Inc (HCCA) challenges the decision. Decisions about climate change deserve heightened scrutiny on judicial review, depending on their context. The Declaration contains "Council Commitments". If the Declaration were signed by a Mayor with the approval of a council and on its behalf, it is possible that could create a legally enforceable legitimate expectation, in some circumstances, as HCCA submits. A concern about that, and possible financial implications, was why the Council did not approve signing the Declaration. So the Council's decision was not unreasonable.

[2] But the decision was a significant one. And the Council did not do the analysis or consider consultation with the District, as required by law. I declare the decision by the Council, not to approve signing the Declaration, on the basis it did, was inconsistent with the requirements of the Local Government Act 2002 (the LGA) and the Council's Significance and Engagement Policy (the Policy) to carry out analysis and consider consultation in making that decision. I quash the decision and direct the Council to reconsider it, consistently with law.

What happened?

Climate change

[3] HCCA adduces expert evidence regarding the nature and effects of anthropogenic climate change, including on the Thames-Coromandel district, from Professor Timothy Naish of Earth Sciences in the Antarctic Research Centre at Victoria University of Wellington. He describes the consensus of the global scientific community on the causes and effects of climate change and what is required to mitigate those effects. The High Court has previously accepted that the reports of the Intergovernmental Panel on Climate Change (IPCC) provide a factual basis on which the decisions of domestic courts can be made.[1]

---

1 *Thomson v Minister for Climate Change Issues* [2018] 2 NZLR 160, [2017] NZHC 733 at [133].

[4] The evidence about climate change is not disputed so I do not need to traverse it fully. However, I accept the expert evidence demonstrates unequivocally that anthropogenic climate change is occurring. I accept it demonstrates that the scientific consensus is that the effects of climate change, if unmitigated, include:

(a) rising global mean sea level at an accelerating rate and more frequent extreme sea level events;[2]

(b) increasing ocean temperatures, upper ocean stratification and acidification and oxygen decline;[3]

(c) risks of severe impact on the biodiversity, structure and function of coastal ecosystems including loss of species habitat and diversity and degradation of ecosystem functions;[4]

(d) compromising effects of high temperature and humidity on food growing and, in urban areas, increased health, economic and ecosystem risks from heat stress, storms, extreme precipitation, flooding, landslides, air pollution, drought, water scarcity, sea level rise and storm surges. [5]

[5] I also accept the evidence that the scientific consensus demonstrates dangerous anthropogenic warming is likely to be unavoidable unless substantial mitigation steps are undertaken immediately.[6]

[6] The Council accepts that the Thames-Coromandel District is likely to be materially affected by anthropogenic climate change.[7] It accepts over 20 per cent of water supply in the District comes from groundwater and is used domestically, for irrigation, and for industry. It accepts the District will be significantly impacted by the effects of anthropogenic climate change in the following ways, though it says the

---

2 Affidavit of Timothy Raymond Naish, 21 August 2020 [Naish] at [19](vii) and (xiv).
3 Naish at [19](vi).
4 Naish at [19](xv).
5 Naish at [19](xxii) and (xxiv).
6 Naish at [22].
7 Amended Statement of Defence, 10 August 2020, at [4].

precise extent of those effects on the District are not clear and may not become clear until they occur:

(a) Any increase in sea levels and/or the frequency of storm surges means a greater risk of coastal inundation and/or erosion affecting the District.

(b) More frequent coastal inundation and/or erosion will put pressure on coastal infrastructure, including roads and communication networks.

(c) Climate change will impact on existing fresh and salt water balances in coastal margins.

(d) Higher sea levels will lead to saline water intrusion into unconfined aquifers.

(e) Effects on groundwater levels in coastal aquifers will impact on waste and storm water services and other buried infrastructure.

(f) Increased frequency of severe weather events will significantly impact the District, in particular those areas prone to landslides and flooding.

(g) The risk of fire and drought in the District will increase.

(h) Indigenous terrestrial, fresh water, and coastal and marine biodiversity will be negative impacted.

(i) Terrestrial and aquatic biosecurity will become more difficult to maintain.

(j) Oceanic impacts such as acidification will likely occur in the Firth of Thames.

[7] The Ministry for the Environment's National Climate Change Risk Assessment assesses the most significant risks of climate change are the risks to social cohesion,

community well-being, exacerbated inequalities and new inequities.[8] It identifies people in low-lying coastal areas, people who rely on strong social networks such as the elderly, people in lower socio-economic circumstances, and Māori communities are more sensitive to the risks of climate change.[9] Information on the Council website suggests the Thames-Coromandel District has a higher than average proportion of people in these categories.[10] The Council also accepts the replacement value of core Council infrastructure projected to be affected by sea level rise alone ranges from $63 million to $500 million depending on whether the sea level rises by half a metre or up to three metres.

The Local Government Leaders' Climate Change Declaration

[8] Mr Malcolm Alexander was the Chief Executive of Local Government New Zealand (LGNZ) until August 2020. LGNZ represents 78 local, regional and unitary authorities around New Zealand. Mr Alexander's evidence is that LGNZ drafted and promoted the Declaration.[11] It was an initiative of the larger urban councils but was approved by the National Council of LGNZ and circulated in draft to mayors and regional council chairs on 15 October 2015. LGNZ sought signatures in the lead-up to the 21st Conference of the Parties (COP21) to the 1992 United Nations Framework Convention on Climate Change in Paris in December 2015.

[9] By 30 November 2015, 28 mayors and chairs had signed the Declaration. LGNZ initiated a further drive for signatures in 2017, noting that "many of the Mayors and Chairs who have signed to date view the Declaration as a <u>leaders</u> declaration and so have felt comfortable signing up to the Declaration".[12] By 25 June 2019, 65 mayors and chairs had signed the Declaration.[13] Mr McDonald, for the HCCA, tells me there are now 67 signatories out of some 97 councils and territorial local authorities.

---

8 Ministry for the Environment *National Climate Change Risk Assessment for New Zealand* (August 2020) [Risk Assessment] at 60-66.
9 Risk Assessment at 60-66.
10 Further Affidavit of Denis Charles Tegg, 20 August 2020 [Tegg 2] at DT3-137.
11 Affidavit of Malcolm Alexander, 4 August 2020 [Alexander], at [1].
12 Exhibit H to Alexander (underlining in original).
13 Affidavit of Denis Tegg, 25 June 2019, [Tegg] at [11].

[10] The Declaration is three pages long, plus signatures. It declares "an urgent need for responsive leadership and a holistic approach to climate change". On the first page, it records:

> We have come together, as a group of Mayors and Chairs representing local government from across New Zealand to:
>
> 1. acknowledge the importance and urgent need to address climate change for the benefit of current and future generations;
>
> 2. give our support to the New Zealand Government for developing and implementing, in collaboration with councils, communities and business, an ambitious transition plan toward a low carbon and resilient New Zealand;
>
> 3. encourage Government to be more ambitious with climate change mitigation measures;
>
> 4. outline key commitments our council will take in responding to the opportunities and risks posed by climate change; and
>
> 5. recommend important guiding principles for responding to climate change.

[11] It calls on the government to make an ambitious transition plan a priority underpinned by a holistic economic assessment of New Zealand's vulnerabilities and opportunities. On page two, it says:

> **Council commitments**
>
> For our part we commit to:
>
> 1. Develop and implement ambitious action plans that reduce greenhouse gas emissions and support resilience within our own councils and for our local communities. These plans will:
>
>   - promote walking, cycling, public transport and other low carbon transport options;
>
>   - work to improve the resource efficiency and health of homes, businesses and infrastructure in our district; and
>
>   - support the use of renewable energy and uptake of electric vehicles.
>
> 2. Work with our communities to understand, prepare for and respond to the physical impacts of climate change.
>
> 3. Work with central government to deliver on national emission reduction targets and support resilience in our communities.

[12] On pages two and three, the Declaration outlines seven "guiding principles" for decision-making on climate change titled: Precaution; Stewardship/Kaitiakitanga; Equity/Justice; Anticipation (thinking and acting long-term); Understanding; Co-operation; and Resilience. The principles are said to be "based on established legal and moral obligations placed on Government when considering the current and future social, economic and environmental well-being of the communities they represent".

Council decision-making

[13] The Council has not filed any evidence at all regarding its process of making the decision(s) under challenge or the considerations taken into account. This is always a risk for a decision-maker facing judicial review. As Cooke J stated in *Fiordland Venison Ltd v Minister of Agriculture and Fisheries*, "… it is vital for the Court to be as fully informed as reasonably possible of the facts and issues as they presented themselves at the time to the authority whose decision is under review". [14] Failure to do so opens the opportunity for adverse inferences to be drawn by the Court. Mr McDonald, for the HCCA, submits adverse inferences should be drawn here. Mr Neutze, for the Council, submits the record speaks for itself and nothing additional of utility could be provided. I deal with those submissions below. But at least the public records adduced by HCCA make the sequence of events reasonably clear.

[14] On 11 December 2018, at the public forum part of a Council meeting, two members of the public requested that the Council sign the Declaration.[15] On 19 February 2019, at the public forum part of a Council meeting, two members of the public expressed (or implied) concern that the Council had not signed the Declaration and one suggested it should not do so.[16]

[15] On 19 March 2019, Mayor Goudie provided a two-page report to the Council with the stated purpose "for the Council to consider signing the [Declaration]".[17] After outlining the Declaration, the Mayor's report said:

---

14 *Fiordland Venison Ltd v Minister of Agriculture and Fisheries* [1978] 2 NZLR 341 (CA) at 346; and see *New Zealand Fishing Industry Association Inc v Minister of Agriculture and Fisheries* [1988] 1 NZLR 544 (CA) at 567.

15 Tegg at DT 230.

16 Tegg at DT244.

17 Tegg at DT256.

4 Discussion

In my view the Declaration is a potentially binding document as it ***commits*** the Council to developing and implementing 'ambitious plan'. The term 'commit' means 'to pledge to a cause or a course of action'. Council's reputation, and that of individual elected members, is at risk if we do not uphold all the initiatives promoted by future governments. Without a legal opinion there is no way to prove there is no commitment and obtaining a legal opinion is an unnecessary expense in this instance given we are clearly working in accord with the objective of the declaration. A paper by Jack Hodder QC presented at the recent Rural and Provincial Sector meeting in Wellington noted that there [have] been many climate change litigation cases around the world and recent New Zealand negligent cases (asbestosis and kiwifruit pollen (still underway)) give credence to the possibility of legal challenge.

The initiatives described in the declaration and Local Government have not yet been canvassed and therefore have unknown financial consequences. In fulfilling our fiduciary responsibilities the Council has to follow the decision-making provisions of the Local Government Act 2002. These provisions include:

- Identifying all reasonably practicable options;
- Assessing the advantages and disadvantages of different options;
- Taking into account Māori culture and traditions if it is a significant decision regarding land and water
- Considering the appropriate level of engagement with our communities based on significance of each decision.

While we have not signed the Climate Declaration as a Council, we are already committed to working on many of the initiatives within the Declaration itself. The Council decisions to implement these actions have followed the decision-making provisions of the Local Government Act 2002.

[16] After listing what the Council's existing initiatives include, the Mayor then recommended as "suggested resolution(s)":

That the Council:

1. Receives the 'Local Government Leaders' Climate Change Declaration' report, dated 19 March 2019.

2. Continues to take action, following robust decision-making processes, in response to climate change for our communities.

[17] The report attached copies of the Declaration, LGNZ press statement of 21 February 2019, and LGNZ's climate change project on a page (which did not mention the Declaration). In the press statement the President of LGNZ and Mayor of Dunedin, Mr Dave Cull, disputed Ms Goudie's reported statement that signing the

declaration was "politically charged".[18] Among other things he said "[i]t's not a binding contract; there are no specific goals".

[18] On 22 March 2019, the Mayor asked LGNZ whether it had a legal opinion about the effect of the Declaration.[19] It did not.[20]

[19] The Council considered the Report on 2 April 2019. In the public forum at the beginning of the meeting, six members of the public spoke about the item.[21] Five people urged the Declaration be signed. One person disputed satellite records on sea levels and opposed signing the Declaration on cost grounds. In the last public part of the meeting, the Council considered the Report as one of three items considered under the heading "Governance and management updates". The minutes say this:

> **5.1 Local Government Leaders' Climate Change Declaration**
>
> Councillor Peters moved an alternate resolution (tabled) to the one included in the agenda report and requested a division of the vote by a show of hands.
>
> That the Thames-Coromandel District Council
>
> 1. Approves the Mayor signing the Local Government Leaders' Climate Changes Declaration.
>
> **Moved/seconded by:** Peters/Christie
>
> LOST
>
> The vote for: Councillor Christie, Councillor Peters and Councillor Simpson.
>
> The vote against: Mayor Goudie, Deputy Mayor Brljevich, Councillor Fox, Councillor McLean, Councillor Bartley, and Councillor Walker. The motion was lost.
>
> The suggested resolution from the agenda was then considered at this time. Councillor Simpson requested an additional clause 3 which aligned with the Audit and Risk Committee's recent decision.
>
> **Resolved**
>
> That the Thames-Coromandel District Council

---

18 Tegg at DT259.

19 Exhibit A to Affidavit of Alison Jane Hunt, 5 November 2019 [Hunt]: email from Sandra Goudie (Mayor of Thames-Coromandel District) to Malcolm Alexander (Chief Executive of Local Government New Zealand) regarding a legal opinion on the climate declaration, 22 March 2019.

20 Exhibit A to Hunt: email from Malcolm Alexander (Chief Executive of Local Government New Zealand) to Sandra Goudie (Mayor of Thames-Coromandel District) regarding a legal opinion on the climate declaration, 22 March 2019.

21 Tegg at DT272.

1. Receives the 'Local Government Leaders' Climate Change Declaration' report, dated 19 March 2019.
2. Continues to take action, following robust decision-making processes, in response to climate change for our communities.
3. Requests staff take a broad view of the actions undertaken to mitigate the drivers of climate change and scan how other councils are responding to carbon management and reduction of greenhouse gas emissions.

Moved/seconded by: Simpson/Christie

Councillor Peters noted that he supported the final resolution but did not think it went far enough.

The legal proceedings

[20] On 28 June 2019, HCCA applied for judicial review of the Council's decision. The Council applied to strike out the claim.

[21] Interlocutory applications to strike out impose an additional step in which time the substantive application could usually have been heard. As Cooke J held in *Ngāti Tama Ki Te Waipounamu Trust v Tasman District Council,* there is no automatic right to apply to strike out a judicial review proceeding.[22] The application of the High Court Rules, including r 15 .1, is subject to judicial control under ss 13 and 14 of the Judicial Review Procedure Act 2016. Whether a strike out application should be heard separately depends on the most efficient procedural path for the proceedings in light of the overarching goal of a simple, untechnical and prompt approach to judicial review.

[22] Here, the application for strike-out was heard separately and, in retrospect, did not prove to be the most efficient procedural path. On 9 March 2020, Gault J issued a judgment that necessarily rehearsed much of the same material as does this one, at similar length.[23] He declined to strike out the claim, holding it was arguable the Council decision is amenable to judicial review and the claim is not so clearly untenable that it cannot possibly succeed.[24] I now determine the substantive claim.

---

22 *Ngāti Tama Ki Te Waipounamu Trust v Tasman District Council* [2018] NZHC 2166 at [19].

23 *Hauraki-Coromandel Climate Action Inc v Thames-Coromandel District Council* [2020] NZHC 444.

24 At [33].

1 What is the decision and its effect?

The decision

[23] Mr McDonald, for the HCCA, submits the decisions challenged are the Council's decision not to endorse the Mayor signing the declaration and to receive the report. Mr Neutze's submissions similarly treated both of those decisions as under challenge. Formally, there were two decisions: not to approve the Mayor signing the Declaration; and to receive the Report, continue to take action in response to climate change and to request staff take a broad view of mitigation actions and scan other councils' responses. In substance, the decision challenged is the decision not to approve the Mayor signing the Declaration. That was the explicit effect of the first resolution. It was the implicit effect of the Report's recommendation which led to the second resolution.

[24] The parties differ on the effect of the Council's decision not to approve the Mayor signing the Declaration. This dispute underlies their submissions on the grounds of judicial review, so I examine that first.

Submissions about the nature and effect of the decision

[25] Interestingly Mr Neutze, for the Council, argues against the Mayor's suggestion that the Declaration might have legal force, though he submits she was right to be concerned. He submits the Declaration is a non-binding aspirational political statement by Mayors and Chairs that has little or nothing to do with the Council. He points to affidavits by Mr Alexander, the former Chief Executive of LGNZ, saying "the Declaration is a political and not legal commitment to take climate change seriously" and "[a] view that LGNZ was intending to create a legally binding commitment on signatory councils cannot be correct given the context in which the Declaration was conceived and promoted".[25] Mr Neutze submits it is the governing body of the Council which is responsible and democratically accountable for the decision-making of the Council and the Mayor does not have any powers to bind the Council except in relation to certain appointments and establishment of committees. He submits the "Leaders'" Declaration, with commitments by Mayors and Chairs, was

[25] Alexander at [6] and [16].

not to be signed for or on behalf of the Council so the decision whether or not to sign the Declaration was one for the Mayor, not the Council. He submits the Council just resolved to receive the Mayor's Report and, arguably, the motion tabled to approve her signing the Declaration was not appropriate.

[26] Just as interestingly, the Mayor's legal concerns receive support from the HCCA, which challenges the Council's decision. Mr McDonald, for the HCCA, accepts the Declaration is not legally binding as a contract, but submits it is a public statement promising certain Council commitments will be kept. He submits the text of the Declaration indicates it is signed on behalf of Councils, it was a matter for each council whether to treat it as a leader's declaration, and the purpose of the Mayor's Report was stated to be for the Council to consider signing the Declaration. He submits that makes sense because the Mayor can only sign the Declaration as a member of the Council and with its mandate, under ss 41 and 41A of the Local Government Act 2002 (LGA). He submits the decision was for the Council to make, given its context and the nature of the commitments in the Declaration. He submits the Declaration makes a series of public representations which, if adopted, give rise to legitimate expectations that the "Council Commitments" stated in the Declaration are to be enacted as policy initiatives. He points to different parts of the text. He submits that, if the Council failed to deliver on the commitments, that failure would be reviewable by the Courts. He submits LGNZ's subjective intention is irrelevant and Mr Alexander's evidence is inadmissible as it is heavily laden with legal submissions.

Nature and effect of the decision

[27] The evidence is that the Declaration was intended to be signed, and was signed, by Mayors and Chairs of local, regional and unitary authorities. It is undoubtedly a political document, both domestically and, in the lead-up to COP21, internationally. But political documents adopted by public decision-makers can have legal effects in some circumstances, depending on their wording.

[28] Much of the wording of the Declaration is aspirational and exhortatory. That is unsurprising, given the historical lack of political consensus about what to do about

climate change both domestically and internationally. So, of the five key points on the first page, the signatories:

(a) "acknowledge the importance and urgent need to address climate change" (point 1);

(b) "give our support to the New Zealand Government for developing and implementing … an ambitious transition plan" (point 2),

(c) "encourage Government to be more ambitious with climate change mitigation measures" (point 3); and

(d) "recommend important guiding principles for responding to climate change" (point 5).

[29] The signatories say that they are "a group of Mayors and Chairs representing local government from across New Zealand". At point 4, they "outline **key commitments our councils will take** in responding to the opportunities and risks posed by climate change" (emphasis added). The three "council commitments" are essentially procedural with a substantive intention, to:

(a) "develop and implement ambitious action plans that reduce greenhouse gas emissions and support resilience within our own councils and for our local communities" with regard to specified steps;

(b) "work with our communities to understand, prepare for and respond to the physical impacts of climate change"; and

(c) "work with central government to deliver on national emission reduction targets and support resilience in our communities".

[30] The seven guiding principles are said to be based on legal (and moral) obligations and refer to social, economic, cultural and environmental well-being, which are referred to in the LGA, as outlined below.

[31] Although it may not be well known by councils, administrative law envisages the possibility that a legitimate expectation can be legally enforced against a public decision-maker in some circumstances.[26] In general terms, a claimant must establish the nature of the commitment made by the public authority, whether their reliance on it is legitimate, and what remedy, if any, should be granted.[27] This is easier to do when the legitimate expectation is about process than about substance, though there are circumstances in which a legitimate expectation about substance may be enforceable.[28] For example, in *Aoraki Water Trust v Meridian Energy Ltd* the High Court recognised water rights holders had a legitimate expectation that the regional council would not derogate from their water rights grants unless specifically empowered to do so by statute.[29]

[32] Whether the Declaration could be the basis for enforcement at administrative law of a legitimate expectation would depend on the precise expectation claimed and the circumstances of its alleged breach. It would not necessarily be easy to enforce. It is likely to be quite difficult. But if a Council endorses their Mayor signing the Declaration and the Mayor signs it, then the Mayor would have ostensibly signed it on the Council's behalf. That appears to be what was proposed here by Councillor Peters. And if, for example, the Council were then to refuse to even consider developing any action plan to reduce greenhouse gas emissions, or to decide not to work with its community at all to understand the physical impacts of climate change, then a successful action for breach of legitimate expectation could not be ruled out. Real world cases are likely to be more nuanced, less clear-cut and much less certain. And I reiterate that the chances of success would depend on the circumstances and context of the case. But a legally enforceable legitimate expectation is possible. That is relevant to the issues below.

---

26 Matthew Smith *New Zealand Judicial Review Handbook* (2nd edition, Thomson Reuters, Wellington 2016) at Chapter 57.

27 *Comptroller of Customs v Terminals (NZ) Ltd* [2012] NZCA 598, [2014] 2 NZLR 137 at [125]-[127].

28 *Chamberlain v Attorney-General* [2017] NZHC 1821 at [72]-[74].

29 *Aoraki Water Trust v Meridian Energy Ltd* [2005] NZLR 268 (HC) at [41].

2 Is the Council's decision reviewable?

[33] The Judicial Review Procedure Act 2016 (JRPA) continues the effect of the Judicature Amendment Act 1972 in simplifying the procedure for judicial review. As section 3 says, it relates to the judicial review of the exercise of a statutory power, the failure to exercise a statutory power and the proposed or purported exercise of a statutory power. Section 5 says:

> **5 Meaning of statutory power**
>
> (1) In this Act, **statutory power** means a power or right to do any thing that is specified in subsection (2) and that is conferred by or under—
>
> (a) any Act; or
>
> (b) the constitution or other instrument of incorporation, rules, or bylaws of any body corporate.
>
> (2) The things referred to in subsection (1) are—
>
> (a) to make any regulation, rule, bylaw, or order, or to give any notice or direction that has effect as subordinate legislation; or
>
> (b) to exercise a statutory power of decision; or
>
> (c) to require any person to do or refrain from doing anything that, but for such requirement, the person would not be required by law to do or refrain from doing; or
>
> (d) to do anything that would, but for such power or right, be a breach of the legal rights of any person; or
>
> (e) to make any investigation or inquiry into the rights, powers, privileges, immunities, duties, or liabilities of any person.

[34] The phase "statutory power of decision" in s 5(2)(b) is defined in s 4 as:

> **statutory power of decision** means a power or right conferred by or under any Act, or by or under the constitution or other instrument of incorporation, rules, or bylaws of any body corporate, to make a decision deciding or prescribing or affecting—
>
> (a) the rights, powers, privileges, immunities, duties, or liabilities of any person; or
>
> (b) the eligibility of any person to receive, or to continue to receive, a benefit or licence, whether that person is legally entitled to it or not.

[35] The scope of judicial review under the common law is wider, but less definitively stated. As the Court of Appeal said in *Wilson v White*, judicial review is "less concerned with the source of a power exercised by decision makers" and "now more ready than in the past to treat as reviewable the exercise of any power having public consequences".[30]

Submissions

[36] Mr Neutze, for the Council, submits the decisions challenged were not statutory powers of decision and were not otherwise reviewable. He submits a decision to authorise the Mayor to take steps they have not yet taken is not reviewable and taking investigative steps prior to committing to a decision is not typically reviewable. He submits receiving reports, continuing existing initiatives and approving Mayors making political statements are not statutory powers of decision under the JRPA. He accepts the Council is an inherently public body, as he must. And he acknowledges the Council could authorise the Mayor to sign the Declaration, including on its behalf, but could not require her to do so if she did not want to. He submits the decision whether to sign the Declaration was for the Mayor and there were no public consequences of the council passing the resolution or not. He submits the Declaration is non-binding so does not commit anyone to anything so the effect on the public, if any, is minimal or speculative. He submits the Declaration is little more than political rhetoric and the decision was not to interfere with the Mayor's separate discretionary political decision. He submits the decision to receive a report is not reviewable.

[37] Mr McDonald submits the decision involves an exercise of public power on an issue of importance to the public, so is amenable to judicial review. He submits it also constitutes a statutory power of decision in terms of the JRPA. He points to the High Court decision in *Thomson v Minister for Climate Change Issues* holding that climate issues are amenable to judicial review even though they involve policy judgments.[31] He submits that failing to commit to climate change mitigation has public effects and qualifies as a statutory power of decision under s 3 of the JRPA. He submits that, in

---

30 *Wilson v White* [2005] 1 NZLR 189 (CA) at [21].

31 *Thomson v Minister for Climate Change Issues,* above n 1, at [133]-[134].

the judgment refusing to strike-out the proceedings, Gault J determined the Court had jurisdiction to judicially review the decision.

Reviewability

[38] New Zealand courts take a generous view of the extent of the rights, powers, privileges, immunities, duties or liabilities of a person that could found a judicial review. That is consistent with the purpose of judicial review in constraining the potential abuse of power.

[39] Here, I am satisfied that the rights and duties of citizens and ratepayers of the district could be directly affected by the decision of the Council about whether or not to approve the Mayor signing the Declaration. In terms of the definition of "statutory power of decision" in s 5(2)(b), the decision affects their rights and duties. Under s 5(1)(a) it invokes a power conferred by or under the LGA, which constitutes and empowers the Council to act, as it was doing in a duly constituted meeting, under its usual procedures.

[40] The evidence, including the Council's own documents, establishes that the potential and likely effects of climate change, and the measures required to mitigate those effects, are of the highest public importance. As the Declaration states, they are likely to implicate a wide range of dimensions of social, economic and environmental well-being in the district. The decision could have legal implications. But even if it did not, the political and policy issues for Council are of the highest order. The existence of a policy dimension to a decision does not immunise it from judicial review, as *Thomson v Minister for Climate Change Issues* held in relation to climate change. Rather, the reverse. There is a strong public interest in decision-making by the Council on such issues being subject to judicial review. Given the nature, effects and significance of the decision, it is reviewable.

3 Was the Council's decision unreasonable?

Law of reasonableness

[41] For many years the law has recognised unreasonableness as a ground for judicial review in terms of the formulation in the English case of *Associated Provincial Picture Houses, Limited v Wednesbury Corporation*.[32] The courts could only "interfere" if a decision was "so unreasonable that no reasonable authority could ever have come to it".[33]

[42] The *Wednesbury* formulation has been recognised as unsatisfactory.[34] It is certainly tautologous.[35] In *Waitakere City Council v Lovelock*, Thomas J in the Court of Appeal pointed out that unreasonableness could overlap or encompass most of the other grounds of judicial review, with little utility, and that there may be a number of principles of reasonableness.[36] In *Wolf v Minister of Immigration*, Wild J stated that whether a decision is unreasonable will depend on context: who made it; by what process, what it involves, and the consequences for those affected.[37]

[43] In *Hu v Immigration and Protection Tribunal,* I agreed that the day predicted by Lord Cooke had come whereby *Wednesbury* is more widely recognised as an unfortunately retrogressive decision.[38] I offered an alternative, narrow but usable concept of unreasonableness. I did not claim this as an all-encompassing conception and acknowledged there may be wider conceptions.[39] I said, in summary:

> [2] The law of judicial review is bedevilled by whether and how "unreasonable" public decisions are allowed to be. I consider the Supreme Court's established reformulation of the *Edwards v Bairstow* test of when a finding of fact constitutes an error of law offers a better account of unreasonableness in judicial review than the tautologous words used in *Wednesbury*. Where a decision is so insupportable or untenable that proper

---

32 *Associated Provincial Picture Houses, Limited v Wednesbury Corporation* [1948] 1 KB 223 (ECA).
33 At 230 and 234.
34 For example, *Waitakere City Council v Lovelock* [1997] 2 NZLR 385 (CA) at 403 (Thomas J concurring).
35 Harry Woolf and others *De Smith's Judicial Review* (7th ed, Sweet & Maxwell, London, 2018) at [11-019] [*De Smith's Judicial Review*].
36 At 406-408, 411-413.
37 *Wolf v Minister of Immigration* [2004] NZAZR 414 (HC).
38 *Hu v Immigration and Protection Tribunal* [2017] NZHC 41, [2017] NZAR 508 at [27], citing *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532 (HL) at 549.
39 At [31].

> application of the law requires a different answer, it is unlawful because it is unreasonable. That may involve the adequacy of the evidential foundation of a decision or the chain of logical reasoning in the application of the law to the facts. Unremarkably, unreasonableness, also termed irrationality, is to be found in the reasoning supporting a public decision.

[44] I noted that three scenarios encapsulated in the "insupportable or untenable ultimate conclusion" formulation assist in identifying what constitutes unreasonableness:[40]

(a) if the decision is not supported by any evidence;

(b) if the evidence is inconsistent with, or contradictory to, the decision; or

(c) if the only reasonable conclusion contradicts the decision ("if there is a material disconnect in the chain of logic from a fact or a legal proposition to a conclusion, a decision may be unreasonable and therefore unlawful").

[45] I also noted that New Zealand courts apply sliding standards of review depending on the context and suggested it is desirable to engage more openly with what contextual factors matter.[41] While doubting the helpfulness of labels such as "hard look" or "anxious scrutiny", I said "there is no doubt the New Zealand courts will focus very carefully on cases where human rights are at stake.[42] Since then, in *Kim v Minister of Justice*, the Court of Appeal has applied, without comment, the label "heightened scrutiny" to an extradition decision where fundamental human rights are at stake.[43]

[46] In *Zhang v Minister of Immigration*, Gwyn J applied the *Hu* conception of unreasonableness in an immigration context.[44] She found an Associate Minister's decision to decline a resident visa on an exceptional basis was unreasonable because

---

40 At [30].
41 At [32].
42 At [32].
43 *Kim v Minister of Justice* [2019] NZCA 209, [2019] 3 NZLR 173 at [45]–[47].
44 *Zhang v Minister of Immigration* [2020] NZHC 568.

it was so unsupportable or untenable that proper application of the law requires a different answer.[45]

Submissions

[47] Mr McDonald submits:

(a) The *Hu* formulation of unreasonableness is a sound and sensible replacement for *Wednesbury* and should be applied. There is a sliding scale of intensity with which the Court should view the decision. The effects of climate change are such that the intensity of review approaches that which is adopted for human rights.

(b) It was unreasonable for the Council to decline to sign the Declaration, given the global consensus on anthropogenic climate change and its predicted effects on the District. The decision was patently perverse, given the statutory function of the Council, the relevant facts regarding the Declaration, the effects of climate change on the District and the Council's failure to consider the global scientific consensus on climate change and the Report he submits was unbalanced. Only if a council had taken sound and sensible mitigation steps that went far beyond the Declaration might it be reasonable for them not to sign it. The Mayor was precluded from taking an objective perspective on the matter by her own prejudices.

(c) While the Council's failure to take the steps it should have taken (in the next ground of review) might be a reason not to sign the Declaration, there is no evidence that is why the Council made the decision it did. I should draw adverse inferences from the Council's failure to file evidence.

[48] Mr Neutze, for the Council, submits:

---

[45] At [86]-[93].

(a) The decision was not so unsupportable or untenable that proper application of the law requires a different answer. The standard of review varies with context and the *Hu* threshold is a very high hurdle.

(b) Properly analysed, the Council's decisions were the most reasonable it could make, as they were consistent with the Council's lack of capacity to influence the Mayor to sign or not sign the Declaration, the Mayor's Report and the fact any request for the Council to sign up to the Declaration would be misguided.

(c) The Council does not deny climate change is a significant issue for the District but it was perfectly reasonable for the Council to decline to make a decision about its future policy on climate change in response to Councillor Peters' motion, given that the considerations the HCCA refers to had not been properly considered by the Council.

(d) The HCCA's submission that the Declaration will create reviewable legitimate expectations justifies the Mayor's concern. But an application based on that ground would be doomed to fail because of the generality of the commitments stated in the Declaration.

(e) Nothing in the Council's decisions prevents the Council from undertaking further consideration of climate change issues.

Unreasonableness

[49] In theory, a label such as "heightened scrutiny" does not add anything substantively different to what a court always does in conducting judicial review. But it does add emphasis in practice. It serves as a signal to courts of the degree of priority of attention and care to be accorded to one case compared to another in their busy workloads. I consider that is good reason for the appropriate "intensity" of judicial review being explicitly signalled, depending on its context.

[50] There is no doubt climate change gives rise to vitally important environmental, economic, social, cultural and political issues in 2020. It can also give rise to

important legal issues. In *Netherlands (Ministry of Infrastructure and the Environment) v Urgenda Foundation*, the Supreme Court of the Netherlands examined the obligations imposed on states by articles 2 and 8 of the European Convention on Human Rights regarding the right to life and the right to private and family life.[46] It held that climate change threatens human rights.[47] It held those human rights, in conjunction with the United Nations Framework Convention on Climate Change, oblige the Netherlands to reduce greenhouse gas emissions from its territory in proportion to its share of responsibility because there is a grave risk that dangerous climate change will occur that will endanger the lives and welfare of many people in the Netherlands.[48] Here, as I find above, the inhabitants and environment in the Thames-Coromandel District, and the cost of Council infrastructure, are likely to be significantly impacted by the effects of anthropogenic climate change.

[51] I accept that the intensity of review of decisions about climate change by public decision-makers is similar to that for fundamental human rights. Depending on their context, decisions about climate change deserve heightened scrutiny. That is so here.

[52] If the Council's decision not to approve signing the Declaration had been based on misinformation or blanket denial of climate change, it may well have been unreasonable. But there is no evidence it was. The Mayor's Report is the only document the Council appears to have had before it in making its decision. The primary reason for not signing the Declaration that is apparent in the Report is the Mayor's concern that the Declaration is a "potentially binding document" and the commitments in it have "unknown financial consequences".

[53] The two reasons in the Mayor's Report logically support the Council's decision not to approve signing the Declaration. As HCCA itself submits, and I have observed above, aspects of the Declaration may potentially have binding force in law, depending on the circumstances. If the Declaration were signed by a Mayor with the approval of a council, on its behalf, it is possible that could create a legally enforceable legitimate expectation that the council would abide by the procedural commitments. And if

---

46 *Netherlands (Ministry of Infrastructure and the Environment) v Urgenda Foundation*, ECLI:NL:HR:2019:2007 (Supreme Court of the Netherlands, 13 January 2020).

47 At [5.7.9].

48 At [5.8], [7.2.11], [7.3.6] and [8.3.4].

commitments in the Declaration could be enforced, financial consequences would logically need to be considered.

[54] I do not comment on the merits of the decision. That was the subject of political debate, as it may be again. But I conclude that the Council's decision not to approve signing the Declaration, which I infer rested on the two reasons in the Mayor's Report, was reasonable. The evidence is not inconsistent with the decision. There is no material disconnect in the logic from fact or law to conclusion. The decision was not so unsupportable or untenable that the law requires a different answer. The decision is not unreasonable at law, whether given heightened scrutiny or not. But the reasons for the decision indicated the need for further analysis and consideration of the issue, which is relevant to the next ground of review.

4 Was the Council's decision-making process lawful?

Law of local government decision-making

[55] As Mayor Goudie's Report mentioned, the LGA provides a framework for local government decision-making. Section 10 provides that the purpose of local government is:

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

[56] Subpart 1 of Part 6 deals with Planning and Decision-making and subpart 2 deals with Consultation. I set out the relevant provisions in the Annex to this judgment. In summary, and relevantly:

(a) Section 76AA requires the Council to adopt a Significance and Engagement Policy regarding how it would approach determining the significance of proposals and decisions and how it would engage with the community, depending on that significance.

(b) The Council's Significance and Engagement Policy (the Policy), adopted in 2014, requires the Council to assess the degree of

significance of proposals and decisions, and the appropriate level of engagement, in the early stages of a proposal, taking into account specified considerations.

(c) Section 76 requires every decision of the Council (including a decision not to take action) to ensure that its decision-making processes comply with the following requirements and, in the case of a significant decision, ensure the requirements have been "appropriately observed":

(i) Sections 77 and 78: subject to the Council's judgments under s 79, it must:

1. seek to identify all reasonably practicable options for achieving the decision's objective;

2. assess the options in terms of advantages and disadvantages;

3. if any option involves a significant decision in relation to land or water, take into account the relationship of Māori with their ancestral land, water and other taonga; and

4. consider the views and preferences of persons likely to be affected by, or to have an interest in the matter (s 78).

(ii) The Court of Appeal in *Whakatane District Council v Bay of Plenty Regional Council* determined s 78 requires local authorities to take conscious steps to secure information on the views and preferences of those likely to be affected, and actual and intentional consideration of the information.[49] The subsequent repeal of s 78(2) did not affect that.

---

[49] *Whakatane District Council v Bay of Plenty Regional Council* [2010] 3 NZLR 826 (CA) at [72]-[75].

(iii) Section 79: it is the responsibility of the Council to make, in its discretion, judgments about:

1. How to achieve compliance with ss 77 and 78 "that is largely in proportion to the significance of the matters affected by the decision as determined in accordance with" the Policy.

2. In particular, the extent to which different options are to be identified and assessed; the degree to which benefits and costs are to be quantified; the extent and detail of the information to be considered; and the extent and nature of any written record to be kept of the manner in which it has complied with ss 77 and 78.

3. The Council must have regard to the significance of all relevant matters and, in addition, to the principles relating to local authorities in s 14 and to the extent to which the nature of a decision or its circumstances allow opportunity to consider a range of options or the views and preferences of others.

(iv) The Court of Appeal in *Whakatane District Council v Bay of Plenty Regional Council* observed that a court will not interfere with a discretionary judgment under s 79 unless it is irrational or made on a wrong legal principle.[50] But it held there must be an evidential basis for the judgment and the Council there did not make any s 79 judgment at all. The Court of Appeal set aside the decision and required the Council to make a s 79 judgment.[51] In *Wellington City Council v Minotaur Custodians Ltd,* the Court of Appeal said that the sections give local

---

50 At [76].
51 At [78], [83].

authorities "a deliberately broad discretion as to whether to consult, and if so, how".[52]

(d) Section 14 requires the Council to act in accordance with specified principles regarding, relevantly: openness, transparency and accountability; efficiency and effectiveness; the views of all its communities; taking account of the interests of future communities and the likely impact on the four s 10 well-beings; planning effectively for future management of its assets; taking into account the four well-beings and the reasonably foreseeable needs of future generations in taking a sustainable development approach.

(e) Section 80 requires that, if a Council decision is "significantly inconsistent with or anticipated to have consequences that will be significantly inconsistent with" any Council policy, the Council must, when making the decision, clearly identify the inconsistency, the reasons for it and any intention of the Council to amend the policy or plan to accommodate the decision.

Submissions

[57] Mr McDonald, for HCCA, submits:

(a) Although the Mayor identified the need for decision-making to comply with the LGA as a reason not to sign the Declaration, the Council failed to undertake the analysis required under the Policy and that was a disqualifying error of law. He submits the decision is plainly a matter of high significance in light of the mandatory considerations in the Policy. There is no evidence of any such consideration.

(b) The Council erred in law by not considering the principles in s 14, which are express mandatory considerations. It is difficult to see how

---

[52] *Wellington City Council v Minotaur Custodians Ltd* [2017] NZCA 302, [2017] 3 NZLR 464 at [42].

the decision could be anything other than one of considerable significance.

(c) The Council was required to, but did not, consider the global scientific consensus on anthropogenic climate change as a mandatory relevant consideration, under s 79(2) of the Act and as a matter of the purpose and scope of the Act.

(d) The Council had failed to adopt a coherent approach to climate change mitigation in its 2018-2028 Long Term Plan, its Management Strategy of 2018 and the Ministry for the Environment's Coastal Hazards and Climate Change Guidance for Local Authorities of 2017. And it did not consider them in making its decision.

(e) The Council did not take steps towards meeting the requirements of s 77, did not consider the views and preferences of persons likely to be affected by, or have an interest in the decision, as required by s 78, and it failed to consider whether a consultation process was required, which was a mandatory consideration given the significance of the decision.

[58] Mr McDonald also submits the Report derailed the decision-making process because it made no attempt to address the broader context of the decision or set out relevant considerations and is unbalanced, reflecting the Mayor's personal views as to why the Declaration should not be signed. He submits the Mayor's personal biases appear to have precluded her from approaching the question objectively. He points to media interviews with, and emails from, the Mayor to submit she refused to publicly accept that anthropogenic climate change is real.[53]

[59] Mr Neutze submits the Council's decision did not breach the Act. He submits:

(a) Local authorities have a deliberately broad discretion as to whether to consult, and if so, how.[54] Because the Council was not making any

---

53 Tegg at DT252.

54 *Wellington City Council v Minotaur Custodians Ltd*, above n 52.

substantive decision for itself, it was not required to comply with s 14 or part 6 of the LGA.

(b) Alternatively, it is the Council's responsibility to make judgments, in its discretion, about compliance with ss 77 and 78, proportional to the significance of the decision and taking into account the factors in the Policy. The Council did not expressly turn their minds to the s 79 considerations, but this decision should be put at the lowest possible level of significance. Although community interest in the decision may have been relatively high, the community interest was misguided because there were no actual consequences for the community of the Mayor signing or not signing the Declaration.

(c) It was open to the Council to consider that it had sufficiently complied with part 6. The significant amount of work that HCCA says was required to consider the decision was not required to receive the Mayor's Report and recommendation to continue its existing work. The principles in *Whakatane District Council* are not applicable because the decisions here do not have the same significance as the decision in that case, moving the Council's head office from one city to another.

The lawfulness of the Council's decision-making

[60] Uncertain legal implications and financial consequences were reasons for the Council not to approve signing the Declaration on the basis of the information it had. That was the effective advice in the Mayor's Report. But the LGA and the Council's own Policy required the Council to go further.

[61] As I have explained above, climate change is important both internationally and locally. The Council itself accepts its district is likely to be materially affected by anthropogenic climate change in terms of the risks of: coastal inundation and/or erosion; fresh and salt water balances in coastal margins, saline water intrusion into unconfined aquifers; impact on waste and storm water services; impacts on areas prone to landslides and flooding; increased fire and drought; negative impacts on

biodiversity; and acidification in the Firth of Thames. The physical, social, economic, and cultural effects of climate change and necessary mitigation measures are likely to be highly significant for Thames-Coromandel.

[62] Given this, the Council's climate change strategy, and a proposed decision engaging with climate change issues at a strategic level, must be a significant issue in terms of the LGA and its Significance and Engagement Policy. While the question of whether to sign the Declaration might not implicate all aspects of the Council's climate change strategy, it raised salient strategic issues about it. The legal and financial implications alone needed to be considered, as the Mayor's Report itself suggested. But much wider strategic issues were engaged. Should the Council develop and implement an action plan to reduce greenhouse gas emissions and support resilience in the district and how? Should it work with its communities to understand, prepare for and respond to the physical impacts of climate change, and how? Should it work with central government to deliver on national emission reduction targets, and how? These issues are significant; more significant than whether to move a head office from one city to another.

[63] Considering these questions did not require the Council necessarily to approve signing the Declaration. But they are significant questions bearing directly to the social, economic, environmental and cultural well-being of the district in the present and for the future, which is the purpose of local government in s 10. Sections 76-79 of the LGA and the Policy required the Council to assess the degree of significance of the issues and, in light of that, to:

(a) identify all reasonably practicable options and assess them, taking into account all relevant considerations; and

(b) consider the views and preferences of those likely to be affected by or have an interest in the issues.

[64] The Mayor's two-page Report identified the need to follow the decision-making provisions of the LGA. But the Report did not fulfil those requirements in relation to the decision. The Report put squarely on the table the question of whether

the Council should approve signing the Declaration, as its stated purpose indicated. While the Council had a discretion as to how to satisfy its compliance with the LGA, it was required to consider how to comply. Mr Neutze conceded the Council did not expressly turn their minds to that, as he had to. As in *Whakatane District Council v Bay of Plenty Regional Council*, there is no evidence the Council made a judgment under s 79. It did not consider how to comply with ss 77 and 78 in proportion to the significance of the matters affected by the decision and in accordance with its Policy and it did not take into account all the mandatory considerations s 79 specifies as relevant. It did not do the required analysis and it did not consider what consultation with the District was required.

[65] I do not, though, accept HCCA's submissions regarding the part the Mayor's personal views played in the process. Mayors are expected to have views. They are elected on the basis of their views, among other things. There is no evidence the Mayor's views here derailed the decision-making process. That was done by failing to comply with the legal requirements.

5 What relief should be granted?

[66] The HCCA seeks a declaration that the decision was unlawful, an order quashing the decision, an order that the decision be remade and any other relief the Courts sees fit.

[67] Mr Neutze, for the Council, submits it cannot be seriously suggested that the resolution to receive the Mayor's report, with continued action and monitoring, can or should be quashed and reconsidered. He submits there is little to be achieved in quashing the decision to decline to approve the Mayor approving the Declaration, since that was a decision for the Mayor and any decisions by the Council in relation to that are relatively insignificant. He submits the outcome is likely to be the same, given the Mayor's legitimate concerns that the Declaration created binding commitments.

[68] I have found the decision by the Council, not to approve signing the Declaration, was inconsistent with the requirements under the LGA and its Policy to

carry out analysis and considering consultation. Accordingly, it is unlawful. The HCCA is entitled to relief. I make a declaration to that effect.

[69] I quash the decision to decline to approve the Mayor approving the Declaration. Under s 17 of the JRPA, I direct the Council to reconsider and determine, consistently with the requirements of the LGA and its Policy, whether or not to approve the Mayor signing the Declaration.

Result

[70] I make the following orders:

(a) I declare the decision by the Council, not to approve signing the Declaration, on the basis it did, was inconsistent with the requirements of the Local Government Act 2002 and the Council's Significance and Engagement Policy to carry out analysis and consider consultation in making that decision.

(b) I quash the decision and direct the Council to reconsider and determine, consistently with the requirements of the Local Government Act 2002, the Council's Significance and Engagement Policy, and this judgment, whether or not to approve the Mayor signing the Declaration.

(c) I award costs to the HCCA on a 2B basis, and reasonable disbursements.

Palmer J

Annex: Relevant statutory and policy provisions

[1] Section 10 of the Local Government Act 2002 (the Act) provides that the purpose of local government is:

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

[2] Section 76AA of the Act requires every local authority to adopt a Significance and Engagement Policy as follows, relevantly:

> **76AA Significance and engagement policy**
>
> (1) Every local authority must adopt a policy setting out—
>
> > (a) that local authority's general approach to determining the significance of proposals and decisions in relation to issues, assets, and other matters; and
> >
> > (b) any criteria or procedures that are to be used by the local authority in assessing the extent to which issues, proposals, assets, decisions, or activities are significant or may have significant consequences; and
> >
> > (c) how the local authority will respond to community preferences about engagement on decisions relating to specific issues, assets, or other matters, including the form of consultation that may be desirable; and
> >
> > (d) how the local authority will engage with communities on other matters.
>
> (2) The purpose of the policy is—
>
> > (a) to enable the local authority and its communities to identify the degree of significance attached to particular issues, proposals, assets, decisions, and activities; and
> >
> > (b) to provide clarity about how and when communities can expect to be engaged in decisions about different issues, assets, or other matters; and
> >
> > (c) to inform the local authority from the beginning of a decision-making process about—
> >
> > > (i) the extent of any public engagement that is expected before a particular decision is made; and
> > >
> > > (ii) the form or type of engagement required.

…

(6) To avoid doubt, section 80 applies when a local authority deviates from this policy.

[3] 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.

[4] The Council's Significance and Engagement Policy (the Policy) was adopted on 24 September 2014 and is admirably brief. It applies to all decisions made by or on behalf of Council. Relevantly, it provides:

> 2 Engaging with the community is needed to understand the views and preference so people likely to be affected by or interested in a proposal or decision.
>
> 3 An assessment of the degree of significance of proposals and decisions, and the appropriate level of engagement, will therefore be considered in the early stages of a proposal before decision making occurs and, if necessary reconsidered as a proposal develops.
>
> 4 The Council will take into account the following matters when assessing the degree of significance of proposals and decision, and the appropriate level of engagement:
>
> a. There is a legal requirement to engage with the community
> b. The level of financial consequences of the proposal or decision
> c. Whether the proposal or decision will affect a large portion of the community.
> d. The likely impact on present and future interests of the community, recognising Māori culture values and their relationship to land and water
> e. Whether the proposal affects the level of service of a significant activity
> f. Whether community interest is high
> g. Whether the likely consequences are controversial

h. Whether community views are already known, including the community's preferences about the form of engagement
i. The form of engagement used in the past for similar proposals and decisions

5 If a proposal or decision is affected by a number of the above considerations, it is more likely to have a higher degree of significance.

6 In general, the more significant an issue, the greater the need for community engagement.

7 The Council will apply a consistent and transparent approach to engagement.

…

11 … Council will determine the appropriate level of engagement on a case by case basis.

12 The Community Engagement Guide (attached) identifies the form of engagement Council will use to respond to some specific issues. It also provides examples of types of issues and how and when communities could expect to be engaged in the decision making process.

…

14 When Council makes a decision that is significantly inconsistent with this policy, the steps identified in Section 80 of the Local Government Act 2002 will be undertaken.

[5] Sections 76 to 80, and 82 of the Act, provide:

76 Decision-making

(1) Every decision made by a local authority must be made in accordance with such of the provisions of sections 77, 78, 80, 81, and 82 as are applicable.

(2) Subsection (1) is subject, in relation to compliance with sections 77 and 78, to the judgments made by the local authority under section 79.

(3) A local authority—

(a) must ensure that, subject to subsection (2), its decision-making processes promote compliance with subsection (1); and

(b) in the case of a significant decision, must ensure, before the decision is made, that subsection (1) has been appropriately observed.

(4) For the avoidance of doubt, it is declared that, subject to subsection (2), subsection (1) applies to every decision made by or on behalf of a local authority, including a decision not to take any action.

77 Requirements in relation to decisions

(1) A local authority must, in the course of the decision-making process,—

(a) seek to identify all reasonably practicable options for the achievement of the objective of a decision; and

(b) assess the options in terms of their advantages and disadvantages; and

(c) if any of the options identified under paragraph (a) involves a significant decision in relation to land or a body of water, take into account the relationship of Māori and their culture and traditions with their ancestral land, water, sites, waahi tapu, valued flora and fauna, and other taonga.

(2) This section is subject to section 79.

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.

…

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

(4) This section is subject to section 79.

79 Compliance with procedures in relation to decisions

(1) It is the responsibility of a local authority to make, in its discretion, judgments—

(a) about how to achieve compliance with sections 77 and 78 that is largely in proportion to the significance of the matters affected by the decision as determined in accordance with the policy under section 76AA; and

(b) about, in particular,—

(i) the extent to which different options are to be identified and assessed; and

(ii) the degree to which benefits and costs are to be quantified; and

(iii) the extent and detail of the information to be considered; and

(iv) the extent and nature of any written record to be kept of the manner in which it has complied with those sections.

(2) In making judgments under subsection (1), a local authority must have regard to the significance of all relevant matters and, in addition, to—

(a) the principles set out in section 14; and

(b) the extent of the local authority's resources; and

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

…

80 Identification of inconsistent decisions

(1) If a decision of a local authority is significantly inconsistent with, or is anticipated to have consequences that will be significantly inconsistent with, any policy adopted by the local authority or any plan required by this Act or any other enactment, the local authority must, when making the decision, clearly identify—

(a) the inconsistency; and

(b) the reasons for the inconsistency; and

(c) any intention of the local authority to amend the policy or plan to accommodate the decision.

…

82 Principles of consultation

(1) Consultation that a local authority undertakes in relation to any decision or other matter must be undertaken, subject to subsections (3) to (5), in accordance with the following principles:

(a) that persons who will or may be affected by, or have an interest in, the decision or matter should be provided by the local authority with reasonable access to relevant information in a manner and format that is appropriate to the preferences and needs of those persons:

(b) that persons who will or may be affected by, or have an interest in, the decision or matter should be encouraged by the local authority to present their views to the local authority:

(c) that persons who are invited or encouraged to present their views to the local authority should be given clear information by the local authority concerning the purpose of the

consultation and the scope of the decisions to be taken following the consideration of views presented:

(d) that persons who wish to have their views on the decision or matter considered by the local authority should be provided by the local authority with a reasonable opportunity to present those views to the local authority in a manner and format that is appropriate to the preferences and needs of those persons:

(e) that the views presented to the local authority should be received by the local authority with an open mind and should be given by the local authority, in making a decision, due consideration:

(f) that persons who present views to the local authority should have access to a clear record or description of relevant decisions made by the local authority and explanatory material relating to the decisions, which may include, for example, reports relating to the matter that were considered before the decisions were made.

(2) A local authority must ensure that it has in place processes for consulting with Māori in accordance with subsection (1).

(3) The principles set out in subsection (1) are, subject to subsections (4) and (5), to be observed by a local authority in such manner as the local authority considers, in its discretion, to be appropriate in any particular instance.

(4) A local authority must, in exercising its discretion under subsection (3), have regard to—

(a) the requirements of section 78; and

(b) the extent to which the current views and preferences of persons who will or may be affected by, or have an interest in, the decision or matter are known to the local authority; and

(c) the nature and significance of the decision or matter, including its likely impact from the perspective of the persons who will or may be affected by, or have an interest in, the decision or matter; and

(d) the provisions of Part 1 of the Local Government Official Information and Meetings Act 1987 (which Part, among other things, sets out the circumstances in which there is good reason for withholding local authority information); and

(e) the costs and benefits of any consultation process or procedure.

(5) Where a local authority is authorised or required by this Act or any other enactment to undertake consultation in relation to any decision or matter and the procedure in respect of that consultation is prescribed by this Act or any other enactment, such of the provisions

of the principles set out in subsection (1) as are inconsistent with specific requirements of the procedure so prescribed are not to be observed by the local authority in respect of that consultation.

[6] Section 14 also relevantly provides:

14 Principles relating to local authorities

(1) In performing its role, a local authority must act in accordance with the following principles:

(a) a local authority should—

(i) conduct its business in an open, transparent, and democratically accountable manner; and

(ii) give effect to its identified priorities and desired outcomes in an efficient and effective manner:

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

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

(i) the diversity of the community, and the community's interests, within its district or region; and

(ii) the interests of future as well as current communities; and

(iii) the likely impact of any decision on each aspect of well-being referred to in section 10:

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

(e) a local authority should actively seek to collaborate and co-operate with other local authorities and bodies to improve the effectiveness and efficiency with which it achieves its identified priorities and desired outcomes; and

(f) a local authority should undertake any commercial transactions in accordance with sound business practices; and

(fa) a local authority should periodically—

(i) assess the expected returns to the authority from investing in, or undertaking, a commercial activity; and

(ii) satisfy itself that the expected returns are likely to outweigh the risks inherent in the investment or activity; and

(g) a local authority should ensure prudent stewardship and the efficient and effective use of its resources in the interests of its district or region, including by planning effectively for the future management of its assets; and

(h) in taking a sustainable development approach, a local authority should take into account—

(i) the social, economic, and cultural well-being of people and communities; and

(ii) the need to maintain and enhance the quality of the environment; and

(iii) the reasonably foreseeable needs of future generations.

(2) If any of these principles, or any aspects of well-being referred to in section 10, are in conflict in any particular case, the local authority should resolve the conflict in accordance with the principle in subsection (1)(a)(i).