IN THE COURT OF APPEAL OF NEW ZEALAND

CA258/2009
[2010] NZCA 346

BETWEEN	WHAKATANE DISTRICT COUNCIL Appellant
AND	BAY OF PLENTY REGIONAL COUNCIL Respondent

Hearing: 21-22 April 2010

Court: William Young P, O'Regan and Baragwanath JJ

Counsel: D J Goddard QC and D J Neutze for Appellant
J G Miles QC and K J Caltran for Respondent

Judgment: 3 August 2010 at 9.30am

JUDGMENT OF THE COURT

A The appeal is allowed.

B We declare that the respondent failed to comply with the requirements of the Local Government Act 2002.

C The respondent must pay the appellant costs for a complex appeal on a band A basis and usual disbursements, including costs for two counsel and travel costs of junior counsel, in the Court of Appeal.

D The respondent must pay the appellant costs on a 3B basis in the High Court.

REASONS OF THE COURT

(Given by Baragwanath J)

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[1] This appeal concerns a decision by the Bay of Plenty Regional Council (known by the acronym EBOP for "Environment Bay of Plenty") to relocate its headquarters and a majority of its staff positions from Whakatane to Tauranga. Did it comply with the requirements of the Local Government Act 2002 (LGA), from which its powers derive and to which it is subject?

[2] In the High Court Duffy J dismissed an application for review brought by the Whakatane District Council (WDC) against the decision.[1] We have concluded that the elaborate procedures imposed by the LGA required at the outset of the process greater consideration of community views and preferences than occurred and that WDC's appeal succeeds.

Context

[3] The Bay of Plenty region is in the form of an inverted triangle, its northern boundary formed by the Bay which extends from Katikati to the northwest to Whangaparaoa, near Hicks Bay, to the northeast, with Whakatane lying on the coast

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1 *Whakatane District Council v Bay of Plenty Regional Council* [2009] 3 NZLR 799.

centrally between them. Its apex to the south is just east of Lake Taupo. The major city of Tauranga, which increasingly dominates the region, lies on the coast some 30 km east of Katikati; Whakatane is about 100 km east of Tauranga. The hinterland includes the city of Rotorua. There are as well a number of significant towns, including Te Puke south-east of Tauranga, Opotiki to the east of Whakatane, and Kawerau east of Rotorua as well as smaller settlements such as Murupara in the south. So those with potential interest in regional government will include residents of a range of localities.

[4] Under the LGA WDC is the territorial authority for the Whakatane district, with its principal offices located in Whakatane. EBOP is the regional council under the LGA; its region includes as well as the Whakatane district the districts of Opotiki, Kawerau, Western Bays and the cities of Tauranga and Rotorua.

[5] The LGA entailed a major reform which for the first time conferred on regional and district councils full capacity to carry on or undertake any activity and, for that purpose, full rights, powers, and privileges.[2] But that broad capacity is limited by other provisions which require close analysis.[3]

[6] Among them is the requirement for a council to have a long-term council community plan (LTCCP) both to provide a long-term focus for its decisions and activities and to provide a basis for its accountability to the community. On 1 June 2007 EBOP resolved by nine votes to five to proceed with amendment to its LTCCP to relocate its head office from Whakatane to Tauranga on the basis that 100 positions be transferred. On 21 June 2007 EBOP resolved to adopt the proposed amendments. WDC's application for review to challenge both the resolutions was filed promptly. No point is taken concerning the time that has since elapsed.

The legislation

[7] Part 2 of the LGA is headed:

> **Purpose of local government, and role and powers of local authorities**

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2 Section 12(2).

3 Section 12(3): "Subsection (2) is subject to this Act, any other enactment, and the general law."

[8] The first purpose of local government is to enable democratic local decision-making and action by and on behalf of communities.[4] A major question on this appeal is how far that democratic process must go. Its other purpose is to promote the social, economic, environmental and cultural well-being of communities in the present and for the future.[5]

[9] Principles relating to the performance by a local authority of its role are stated in s 14. It should, inter alia, make itself aware of and have regard to the views of all of its communities.[6] That principle is supported by the more specific provisions next mentioned.

[10] Amendment of an LTCCP requires use of a special consultative procedure.[7] That requirement falls within Part 6 of the LGA "Planning, decision-making and accountability" which begins with s 75:

> **Outline of Part**
>
> This Part—
>
> (a) sets out obligations of local authorities in relation to the making of decisions:
>
> ...
>
> (c) states the obligations of local authorities in relation to consultation with interested and affected persons:
>
> (d) sets out the nature and use of the special consultative procedure:
>
> ...

[11] There follows Subpart 1 – Planning and decision-making. It begins with s 76, subs (1) of which requires that "every decision made by a local authority must be made in accordance with such of the provisions of [of present relevance] ss 77, 78 and 82 as are applicable". Subs (2) states that subs (1) is subject, in relation to compliance with ss 77 and 78, to the judgments made by the local authority under s 79.[8] Subsection (3) states:

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4 Section 10(a).
5 Section 10(b).
6 Section 14(1)(b).
7 Sections 93(5) and 83.
8 [14] below.

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.

Self-evidently the decision to shift the head office and many personnel from Whakatane to Tauranga is significant. So in terms of s 76(3)(b), ss 77, 78 and 82 *must* be complied with.

[12] Section 77 states the council's obligations to *seek to identify* and to *assess* options:

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 those options* by considering—

(i) *the benefits and costs of each option* in terms of the present and future social, economic, environmental, and cultural well-being of the district or region; and

(ii) *the extent to which community outcomes would be promoted or achieved* in an integrated and efficient manner by each option; and

(iii) *the impact of each option on the local authority's capacity to meet present and future needs* in relation to any statutory responsibility of the local authority; and

(iv) *any other matters that*, in the opinion of the local authority, *are relevant*;

...

(2) This section is *subject to section 79*.

(Emphasis added.)

Identification of options is stage 2 of s 78, to which we come next. *Assessment* of options is stage 3 of s 78.

[13] The primary issue argued is whether EBOP complied with the first and second of four statutory obligations to ascertain community views – those in s 78(2)(a) and (b). Section 78 states:

> **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.*
>
> (2) That consideration must be given at—
>
> (a) *the stage at which the problems and objectives related to the matter are defined:*
>
> (b) *the stage at which the options that may be reasonably practicable options of achieving an objective are identified*:
>
> (c) the stage at which reasonably practicable *options are assessed and proposals developed*:
>
> (d) the stage at which *proposals* of the kind described in paragraph (c) *are adopted*.
>
> (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.*
>
> (Emphasis added.)

[14] Councils make decisions affecting many topics of a wide range of importance. So s 79 confers a discretionary power to approach in a manner proportionate to the occasion the options of s 77 and the consideration of community views under s 78. But it does not operate as a dispensing provision. It states:

> **79 Compliance with procedures in relation to decisions**
>
> (1) *It is the responsibility of a local authority to make, in its discretion, judgments—*
>
> (a) *about how to achieve compliance with sections 77 and 78 that is largely in proportion to the significance of the matters affected by the decision*; and
>
> (b) *about, in particular,—*
>
> (i) *the extent to which different options are to be identified and assessed*; and

> (ii) the degree to which benefits and costs are to be quantified; and
>
> (iii) the extent and detail of the information to be considered; and
>
> (iv) the extent and nature of any written record to be kept of the manner in which it has complied with those sections.
>
> (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;[9] 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.
>
> (Emphasis added.)

[15] The question of location of the head office and whether 130 staff (a figure later reduced to 100) should be moved clearly falls at or near the significant end of the s 79(1)(a) spectrum. That conclusion is confirmed by the requirement next mentioned: that the question of shifting the location requires the amendment of the LTCCP, which in turn required use of the special consultative procedure.

[16] Section 82 states principles of consultation. Section 83 records the procedures to be employed when a local authority is required to use the special consultative procedure, as for such amendment of the LTCCP.[10]

Hansard and the Select Committee's Report

[17] The reasons for the detail of these requirements were explained both by the Minister of Local Government, the Hon Sandra Lee, and by the Select Committee. In introducing the first reading of the Local Government Bill the Minister stated:[11]

> ... the 700-page tome that is the old Local Government Act is in desperate need of reform. In fact, through its prescriptive nature it precludes the councils from doing things that make common sense; rather, it says that

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9 See [9] above.
10 Section 84.
11 (18 December 2001) 597 NZPD 14126–14127.

> unless something is prescribed it simply cannot be done. That is a bizarre approach to legislation in the new century, and it is not one that we support.
>
> ...
>
> We want to move from a detailed, prescriptive form of law to one that is empowering and flexible.
>
> ...
>
> Above all, the bill is about empowering communities; not, as some might imagine, the empowerment of the councils to exert greater and greater power and authority over their electors, but, rather, the empowerment of New Zealanders within their local communities to exercise even greater control over their elected representatives and councils, and over the environments and communities in which they live. That is to be achieved by requiring the councils to conduct their decision-making process in a democratic and open manner; by requiring greater responsibility from elected members in return for increased legislative flexibility; ... and by giving people the information and opportunities they need to influence the decision-making process. To be successful, the councils must in future be driven less by the need for strict compliance with a detailed statute, and more by the need to deliver the results that local communities demand.

[18] In reporting back the Select Committee noted that submissions revealed a mistrust of the decision-making processes of local authorities. It began with a summary of its response:[12]

> The key results of our consideration and any changes, by majority, are summarised below:
>
> Local authorities must encourage the presentation of community views.
>
> Communities are important in identifying community outcomes.
>
> Community views will be sought from the early stages and throughout decision-making processes.

[19] It reported:[13]

> The current Local Government Act 1974 is prescriptive in nature, sometimes preventing councils from carrying out activities that might have proved appropriate approaches to meeting the needs of particular communities. In contrast, the bill confers a more general form of empowerment on local authorities. The bill empowers communities as well as councils, and requires local authorities to be more accountable to their electors. Councils are allowed great flexibility in their activities but must ensure that their decision-making processes are open to the influence and scrutiny of their communities.

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12 Local Government Bill 2001 (191–2) (select committee report) at 1.

13 At 3, 9–10, 15–16.

...

Further amendments strengthen the need for local authorities to encourage, as well as allow, participation by communities. In subclause (1)(b)[now s 14(1)(b)], a local authority should make itself aware of the views of all its communities and have regard to those views.

...

The bill as introduced proposed a detailed and prescriptive process of consultation, which on the one hand is not needed for less significant decisions, and on the other hand does not involve the public early enough in the process to contribute to identifying the problem to be addressed, identifying options, and choosing the appropriate option. We have therefore proposed a number of amendments which collectively restrict this special consultative procedure to significant decisions ...; establish a requirement to involve the community in determining community visions and options (clause 73) [s 91]; and provide for community views to be considered at the earliest stage of planning (clause 62A(2)) [s 78(2)].

...

Community views should be sought throughout a decision-making process

Submissions suggested that the 'principles' of decision-making in clause 62 [s 77] define how the principles are to be carried out. Reassessment suggested that they are process requirements. This has been reflected in the proposed amendment where the clause is now the 'requirements' in relation to decisions.

We propose a new clause 62A [s 78] to establish when a local authority must consider the views of those affected by or having an interest in a decision by the authority. We suggest that this should commence at the early stage of the definition of problems and objectives. A local authority should further consider community views at the stages of the identification and assessment of options, the development of proposals, and the adoption of proposals. Consideration of community views therefore occurs throughout the decision-making process.

Although clause 62A [s 78] specifies when the local authority must consider the views of affected and interested persons, it does not require the authority to undertake a consultation process specifically to meet the requirements of that clause. We therefore recommend addition of a subclause (3) to clarify that there is no obligation to undertake a particular consultation process at that stage provided the processes of determining community outcomes, or some other process, have provided the council with the information it needed to take community views into account at each stage of the process.

...

[20] So while the narrow constraints of the former legislation were abandoned they were not replaced by a simple power in the elected local authority to do what it thought best in the interests of its community. As was recognised by Chisholm J in

Council of Social Services v Christchurch City Council,[14] although wide powers were conferred they were given subject to elaborate conditions. And, as he stated,[15] the views and preferences must be considered at *each* of the four stages of the decision-making process specified in s 78(2). Yet in ascertaining and considering community views and preferences formal consultation is not required (s 78(3).

[21] The background of a prescriptive regime replaced by one subject to elaborate conditions does not suggest that the prescription of s 78 may be read down because compliance would be over-demanding. Duffy J considered that the conditions in s 78 are merely directory. But as this Court stated in *A J Burr Ltd v Blenheim Borough Council*,[16] that concept is no longer considered particularly helpful. Any Parliamentary requirement must simply be complied with, even though in some contexts a court may withhold a discretionary remedy for breach. The point is discussed in *Manuel v Superintendent, Hawkes Bay Regional Prison*[17] and in Professor Joseph's text.[18]

[22] We did not invite submissions on the Local Government Act 2002 Amendment Bill introduced as a Government Bill on 29 April 2010.[19] Its explanatory note states that clause 8 of that bill would:[20]

> ... repeal ... s 78(2), which specifies the 4 different stages in the decision-making process when a local authority must consider the views and preferences of persons likely to be affected by, or have an interest in, the matter being considered.

[23] We must apply the law as it was at the time of the challenged decisions. We are not prepared to treat the clause as some kind of acknowledgement that subs (2) is over-demanding. Our decision is made without reference to the bill.

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14 *Council of Social Services v Christchurch City Council* [2009] 2 NZLR 123 (HC) at [22].
15 At [26].
16 *A J Burr Ltd v Blenheim Borough Council* [1980] 2 NZLR 1.
17 *Manuel v Superintendent, Hawkes Bay Regional Prison* [2005] 1 NZLR 161 (CA) at [33]–[34].
18 Philip A Joseph *Constitutional and Administrative Law in New Zealand* (3rd ed, Brookers, Wellington, 2007) at [21.7.3].
19 Local Government Act 2002 Amendment Bill 2010 (142–1).
20 At 3.

The issues

[24] WDC contends that EBOP failed to comply with its duties under s 78 to give consideration to the views and preferences of persons likely to be affected by, or to have an interest in the matter of the proposed changes:

(a) at the first stage, of definition: "(a) the stage at which the problems and objectives related to the matter are defined";

(b) at the second stage, of identification: "(b) the stage at which the options that may be reasonably practicable options of achieving an objective are identified"; and

(c) at the third stage: "(c) the stage at which reasonably practicable options are assessed and proposals developed".

[25] If the earlier stages were disregarded no issue would arise about the procedural handling of the fourth stage: "(d) the stage at which the third stage proposals are adopted"; in respect of the Tauranga-focused proposal it was carefully carried out. But the primary issue is whether the fourth stage started from the wrong point and what was adopted was not "proposals of the kind described in paragraph (c)", because there had been lack of due consideration at the first, second and third stages. It is necessary to consider:

(a) the facts as to those stages;

(b) how the stages are to be defined;

(c) whether there was due consideration of relevant views and preferences;

(d) the remedy for any breach.

[26] There is a further issue whether the EBOP decision was invalidated by the absence of council members from parts of the hearing.

The primary issue: was s 78 complied with?

(1) The facts

[27] The first step in the process of change was taken on 30 March 2006, when the EBOP Finance and Corporate Services Committee agreed to undertake an accommodation and location review using external advisors. A report that the committee had received from Miles Conway (Group Manager of EBOP's Human Resources and Corporate Services) recorded that the brief to the external advisors was to be developed in consultation with the Chairman and was to investigate "all aspects of our present and future accommodation needs, including where we would best be located to deliver our services and the estimated tangible and intangible costs and benefits associated with any recommendations".

[28] In April 2006, potential advisors were approached. As part of this process, on 13 April 2006 a briefing letter was sent to Deloitte New Zealand ("Deloitte"). The briefing letter said that EBOP was seeking:

> a comprehensive report analysing where [it] as a corporate organisation could best be located and what [were] the tangible and intangible costs, benefits, drawbacks and hurdles.

The letter set out a number of things that Deloitte would need to do, including definition of what makes a headquarters or the brains trust/leadership unit of EBOP and examining present and future functions.

[29] WDC contends that Deloitte was not asked to assess how well EBOP was fulfilling its functions, or how it could do better; rather, Deloitte was asked to:

> identify the most cost efficient means of delivering our functions in terms of location

We consider that the instruction cited at [28] was appropriately open-ended so as not to foreclose options at that stage. But it contained no reference to community views. So the instruction did not require Deloite to advise as to compliance with s 78.

[30] In June 2006 Deloitte provided a proposal which noted:

> Your requirements are set out in your letter dated 13 March 2006. In summary you require a comprehensive report analysing where Environment Bay of Plenty should be located in the future and the tangible and intangible costs, benefits/drawbacks and hurdles associated with the recommended option.

Duffy J noted that the proposal referred to the task as an accommodation needs and location review, but said that the content of the proposal indicated that Deloitte understood the wider and more comprehensive scope of the exercise.[21]

[31] The Deloitte proposal was subsequently accepted by EBOP, and Deloitte was engaged to carry out the review.

[32] A steering group was set up for "Project HQ". It consisted of the EBOP Chairman, Mr Cronin, Councillors Riesterer and Cleghorn, the Chief Executive, Mr Bayfield and two senior staff members. The group met regularly, including with Deloitte.[22]

[33] The Judge found that in October 2006 Deloitte undertook interviews with EBOP councillors and with the mayors and chief executives of local territorial authorities within EBOP's region. EBOP submitted that the discussions with those likely to be the best informed about local opinion must have conveyed to Deloitte community views on s 78 factors, so that such information was inherent in its report. We return to this important topic.

[34] In November 2006, Deloitte released that report, called "Environment Bay of Plenty Accommodation Needs and Location Review". It stated:

> We have considered a number of possibilities, and believe that there are really only two options that warrant serious consideration:
>
> Option 1: retain the head office in Whakatane;
>
> Option 2: relocate the head office to Tauranga.

Deloitte recommended that the EBOP head office should be relocated to Tauranga.

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21 At [12].

22 High Court judgment at [15].

[35] By memo dated 1 December 2006, the Chief Executive of EBOP, Mr Bayfield, recommended that EBOP:

> Support the key recommendation in the Deloitte report and therefore agrees in principle that the head office of EBOP should be relocated to Tauranga, subject to further detailed investigative work on costs and accommodation.

[36] On 7 December 2006 EBOP resolved that it supported the key recommendations in the Deloitte report and agreed in principle that the head office should be relocated to Tauranga, subject to further detailed investigative work on costs and accommodation.

[37] Both the Deloitte report and the report Mr Bayfield prepared for the 7 December 2006 meeting were published on EBOP's website after the in principle decision had been made by EBOP.

[38] The in principle decision was a crucial stage. There was no evidence that there had been any judgment, as required by s 79(1),[23] by EBOP about how to achieve compliance with:

(a) s 77 which required identification of reasonably practicable options for the achievement of the objective of a decision, stated by its Chief Executive as "a need to adapt to reflect changing community expectations and the changing roles of regional councils under recent legislation"[24] and in the context of heightened community expectations and broadened roles entailing a need to address pressing Council and staff accommodation needs. That necessarily included the siting of the head office and its staff.

(b) s 78 which required consideration of community views as to definition of problems and objectives related to "the matter", including such siting.

[39] EBOP submitted that the "objective of the decision" was to better fulfil new roles undertaken in respect of urban issues in the Western Bay and primarily in

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[23] [14] above.

Tauranga and that options other than a Western Bay presence were irrelevant to the issue of the siting ; the "reasonable practicable" options were self-selecting. It was reasonable, it argued, for EBOP to determine that locating key functions in any other centre, such as Rotorua, Te Puke, or Katikati, would not meet that standard. Other options had been considered at earlier reviews and formed part of EBOP's institutional knowledge.

[40] But the language of s 78(1) and (2)(a) is imperative: at stage 1 the council "must ... give consideration to community views and preferences". That can only mean consideration that is specific to the particular stages of the decision-making process as they develop.

[41] The same is the case at stage 2: s 78(2)(b). But what meaning should be given to the requirement "must ... give consideration to community views and preferences"? We return to this point at [68]ff.

[42] WDC says that none of the steps taken after 7 December 2006 involved calling for community views on the definition of the problems and objectives related to the matter, or the reasonably practicable options of achieving the identified objective. Rather, after that date the steps that were taken involved assessing the options that had already been identified by that date.

[43] The High Court judgment sets out some of the key steps[25] taken after 7 December 2006. These included:

(a) a formal presentation on the relocation at a workshop with WDC representatives on 31 January 2007;

(b) the commissioning of an independent market economics report on the potential positive and negative impacts likely to result from the relocation of the headquarters in February 2007; and

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[24] Including the LGA, the Land Transport Act 2003 and the Resource Management Act 1991.
[25] At [24]–[26].

(c) Deloitte's production of a socio-economic impact report on the proposed relocation in March 2007.

But each of these steps was an assessment of the proposed relocation already "approved in principle". So, for example, the title of the economic assessment prepared in February 2007 was "Assessing the Potential Economic Impacts of the Proposal to Move the Environment Bay of Plenty Head Office", rather than "what are views and preferences of relevant persons as to defining the problems and objectives" (s 78(1) and (2)(a)) or "what are the reasonably practicable options of achieving the objective" (s 78(1) and (2)(b)).

[44] On 15 March 2007, there was a public release of a statement of proposal and proposed amendments to EBOP's LTCCP. This proposal recommended moving the headquarters to Tauranga, including 130 staff positions. As the judgment records,[26] this action was taken because by then EBOP had realised that a decision to move its headquarters away from Whakatane was a decision that needed to be provided for in its LTCCP. As a result, that proposal was subject to the special consultative procedure in Part 6 of the LGA.

[45] Persons with an interest in making submissions on the proposal were given the opportunity to do so in writing by 2 May 2007. From 21 to 24 May (over 4 days) there were meetings at which EBOP heard interested persons who had asked to make submissions in person, as they are entitled to do under s 83(1)(h)(ii) of the LGA. The councillors then deliberated on the issue on 31 May and 1 June.

[46] The decision was effectively made on 1 June 2007, when EBOP decided to amend its draft LTCCP to provide for the relocation of its headquarters.

[47] EBOP had received a report dated 28 May 2007 from Mr Bayfield. It contained an option 2B which proposed the relocation of 100 positions from Whakatane to Tauranga, rather than the 130 positions initially envisaged. The June 2007 decision adopted option 2B.

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[26] At [26].

[48] The vote on 1 June 2007 in favour of relocation was carried by 9 votes to 5. Two councillors who voted in favour of relocation, Councillors Eru and Sherry, were absent for three and a half of the four submission days. Another councillor who voted in favour of relocation, Councillor Von Dadelszen, was absent for the whole of the submissions on 24 May and for about two and a half hours on the other three days of submissions.[27]

[49] On 21 June 2007, EBOP formally resolved to adopt the proposed amendment to its LTCCP and to relocate its head office, with the result that approximately 100 staff positions would be relocated to Tauranga.[28]

(2) How the stages are to be defined

[50] Stage 1 is when the problems and objectives relating to "the matter" are defined. What was that "matter"? In our view it was the matters recited at [38] above which, as stated in EBOP's letter of 13 April 2006 to Deloitte, included:

> ... where Environment Bay of Plenty as a corporate organisation could best be located.

So EBOP was required by s 78(2)(a), at the stage of defining the problems and objectives relating to siting, to "give consideration" to the views and preferences of persons likely to be affected by such siting.

[51] Stage 2 is when the options that may be reasonably practicable to achieve an objective are identified. EBOP was required by s78(2)(b), at the stage of identifying those siting options, to "give consideration" to the views and preferences of persons likely to be affected by the choice among such options.

[52] Section 78(3) provided that EBOP was not required by s 78 alone to undertake any consultation process or procedure. By s 79 it was for EBOP to make, in its discretion, a judgment about how to achieve compliance with s 78 and, in

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[27] Note that day four on 24 May is described as a "Deliberation" day when in fact it was still a submission day.

[28] The High Court judgment at [27] incorrectly records these decisions as being made on 14 June 2007.

doing so, to "have regard to the significance of all relevant matters".[29] These included:

(a) the extent to which different options were to be identified and assessed;

(b) the degree of quantification of costs and benefits;

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

(d) the extent and nature of any written record.

[53] Duffy J was prepared to draw the inference that, although there was no specific evidence of compliance with s 78(2)(a) and (b) (considering community views and preferences at stages 1 and 2), EBOP must be taken to have done so. Counsel for EBOP supported that conclusion.

[54] Counsel for WDC submitted there was a core problem with the EBOP decision-making process: that EBOP leapt to a "solution" – moving the head office to Tauranga – before it had clearly identified the problem and objectives, before identifying all reasonably practicable options, and without giving consideration to the views and preferences of those affected at each relevant stage.

[55] Counsel for EBOP submitted that, on the contrary, both Deloitte when preparing its report and, vitally, EBOP, knew of and are to be taken to have given consideration to the views and preferences of the relevant members of the Bay of Plenty community, including those of WDC and other local authorities and the residents within the various district council boundaries.

[56] We begin by clearing away events after the "in principle" decision on 7 December 2006 to move to Tauranga.

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[29] Section 79(2).

[57] That took EBOP's decision-making processes as to head office location well beyond stage 1 (identifying the problem and objectives)[30] and stage 2 (identifying reasonably practicable options)[31] and appears to have been the end point of stage 3 (assessing options and developing proposals).[32] It is difficult to see how the making of an in principle decision did not amount at the least to development of a proposal; indeed, EBOP appears to have been well down the track on stage four (adoption of proposals) by this point.[33]

[58] As at 7 December 2006:

(a) EBOP had not expressly formed any decision-making template in terms of ss 77–79;[34] and

(b) EBOP's own internal checklist dated 28 November 2006 noted that it was not informed about the community's views on the matter.[35]

[59] The Judge adopted a charitable approach to this acknowledgement, finding that the checklist was not a reliable indicator of what was known to EBOP at the time. Her opinion appears to have been strongly influenced by the view that "this was very early on in the decision-making process".[36] She considered that as at 7 December 2006 there was information in the Deloitte report that would have assisted EBOP's councillors to appraise the community's views on the first and second of the s 78 factors. And, she observed, Mr Bayfield's report of 1 December specifically drew attention to the need to engage with "stakeholders" in the region in relation to the proposed move.

[60] But while Mr Bayfield's report touched on stage 1 and 2 topics it gave no specific consideration to them distinct from the ensuing stage 3 which was its main focus. It included:

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30 Section 78(2)(a).
31 Section 78(2)(b).
32 Section 78(2)(c).
33 Section 78(2)(d).
34 At [71].
35 At [77].
36 At [81].

2.2 Deloitte's Recommendation

The Deloitte's report makes an unconditional recommendation which I support that:

"*The head office of Environment Bay of Plenty should be relocated to Tauranga*. The functions to be relocated should be broadly aligned to those identified in Option 2 of Section 6 of this report, however, changes may be necessary if a different organisation structure is selected to be put in place."

The report is the professional opinion of Deloitte and on this basis it does not in my opinion require adoption by Council. The report is the consultant's view which you, the Council and I as Chief Executive must consider in making and implementing any decision. **The report is not a blueprint for any relocation or retention project and should not be construed as setting out what changes will occur.** While I agree with Deloitte's key findings and recommendation, there are aspects of the report that clearly need further investigative work.

At this time I concur with section 8.3 of the report, that an 'in principle' decision only is needed. An 'in principle' decision to accept the recommendation will allow us to investigate in detail options at each of the locations on the basis that the head office should be located in Tauranga. If the recommendation is not accepted, the Council still faces a significant project to look at accommodation needs at all three locations. Over the next three to six months substantial work will need to be carried out, with the findings and options reported back to Council.

Nevertheless, *an 'in principle' decision to accept the strategic imperative and move the head office to Tauranga, subject to more detailed investigations, is a clear signal of intention by Council and will be reflected in your draft 2007/2008 annual plan.*

The Deloitte report, notwithstanding the lack of cost benefit analysis of the options, is a comprehensive analysis of location and accommodation issues facing the Council. While there have been previous debates on and consideration of the possibility of relocation, *the independent report represents the first detailed analysis of the drivers and implications of change Council has received.*

4.2 Assumptions

For the purpose of putting some shape and form around the impacts of a head office relocation Deloitte, with assistance from staff, have made a number of assumptions. The assumptions made (section 7.1 of Deloitte's report) are in the areas of relocation, human resources and property.

The assumptions can obviously be challenged and in the end may not reflect the final outcome. However, they have been made to assist in assessing the significant costs and benefits that a relocation of the size envisaged could have. *If we proceed on the basis of an 'in principle' decision to relocate the head office to Tauranga, the assumptions will need to be thoroughly evaluated and tested.*

4.5 Timeframes

The report suggests that it would be possible to achieve relocation within two years. I think this is probably an optimistic timeframe for a public sector authority such as ours but one which we should aim for.... If we get into developing a detailed plan for the relocation we will get a better understanding of timeframes and what may be achievable, particularly on the variations in *timeframes if the subsequent decision regarding a head office in Tauranga involves either leasing or owning and either an existing (unlikely) or new building*.

7 Significance of the Decision

... the decision to proceed either with relocation or otherwise is likely to be significant as it is likely to incur more than $5 million of expenditure.

A significant decision would have to go through due process either in conjunction with an annual plan or separately in accordance with the special consultative procedure under the Local Government Act.

In terms of community views, an 'in principle' decision to relocate Environment Bay of Plenty's head office to Tauranga can be incorporated into the draft 2007/2008 annual plan. The draft annual plan will be adopted by Council on 15 March 2007 and will then be open to public submissions for the month of April. *Including Council's 'in principle' decision as a proposal in the 2007/2008 annual plan signals your intention and will allow Environment Bay of Plenty's stakeholders and any member of the regional community to make their views known to Council and to provide input.*

A final or definitive decision would accordingly not be made until the 2007/2008 annual plan process has been completed in June 2007 allowing time for further investigation of options.

The public will be provided with an opportunity to provide input to the decision through the annual plan process, as already noted.

9 Summary

It is Council's role to determine how and from where Environment Bay of Plenty will serve the community best in the long term. The decision as to the location of Environment Bay of Plenty's head office is a strategic decision that must be made based on the roles Environment Bay of Plenty needs to play now and into the future.

I believe, in line with the recommendation in the Deloitte report, that Environment Bay of Plenty will best serve its regional community from a head office located in Tauranga, maintaining a substantial presence in Whakatane and an increased presence in Rotorua.

... A decision to adopt in principle the recommendation of Deloitte allows us to proceed to do further detailed investigative works on costs and the implications of relocation, consult with the community, and report back to Council for final consideration at or about June 2007.

Recommendation

That the Regional Council:

1 Receives the Chief Executive's report.

2 Receives the report 'Environment Bay of Plenty: Accommodation Needs and Location Review' prepared by Deloitte.

3 Supports the key recommendation of the Deloitte report and therefore agrees in principle that the head office of Environment Bay of Plenty should be relocated to Tauranga subject to further detailed investigative work on costs and accommodation.

4 Approves the public release of the report 'Environment Bay of Plenty: Accommodation Needs and Location Review' prepared by Deloitte.

5 Supports the Chief Executive's proposal to commence a change programme to redirect and reshape Environment Bay of Plenty aligning the direction of the organisation with new functions and legislation including our [LTCCP].

6 Approves the public release of this report and Council's decisions outlined in 1 to 5 above.

7 Notes that the Chairman, Deputy Chairman, Councillor Cleghorn, Councillor Bennett be delegated to continue to work with the CEO on this matter.

8 Notes that the decisions recommended above have been assessed in accordance with Environment Bay of Plenty's Policy on Significance as having a medium degree of significance.

9 That "Tauranga" means the greater Tauranga area including parts of Western Bay District.

(Bold text in original; italics added.)

[61] The report went far beyond stages 1 and 2. It contained the recommendation that EBOP:

> Supports the key recommendation of the Deloitte report and therefore agrees in principle that the head office of Environment Bay of Plenty should be relocated to Tauranga subject to further detailed investigative work on costs and accommodation

which six days later[37] EBOP resolved to support.

[62] Moreover the report is close to (and perhaps is) an acknowledgement that there had not, to that point, been consideration of public views and preferences. That

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[37] [36] above.

is suggested especially by the first emphasised passage in paragraph 7. If there had been such consideration it is unlikely to have escaped the attention of Mr Bayfield, who can hardly have given it consideration without knowing it.

[63] We construe s 78[38] as requiring stage 1 to precede stage 2, which must precede stage 3. Stage 4 must follow stage 3, to which it refers. Realistically, in a case of any complexity a purely lineal process would not be feasible. One would expect policy development in relation to stage 1 (definition of problems and objectives) to take place progressively in the light of provisional stage 2 possibilities (identification of reasonably practicable options) which might be coupled with a tentative assessment of the proposals which might come to be developed (stage 3). As was seen in *Friends of Turitea Reserve Society Inc v Palmerston North City Council*[39] a council is entitled to undertake initiatives rather than wait for others to begin a proposal. But care must be taken to avoid moving to stage 3 *decision-making* before the consideration of views of persons likely to be affected by or interested in the matter has occurred at stages 1 and 2. The same is true of stage 4. If an earlier stage is omitted a local authority must back up and perform it, not proceed without it.

[64] Mr Bayfield's report was dealing principally with stage 3 and led shortly after to EBOP's in principle decision which, in relation to the head office site was a stage 3 function. It had not been preceded by EBOP's compliance with stage 1 or stage 2.

[65] The report referred to a *future* seeking of community views. But that would *follow* the in principle decision as to location on 7 December 2006 and could relate only to the third and fourth stages of s 78(2), not the crucial second stage of identifying options, let alone the first stage of defining problems and objectives. We accept WDC's submission that by the time of Mr Bayfield's report a specific proposal was under the microscope; the stage at which a "macro" view should be

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38 [13] above.

39 *Friends of Turitea Reserve Society Inc v Palmerston North City Council* [2008] 2 NZLR 661 (HC).

taken, and views and preferences about those macro issues considered, was simply skipped.

[66] The information-gathering process that was undertaken after 7 December 2006 was conducted in the light of the in principle decision that had been made. The focus was on the pros and cons of that decision – it did not address the underlying issues of what the problem and objectives were, and what the reasonably practicable options for achieving those objectives might be.

(3) Whether there was due consideration of relevant views and preferences

[67] EBOP's principal submission on s 78 was that it is both unnecessary and unhelpful to attempt to draw bright lines between the various stages. It argued that affixing start and finish dates to the stages gives them a discreteness not provided by the LGA. The consideration of community views is to be given "in the course of the decision-making process" and work in the various stages may overlap. The process is a dynamic one which permits, where necessary, constant reviewing of earlier decisions to meet the vagaries of real life.

[68] EBOP submitted, and we accept, that councillors had institutional knowledge of public opinion from prior phases of consideration of EBOP's needs. EBOP further submitted that prior to Mr Bayfield's report there was stage 1 and 2 compliance by reason of the knowledge of Deloitte, which lay behind its report and should be attributed to EBOP.

[69] Deloitte conducted interviews with representatives of territorial authorities which included use of a questionnaire asking:

> 1. What do you see as being the role of Environment Bay of Plenty?
>
> 2. What level of interaction do you have now with Environment Bay of Plenty?
>
> 3. Do you believe that this level of interaction is adequate for Environment Bay of Plenty to perform their role?

4. Do you expect this role to change in the future and if so what changes do you expect?

5. How will these changes impact the level of interaction you expect to have with Environment Bay of Plenty?

6. Do you have a view as to whether Environment Bay of Plenty currently has enough of a presence in the region? If not what changes would you like to see and why?

7. Do you have difficulty in attracting and retaining appropriate staff?

[70] The responses included, in the case of the Rotorua District Council, the Mayor's statement that he did not want to see EBOP "building up bricks and mortar empires" in one city. He would prefer to see a Whakatane headquarters with satellite offices. In the case of WDC the Mayor was recorded as saying that if the head office went to Tauranga there would be a problem for the eastern Bay people and a "huge issue" for the Whakatane community.

[71] We have however concluded that there was no substantial basis for a finding that consideration of community views and preferences was given by EBOP at the first stage of s 78: definition of problems and objectives or at the second stage: identifying siting options. The Deloitte report simply did not purport to have done so. Nor did EPOB, whether by its councillors or perhaps by its Chief Executive Mr Bayfield on its behalf, following receipt of that report.[40]

[72] To "give consideration to the views and preferences" of the relevant members of the community is not achieved by mere knowledge of such views and preferences. It comprises two steps. The first is for EBOP to secure information as to such views and preferences. As a legal person it must do so by the conduct of natural persons which will be attributed to it by law.[41] The information may be held by councillors; it may be held by an agent of EBOP holding an appropriate delegation. We accept that some information of that kind was held by EBOP via its councillors and perhaps via Mr Bayfield. Some of the information obtained by Deloitte would have informed its report and so become knowledge of EBOP.

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40 We were not taken to the detail of the Chief Executive's delegated authority.

41 *Meridian Global Funds Management Asia Ltd v Securities Commission* [1994] 2 NZLR 291 (PC).

[73] There remains however the second step – of actually considering that information for the purposes of stages 1 and 2. The Judge considered that could occur "accidentally". It is not logically impossible that EBOP could have "accidentally" done enough in its engagement with those likely to be affected to comply with s 78(2). But the prescriptive nature of s 78(2), particularly when read with s 77, makes it inherently unlikely that there would be "accidental" compliance. There is simply no factual basis for the submission that that occurred.

[74] The submission that it did, like EBOP's argument that the consideration of community views is to be given "in the course of the decision-making process" and work in the various stages may overlap, fails to meet the problem that it was for EBOP to show it had carried out its statutory obligation.[42] No document and no other evidence was adduced to show it had *in the course of its decision-making process in relation to the matter of siting the head office, given consideration to the views and preferences of persons likely to be affected by, or to have an interest in, the matter*:

> (a) *at the stage at which the problems and objectives related to the matter are defined:*
>
> (b) *at the stage at which the options that may be reasonably practicable options of achieving an objective are identified*:

[75] That is the simple end of the matter.

[76] We appreciate the reasons for Duffy J's adoption of a broad approach. In terms of s 78(1) the decision-maker is the local authority and it is no function of the courts to engage in intense scrutiny of its decision-making processes. The s 78(1) requirement to "give consideration to the views and preferences of persons likely to be affected by, or have some interest in, the matter" is distinctly less than that of consultation under s 82 which s 78(3) explicitly excludes. By s 79 it is for the local

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[42] *Fairchild v.Glenhaven Funeral Services Ltd* [2003] 1 AC 32 at [13] per Lord Bingham:

> I think it salutary to bear in mind Lord Mansfield's aphorism in *Blatch v Archer* (1774) 1 Cowp 63, 65, quoted with approval by the Supreme Court of Canada in *Snell v Farrell* [1990] 2 SCR 311, 328: "It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted."

authority to make the discretionary judgment about how to achieve compliance with ss 77 –78. A court will not interfere with a discretionary judgment unless it is irrational or made on a wrong legal principle. If not, it is enough to validate such a judgment that there is some evidentiary basis for it.

[77] But here Parliament stipulated with particularity for the four stage consideration of community views and preferences. It is the task of the courts to monitor whether that has been done. EBOP, which possessed the means of putting the relevant information before the Court, has been unable to show that it complied with its obligations at the first two stages.

[78] Here EBOP did not make any s 79 judgment at all. That would not matter if reasonable consideration of community views and preferences had been made at stages 1, 2 and 3. But we are not prepared to share the assumption of the Judge that somehow that did occur when no evidence supports that conclusion.

[79] It follows that WDC has established breach in respect of each of the first and second stages.

The absence of councillors from public consultation meetings

[80] WDC's further claim was that the absence of two councillors for three and a half of the four days of public consultation meetings and of one councillor for the last day of such meetings and for two and a half hours of the other days invalidated the decision reached by nine votes in favour of the proposal and five against. The argument was rejected by the Judge on the basis:

(a) a fair and accurate account of the submissions made was provided to the absent councillors;

(b) disregarding the votes of those councillors would not have altered the final count. She rejected the submission that had the absent councillors been present throughout different perceptions might have emerged and led to a different result.

[81] Since WDC's success on its principal argument makes it unnecessary for us to determine the further issue we do not do so. We simply comment that the answer to what is a difficult question might best be provided by the exercise of the Court's ultimate discretion rather than any simple rule of law: see discussion at [21] above.

[82] We turn to remedy.

Remedy

[83] We have referred to the discretionary nature of judicial review. Here the granting of relief will require EBOP to undertake the procedures at stages 1 and 2, which we have held were not performed, and whatever further steps will follow. That will entail cost, no doubt substantial, and delay. But the law requires that those procedures be undertaken in a case of this kind and, on the findings we have made there is no basis for this Court to decline relief.

[84] There was much evidence about the meticulous care taken at stages 3 and 4 to engage in the full consultation required by ss 82–83 in respect of the special consultative procedure required to change the LTCCP. But to exercise discretion to allow that to compensate for the failure to carry out steps 1 and 2 would be to beg the fundamental question whether their performance would have made any difference. This is not a case where it can be stated with confidence that the outcome would inevitably have been the same. One pointer the other way is the evidence of options other than that proposed by Deloitte and described by witnesses as reasonably practicable, among them the moving of 70 rather than 130 positions to Tauranga (an option proposed by Mr Bayfield and adopted), that proposed by the Rotorua Mayor of retaining the Whakatane headquarters and setting up satellite offices around the Bay of Plenty, and the adoption of Rotorua as the head office site. The division among the councillors is another. We simply cannot speculate on what might have been.

Result

[85] We allow the appeal. We declare that in making the decisions of 1 and 21 June 2007 EBOP failed to comply with the requirements of the LGA. We set aside the EBOP decisions of 1 and 21 June 2007.

Costs

[86] EBOP must pay WDC costs in this Court for a complex appeal on a band A basis and usual disbursements, including costs for two counsel and travel costs of junior counsel, and costs in the High Court on a 3B basis.

Solicitors:
Brookfields Lawyers, Auckland for Appellant
Cooney Lees Morgan, Tauranga for Respondent