IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2017-404-001073
[2018] NZHC 1462

BETWEEN	SAVE CHAMBERLAIN PARK INCORPORATED Applicant
AND	AUCKLAND COUNCIL Respondent

Hearing: 8 February 2018

Appearances: Julian Long, Caitlin Hollings and Douglas Cowan for the Applicant
Katherine Anderson and Harriet Quinlan for the Respondent

Judgment: 19 June 2018

JUDGMENT OF MOORE J

This judgment was delivered by me on 19 June 2018 at 10:00 am
pursuant to Rule 11.5 of the High Court Rules.

Registrar/ Deputy Registrar

Date:

Contents

Paragraph Number

Introduction ..... [1]

Factual background

History, present configuration and use ..... [3]

The Albert-Eden Local Board ..... [12]

Save Chamberlain Park Inc ..... [20]

This application ..... [21]

(a) First cause of action: the allocation decisions ..... [22]

(b) Second cause of action: failure to collaborate and co-operate with other boards ..... [24]

(c) Third cause of action: predetermination ..... [25]

(d) Fourth cause of action: obligation to consult ..... [26]

Approach ..... [27]

First cause of action: did the allocation decisions amount to an error of law?

Introduction ..... [28]

The Council and its functions under the LGAC ..... [30]

Relevant allocation decisions ..... [46]

Analysis ..... [60]

The AELB, Chamberlain Park and the background to the second, third and fourth causes of action

Introduction ..... [94]

Early steps ..... [96]

Initial consultation on the draft AELB Plan ..... [112]

Further consultation and the preparation of the Master Plan ..... [125]

Consultation on the four scenarios and the Master Plan ..... [144]

Second cause of action: Did the AELB fail to collaborate and co-operate with other boards?

Introduction ..... [154]

Submissions ..... [156]

Analysis ..... [159]

Third cause of action: Did the AELB approach its decision-making with a closed mind?

Introduction ..... [171]

Predetermination – legal principles ..... [174]

Analysis ..... [186]

(a) Was there predetermination before February 2014? ..... [188]

(b) Events between February 2014 and April 2015 ..... [200]

(c) The in principle decision of 22 April 2015 ..... [216]

Conclusion on predetermination ..... [224]
Fourth cause of action: Was there a failure to consult on the case for change?
Introduction ..... [225]
Consultation obligations: legal principles ..... [227]
(a) LGA principles ..... [229]
(b) A common law duty of consultation? ..... [248]
Consultation: assessment ..... [253]
Having an open mind: legal principles ..... [273]
Having an open mind: assessment ..... [276]
Conclusion ..... [282]
Result ..... **[286]**
Costs ..... **[288]**

Introduction

[1] Auckland is this country's largest and one of its most rapidly expanding centres. As the city's demographics change, the diverse needs of its many communities correspondingly grow. This judgment concerns decisions by the Auckland Council ("the Council") and the Albert-Eden Local Board ("the AELB") to meet those changing needs; the proposed redevelopment of the Chamberlain Park Golf Course ("Chamberlain Park") into a multi-facility space for the wider benefit of local communities.

[2] The questions for determination in these proceedings are whether those decisions were correct in accordance with public law principles.

Factual background

History, present configuration and use[1]

[3] In 1939, what was described as a scrubby area of bush and waste land used as a water collection area for the Western Springs pumping station, was converted by hand into an 18-hole golf course known as Chamberlain Park.[2]

[4] Chamberlain Park has, at all times, been owned by the Council or its earlier iterations. It has always been an 18-hole golf course although its configuration has been slightly modified over time.

[5] Chamberlain Park is presently a par 69 for men with a standard number of par 3, par 4 and par 5 holes. The course plays between 5,040 and 5,242 metres. For women, the course is a par 70. The 12th is one of the longest par 5 holes in Auckland.

[6] The golf facilities at Chamberlain Park comprise a simple club house and associated parking area. The club house has a rudimentary pro shop where purchases of golf clubs, balls, tees and other golf accessories may be made. Golf clubs can be

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1 See generally the Affidavit of Richard Quince, sworn 10 August 2017.

2 Named after Neville Chamberlain, Prime Minister of the United Kingdom between 1937 to 1940.

hired. In the past the club house also accommodated a small café where food and drink could be purchased.

[7] Two incorporated societies operate the golf course and use the facilities. These are the men's and ladies' golf clubs. Members pay an annual subscription.

[8] However, unlike most other golf clubs, membership of Chamberlain Park does not entitle the member to play on the course. This limitation reflects the history of Chamberlain Park which was operated by the then Auckland City Council. In 1996 management passed to a private company, Auckland City Golf Ltd under a lease.

[9] In July 2013 Auckland City Golf Ltd ceased operations and control passed back to the Council. Since then the course has been managed by the Council through its City Parks Services under contract to the AELB.

[10] The green fees are modest and affordable. That is an historical artefact which reflects the Council's requirements when previous, private operators ran the golf course. Chamberlain Park also differs from most other golf courses in that there are no reserved times. Players may turn up and play at any time.

[11] Chamberlain Park is one of only two 18-hole public golf courses in the Auckland region which is owned and operated by a public body and is open for play to all comers at any time.[3]

The Albert-Eden Local Board

[12] The AELB was established as a local board to service the community within its local area as defined by Order in Council dated 15 March 2010.

[13] The local board is responsible for decision-making in relation to those parks and facilities within its area which are not the responsibility of the Council. This includes Chamberlain Park.

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3 The other is the Takapuna Golf Course in the Kaipātiki Local Board area.

[14] In 2011 the Council recognised there was pressure on winter sports fields in the Auckland region due to population growth and changing participation trends. The Council commissioned a report from Longdill and Associates on the capacity shortfall of sport fields in the Auckland region to identify and quantify these needs.

[15] The report identified a significant capacity shortfall and projected required additional capacity by 2021. For the area governed by the AELB the required capacity was estimated to be 339 sports field hours per week.

[16] The Council informed the AELB that it was one of five areas in the Auckland region most in need of more space for sports, a need forecast to become critical over the next decade. From 2011 the AELB also received input from various sports clubs and groups within its area. Consistently, these suggested that capacity for sports was stretched.

[17] As a result the AELB campaigned the Council for additional funding to acquire more open space. However, no more space was available. The AELB then looked to identify any existing space within its own boundaries and to examine the means by which it might increase and maximise the use of any existing open spaces.

[18] In 2013 the AELB began to consider Chamberlain Park as part of its wider review of the availability of open spaces. This was prompted by the expiry of Auckland City Golf Ltd's lease. Because Chamberlain Park was both owned and operated by the Council, the AELB regarded it as sensible to examine the open space at Chamberlain Park. Thus, in February 2014, the AELB asked Council policy analysts to report on what potential other uses might be made of Chamberlain Park.

[19] The detail of that examination is discussed later in this judgment. In summary, the AELB briefed the Council's policy analysts to assess Chamberlain Park to determine whether it could accommodate a nine-hole golf course, a driving range, a Chinese garden, an aquatic centre and eight to nine sports fields. The purpose of the referral was to obtain options for redevelopment on which the AELB would consult.

Save Chamberlain Park Inc

[20] The applicant, Save Chamberlain Park Inc ("Save CP"), is an incorporated society established by a group of like-minded individuals. Initially its purpose was to identify and lobby mayoral and local board members and candidates to retain Chamberlain Park in its present configuration. A website was set up to emphasise the Auckland-wide community nature of Chamberlain Park and to advance the case for opposing redevelopment. Members of Save CP include golfers and others who share a common interest in retaining Chamberlain Park in its current form.

This application

[21] These proceedings challenge the lawfulness of the Council's decision-making in relation to the development of a Master Plan for Chamberlain Park. There are four causes of action.

(a) First cause of action: the allocation decisions

[22] The first cause of action and Save CP's principal challenge focuses on whether the correct governance arm of the Council made decisions regarding the recreational use of Chamberlain Park. From its inception in November 2010, the Council has operated on the basis that the local board possesses the decision-making responsibility for Chamberlain Park. Save CP says decisions by the AELB relating to Chamberlain Park are unlawful because they should have been made by the governing body, not the AELB.

[23] If Chamberlain Park fails in this aspect of its challenge, it pleads three further causes of action.

(b) Second cause of action: failure to collaborate and co-operate with other boards

[24] Save CP says the local body breached any obligation under s 16(3) of the Local Government (Auckland Council) Act 2009 ("the LGAC") to collaborate and co-operate with other local boards; an obligation which arose "in relation to any change of use of Chamberlain Park".

(c) Third cause of action: predetermination

[25] Save CP next alleges the local board predetermined to change the use of Chamberlain Park from the "existing status quo". It says this predetermination arose sometime before February 2014, being the time Council staff were asked to prepare an assessment of Chamberlain Park. It also says that the AELB approached community engagement in consultation with a "closed mind as to the status quo and the possibility or desirability of that being maintained".

(d) Fourth cause of action: obligation to consult

[26] Finally, Save CP claims the local board breached a positive obligation to consult that required it "to consult on the status quo at the outset". This aspect of the claim overlaps in part with the third cause of action.

Approach

[27] Before turning to consider each of the causes of action, it is apposite to briefly comment on the Court's role in considering the judicial review of the exercise of powers by a local authority. As Richardson P stated in *Wellington City Council v Woolworths New Zealand Ltd (No 2)*, proceedings of this sort involve, essentially, questions of statutory interpretation.[4] The Court may review whether the local authority observed the criteria and purposes specified in the legislation and excluded considerations which were extraneous and did not make their decision for a purpose not contemplated by the legislation. The Court may also review whether the decision was reasonable in the sense that the outcome of the local authority's exercise of discretion is irrational or such that no reasonable body of persons could have arrived at the decision, and the only proper inference is the power itself has been misused. Something overwhelming is required for that second conclusion.[5]

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4 *Wellington City Council v Woolworths New Zealand Ltd (No 2)* [1996] 2 NZLR 537 (CA) at 545.

5 At 545, citing *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 at 230 per Lord Greene MR.

First cause of action: did the allocation decisions amount to an error of law?

Introduction

[28] This first cause of action concerns the Council's allocation powers under s 17 of the LGAC. That section empowers the "governing body" to reserve decision-making responsibility for any non-regulatory activity to itself or delegate that power to local boards. Save CP argues that the allocation of decision-making in respect of Chamberlain Park to the AELB was unlawful and, thus, void. Section 17 has not previously been considered by the courts.

[29] In order to resolve this issue, the process by which the allocation of decision-making responsibility occurred requires some description. This is comprehensively covered in the evidence of Phillip Wilson, the governance director of the Council and a member of the Council's executive leadership team. Mr Wilson's division supports the activities of the Mayor, 20 councillors and the 21 local boards. As such, he has specific responsibility for ensuring local boards have the support necessary to fulfil their roles and ensuring the Council organisation effectively balances local views and aspirations against regional network planning.

The Council and its functions under the LGAC

[30] The Council was established on 1 November 2010 under the LGAC; bespoke legislation for Auckland. The Council makes decisions for the Auckland region which extends to Te Hana in the north, Pukekohe to the south, Kawakawa Bay to the east and Piha to the west.[6] The LGAC sets out its structure and functions, duties and powers which differ from the general provisions applying to other local authorities operating under the Local Government Act 2002 ("the LGA") and other enactments.[7]

[31] There are two classes of decision-making within the Council.[8] The Council, as the governing body, is a unitary authority. More proximate to Auckland's communities, local boards are responsible for local decision-making.

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6 As defined in the Local Government (Auckland Boundaries) Determination 2010, and contained in a map with the reference number LGC-Ak-R1.

7 Local Government (Auckland Council) Act 2009, s 3(b).

8 The Auckland Council's governance structure also includes the Independent Māori Statutory Board, established by s 81, and whose members sit on certain committees in accordance with s 85.

[32] The "governing body" is defined in ss 4 and 8 as the entity comprising the members of the Council, being the Mayor and Council members, elected in accordance with the Local Electoral Act 2001. Certain decisions under the LGAC are reserved for the governing body. These include the setting of rates and all regulatory decisions.

[33] Other decisions are reserved for local boards. Local boards are established for each local board area and also made up of members, elected by the local board constituency.[9] Local boards are unincorporated bodies and thus do not have separate legal standing from the Council.[10]

[34] Local boards enjoy a broad mandate. As Ms Anderson for the Council emphasises, local boards are not community boards. While community boards act solely under delegated authority,[11] local boards have the power to make specific decisions on behalf of the Council relating to matters affecting their local board areas which are set out in statute;[12] delegated by the governing body or by Auckland Transport;[13] or allocated by the governing body pursuant to s 17. They also have governance responsibilities over a discrete set of local assets, services and activities, a responsibility to provide input into regional plans, policies and decisions, and to engage with their communities to identify local needs and preferences.

[35] In the scheme of the LGAC, s 17 is one of a number of provisions which prescribe the manner by which the Council makes its decisions.[14] It concerns what Mr Wilson describes as "a middle group of decisions", non-regulatory decisions. The governing body is responsible for determining the appropriate allocation of non-regulatory decision-making between the governing body and the local boards, based on principles set out in s 17 of the LGAC. It is these allocations which are the focus of the first cause of action.

[36] Section 14 sets out the general scheme of Council decision-making. It provides that both the governing body and local boards are responsible and democratically

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9 Sections 10, 11.
10 Section 12.
11 The establishment of community boards is provided for in s 49 of the Local Government Act 2002.
12 As provided in ss 13 and 16 of the Local Government (Auckland Council) Act 2009.
13 See sections 13 and 31, and 13 and 54, respectively.
14 See generally sections 14 to 23.

accountable for the decision-making of the Council. Whether the responsibility for making any particular decision rests with the governing body or with one or more of the local boards depends on the nature of the decision being made.[15] Decision-making responsibility is then allocated in subs (3) as follows:

(a) section 15 sets out the classes of decisions which the governing body must make, including decisions in relation to some non-regulatory activities;[16]

(b) section 16 sets out the classes of decisions which local boards must make, including decisions in relation to some non-regulatory activities;[17] and

(c) section 17 guides the governing body's exercise of its power to allocate responsibility for decisions in respect of non-regulatory activities of the Council, either to itself or the local boards.

[37] "Non-regulatory activities" are not defined (a point I return to later), but "local activities" are defined as "the non-regulatory activities of the Auckland Council in respect of which a local board is allocated decision-making responsibility under section 17", and include providing services, providing and operating facilities, and providing funding and other support to groups and organisations.[18] Section 17, in its entirety, is set out below:

> **"17 Principles for allocation of decision-making responsibilities of Auckland Council**
>
> (1) Decision-making responsibility for any non-regulatory activity of the Auckland Council must be allocated by the governing body—
>
> (a) to either the governing body or the local boards; and
>
> (b) in accordance with the principles set out in subsection (2); and
>
> (c) after considering the views and preferences expressed by each local board.

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15 Section 14(2).
16 Section 15(1)(b)(ii).
17 Section 16(1)(a).
18 Section 4.

(2) The principles are—

(a) decision-making responsibility for a non-regulatory activity of the Auckland Council should be exercised by its local boards unless paragraph (b) applies:

(b) decision-making responsibility for a non-regulatory activity of the Auckland Council should be exercised by its governing body if the nature of the activity is such that decision making on an Auckland-wide basis will better promote the well-being of the communities across Auckland because—

(i) the impact of the decision will extend beyond a single local board area; or

(ii) effective decision making will require alignment or integration with other decisions that are the responsibility of the governing body; or

(iii) the benefits of a consistent or co-ordinated approach across Auckland will outweigh the benefits of reflecting the diverse needs and preferences of the communities within each local board area."

[38] A number of key principles appear in the text of s 17:

(a) Allocation decisions are mandatory. Only two bodies may be allocated responsibility; the governing body or the local boards. No other entity may exercise decision-making responsibility for non-regulatory activities. It is not permissible for an activity not to be allocated.

(b) Allocations must be made in accordance with the principles set out in s 17(2).

(c) Allocation decisions are only to be made after the governing body has considered the views and preferences expressed by each local board.

[39] I agree with Mr Long, for the applicant, when he submits that the allocation power under s 17 is not unfettered. It must be exercised in a principled way. Section 17(2) lists the principles which the governing body is obliged to follow when making an allocation decision. It contains the presumption that decision-making for a non-regulatory activity of the Council should be exercised by its local boards. That presumption is rebutted only where s 17(2)(b) is engaged, namely where the decision-

making responsibility for a non-regulatory activity of the Council should be exercised by its governing body because the nature of the activity is such that decision-making on an Auckland-wide basis would better promote the well-being of the communities across Auckland. As Mr Long submits, whether paragraph (b) is engaged turns on the *nature of the activity*.

[40] Listed in s 17(2)(b)(i)-(iii) are three indicators of why decision-making on an Auckland-wide basis would better promote the well-being of communities across Auckland:

(a) because the impact of the decision will extend beyond the single local board area;

(b) because effective decision-making requires alignment or integration with other decisions which are the responsibility of the governing body; or

(c) because the benefits of a consistent or co-ordinated approach across Auckland will outweigh the benefits of reflecting the diverse needs and preferences of the community within each local board area.

[41] As Ms Anderson submits, the focus of s 17(2) is the allocation process. The considerations contained in s 17(2)(b)(i)-(iii) do not invite the application of a tick box exercise. The process necessarily requires the consideration of broader issues beyond those of particular interest groups.

[42] The principles set out in subs (2) reflect the careful balancing of priorities which underpin the division of decision-making power in the LGAC between the governing body and the local board. On the one hand is the need, recognised in the purpose section and s 9,[19] for unified and streamlined decision-making in the Auckland area. On the other is a desire to maintain and enable democratic decision-making within local communities, recognised in ss 10, 16 and 20.

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[19] Section 9 provides that the role of the Mayor is to articulate and promote a vision for Auckland and provide leadership for the purpose of achieving objectives that will contribute to that vision.

[43] Section 20 requires each local board to adopt a plan, the purpose of which is:[20]

> "(a) to reflect the priorities and preferences of the communities within the local board area in respect of the level and nature of local activities to be provided by the Auckland Council over the next 3 years; and
>
> (b) to identify and describe the interests and preferences of the people within the local board area for the purposes of enabling the local board to communicate those interests and preferences for the purposes of section 16(1)(b); and
>
> (c) to provide a basis for developing the local board agreement for each of the next 3 years; and
>
> (d) to inform the development of the next LTP, particularly in relation to the identification of the non-regulatory activities of the Council for which decision-making responsibility should be allocated to the local board; and
>
> (e) to provide a basis for accountability of the local board to the communities in the local board area; and
>
> (f) to provide an opportunity for people to participate in decision-making processes on the nature and level of local activities to be provided by the Council within the local board area."

[44] As Ms Anderson submits, this is a mechanism by which local boards are able to determine local preferences and priorities in relation to non-regulatory activities for which they have been allocated responsibility, and consult with their communities. Parliament's Auckland Government Legislation Committee, on its amendments to the Local Government (Auckland Council) Bill which led to the inclusion of s 17, is recorded as saying:[21]

> "Our amendments seek to ensure that decision-making by the two tiers of the Auckland Council would be allocated according to clear principles, and that the governing body of the Council and the local boards would sit alongside each other and have distinct roles, rather than operate in a hierarchical relationship."

[45] The division of responsibility set out in s 17 reflects this framework. As Ms Anderson submits, the principle that local boards are best placed to make most decisions is underscored by the presumption contained in s 17(2)(a). However, as Mr Long adds, the principles listed in s 17(2)(b) recognise that some non-regulatory

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[20] Section 20(2).

[21] Local Government (Auckland Council) Bill (36-2) (select committee report) at 3.

decisions concerning certain activities might, on closer examination, be better suited to the wider focus of the governing body.

Relevant allocation decisions

[46] One of the early tasks in the rollout of the new unitary authority was the initial allocation of non-regulatory decision-making between the governing body and the local boards. The Auckland Transition Agency ("the ATA") was mandated to carry out this initial allocation.[22] The ATA's allocation was contained in the long term plan ("LTP") which it prepared for the period 1 November 2010 to 30 June 2012. A LTP is a 10 year forecast which every council in New Zealand is required to publish, and against which the council sets out its 10 year budget. LTPs identify the future focus of council activities, the intended community outcomes and provide local communities with a basis for holding the governing body accountable. Annual plans and budgets are adopted annually.

[47] The ATA's LTP published its initial allocation in an "allocation table" which listed a wide range of non-regulatory activities and prescribed whether the governing body or a local board was the decision-maker in respect of each activity. After the Council was established and the ATA's functions were extinguished, allocation tables continued to be published.

[48] Perhaps unsurprisingly, the ATA's initial allocation table broadly allocated decision-making in respect of "local" recreation and sports activities and open spaces to local boards, and regional activities to the governing body. After the publication of the ATA's initial LTP allocation table, Mr Wilson describes any further modifications as "incremental in nature".

[49] Since the ATA's initial LTP, two further LTPs have been published by the Council. The first was in 2012, covering the decade 2012 to 2022. The second was published in 2015 for the period 2015 to 2025. The allocation decisions by the ATA

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[22] The ATA was established under the Local Government (Tamaki Makaurau Reorganisation) Act 2009.

and in the 2012 LTP are in focus. They were the operative allocation decisions at the time most of the decisions concerning Chamberlain Park were made.

[50] During the preparation of the Council's 2012 LTP the starting point was the initial ATA allocation table. Amendments identified by exception where experience demonstrated such a need, with a modest number proposed by the Mayor. These were considered by the Strategy and Finance Committee ("the SFC"), which recorded agreement in principle, subject to a review process involving local boards.

[51] During the review process input was received from various sources including local body support staff, a governing body workshop, a review by senior organisational managers and the Mayor's office. Workshops were held in October and November 2011 with local boards to discuss issues identified by that process. Also considered was a report entitled, "Allocation of Non-Regulatory Decision-Making Responsibilities". This report acknowledged that more work was required to assist with allocating decision-making of, amongst other things, parks within the ambit of the governing body. The SFC approved the proposed revisions and released a draft plan for public discussion.

[52] The public consultation process included the convening of regional and local public hearings at which submissions were received on the LTP, including the allocation table. The governing body adopted the 2012 LTP on 28 June 2012.

[53] Significantly, regional parks within the governing body's decision-making ambit were listed in Schedule 1 of the allocation table. Decision-making for all remaining parks was allocated to local boards. Schedule 1 is entitled, "Regional Facilities and Parks". Regional parks are listed as those subject to Treaty of Waitangi settlements and parks delivering Auckland-wide benefits. No regional recreation facilities are listed. However, responsibilities in respect of both recreational services and parks services were allocated.

[54] While this work was being undertaken other policy work had commenced on the question of which parks, if any, should be considered as delivering "Auckland-wide benefit". On 15 February 2012, the SFC agreed that the Regional Development

and Operations Committee ("the RDOC") would approve a procedure for an evidence-based assessment of Auckland-wide benefits delivered by parks and the creation of a schedule of specific parks delivering Auckland-wide benefits. In its report of 24 May 2012 the RDOC noted "a purely criteria-based assessment of Auckland-wide benefit has limitations as a basis for decision-making for parks services" and resolved that further engagement with the local boards should be undertaken:[23]

> "It has become evident from the work to date that further discussion between Local Boards and members of the governing body is required in order to reach a final decision making allocation in an open, consultative and transparent way. The aspiration to resolve the allocation of decision making for parks services before the adoption of the Long-term Plan does not allow sufficient time for appropriate discussions with Local Boards to take place.
>
> The preferred approach is to retain the status quo for decision making for parks services as an interim measure while further discussion with local boards is undertaken. Any agreed changes to the current allocation would be implemented as and when possible, and no later than the 2013/2014 Annual Plan."

[55] A range of possible approaches to determining which parks delivered Auckland-wide benefit were explored. It was agreed that the Parks, Recreation and Heritage Forum ("the Forum"), as a sub-committee, would formulate the appropriate engagement process and compile a schedule of specific parks delivering Auckland-wide benefit prior to consideration by the RDOC.

[56] Engagement with local boards, councillors and external stakeholders on this question was undertaken during late 2012 and early 2013. The ATA's initial allocation provided the starting point for these discussions. After further meetings and consideration by the Forum, the governing body considered a report entitled, "Clarification of Decision-Making Allocation for Specific Parks" and approved the following regional parks for which it would be the decision-maker:

(a) parks subject to Treaty of Waitangi settlement, including:

(i) identified parks subject to the Treaty of Waitangi settlement with Ngā Mana Whenua o Tāmaki Makaurau ("the Tāmaki Collective");

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[23] Affidavit of Philip Richard Wilson, sworn 22 September 2017, at 139.

(ii) identified land contiguous with parks subject to Treaty of Waitangi settlement with the Tāmaki Collective;

(b) parks delivering Auckland-wide benefits, including:

(i) specified regional parks (parks formerly owned or managed by the Auckland Regional Council);

(ii) specific parks or reserves contiguous with regional parks; and

(iii) other specified parks delivering Auckland-wide benefits (the Auckland Domain and Motukorea (Browns Island)).

[57] Decision-making for all other parks was allocated to local boards. Prior to the allocation decisions the governing body had received formal feedback from local boards on the proposed decision-making allocation on specific parks. Consultation with known interested parties was also undertaken. Groups that had previously indicated an interest in the decision-making allocation for parks were invited to provide feedback. The governing body recorded in its report of 22 August 2013 those parks where the decision-making allocation remained "contentious", or where there may be future Auckland-wide benefits in those parks becoming parks under the regional park network. Chamberlain Park was not referred to.

[58] No similar process was carried out in respect of recreational services or facilities.

[59] The allocation table was also reviewed during the development of the 2015 LTP. On 5 November 2014 the Budget Committee considered a report entitled, "Decision-Making Allocation Review". This report recommended the draft allocation of the Council's non-regulatory decision-making responsibilities for inclusion in the 2015 LTP public consultation materials. The AELB presented its priorities to the governing body during a meeting at which the 2015 LTP was considered. Again, there is no evidence of specific consideration of Chamberlain Park during any of these processes. Mr Wilson observes he is not aware of any public submission made in any

LTP or annual plan consultation process on whether the decision-making in respect of Chamberlain Park and/or golfing at Chamberlain Park should be allocated to the governing body.

Analysis

[60] To determine whether an error of law was made, a review of the process actually adopted by the Council is required. With the exception of one point of statutory interpretation, discussed more fully below, Save CP's submissions were directed to this issue.

[61] Save CP claims the Council erred in law by not identifying Chamberlain Park as a regional recreational facility in terms of s 17(2)(b). Mr Long submits compliance with s 17(2)(b) requires the following steps:

(a) identification of the activity;

(b) assessment and analysis by the governing body, namely whether the activity is such that communities across Auckland would benefit from a regional framework and approach being brought to bear on the decision; and

(c) a decision based on the factors contained in s 17(2)(b)(i)-(iii).

[62] He submits the essence of the principles reflects that some non-regulatory decisions relative to certain activities might, on examination, be better suited to the governing body's wider geographical and community focus. He claims the factors listed in s 17(2)(b)(i)-(iii) are alternatives; that if one is engaged the governing body should conclude decisions relating to that activity should be made on an Auckland-wide basis. He says the governing body gave insufficient examination to this principle; that the allocation decisions failed to comply with these principles because they were never considered in relation to Chamberlain Park.

[63] In his oral submissions Mr Long summarised Save CP's position in the following way. It is the governing body's responsibility to allocate the decision-

making for non-regulatory activities to either itself or local boards. It must do this in accordance with s 17(2). That responsibility must be exercised by a local board unless s 17(2)(b) applies. That provision applies if the nature of the activity is such that decision-making on an Auckland-wide basis would better promote the well-being of communities across Auckland. The statute requires the promotion of the well-being of communities across Auckland where the impact of the decision will extend beyond a single local board area; effective decision-making aligns with other decisions of the governing body; or the benefits of a consistent or co-ordinated approach across Auckland will outweigh the benefits of reflecting the diverse needs and preferences of the communities within each local board area. To properly apply the principles under s 17(2), the decision-maker needs to have made a decision on whether or not s 17(2)(b) applies. To do that, depending on the activity, a positive inquiry into the nature of an asset which falls within the identified activity area must be made and only then may an allocation decision be made.

[64] In summary, Mr Long submits that Chamberlain Park is a unique asset which required the governing body to undertake an analysis as it did in respect of other assets, such as the Auckland Domain. On the evidence, he submits it would appear that Chamberlain Park simply "fell through the cracks and was forgotten".

[65] Ms Anderson submits the allocation of parks was a result of a comprehensive and considered approach to the allocation criteria in s 17(2)(b). She disagrees with Mr Long's submission that the factors in s 17(2)(b)(i)-(iii) are alternatives. She says if this interpretation was adopted, it would necessarily result in a dramatic reduction in the number of activities which would fall to local boards because most local parks and facilities attract users from other board areas across Auckland. She also submits that the plain language of s 17(2)(b) does not support Mr Long's submission because of the inclusion of the word "should".

[66] I agree with Ms Anderson's interpretation of s 17(2)(b) for two reasons.

[67] First, the plain meaning of the provision is instructive. Section 17(2) contains the principles which the governing body should comply with when making allocation decisions. Intrinsically, the "principles" is indicative of a permissive, rather than

mandatory, approach to decision-making. They operate as a guide, rather than a constraint. Indeed, the language of the principles at s 17(2)(a) and (b) is permissive.

[68] Namely, the use of the word "should" in contrast to "must" conveys a discretionary, rather than a mandatory, fetter on the exercise of power.[24] King CJ, in the Supreme Court of South Australia, had the following to say about the use of the word "should" in a comparable legislative setting:[25]

> "I am unable to agree that the use of the word "should" indicates an intention that the principle be mandatory. The word "shall" is prima facie a word of mandatory import. The same can be said of the word "must" which is now fashionable with Parliamentary counsel as a synonym for "shall". I think that the use of "should" rather than "shall" or "must" indicates that the sense is not mandatory. The standards specified in the principle are the goal to be aimed at and the planning authority is to be guided by those standards in considering an application for consent."

[69] Secondly, the inference to be drawn from the section's plain meaning is not displaced by reference to the scheme of the LGAC and its wider purpose. As already discussed, the LGAC carefully balances the competing priorities underpinning its division of decision-making power. Section 17 is an integral part of the scheme and represents the compromise between those priorities. Resort to principles guiding the governing body's allocation decisions, rather than mandatory rules, reflects the practical reality that nuanced allocation decisions will often be required to satisfy these competing priorities. The more rigid approach to the application of s 17, as proposed by Mr Long, would not provide the necessary latitude for the governing body when balancing the frequently competing needs of establishing and carrying out its long term vision for Auckland and, where possible, keeping decision-making in the hands of local communities.

[70] Relatedly, there is an implicit acknowledgement in s 16(3) of the LGAC that some responsibilities of local boards will relate to activities which impact on other local board areas.

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[24] *Re Victim X* [2003] 3 NZLR 220 (CA) at [28] per Keith J; *New Zealand Federation of Commercial Fishermen Inc v Minister of Fisheries* HC Wellington CIV-2008-485-2016, 23 February 2010 at [39]-[40].

[25] *South Australian Housing Trust v Development Assessment Commission* (1994) 63 SASR 35 at 38.

[71] Against that background I now turn to consider the actual process followed by the Council and whether it complied with s 17.

[72] In their written submissions both Mr Long and Ms Anderson placed some emphasis on the "activity" classification of Chamberlain Park as a recreation facility or open space activity. Presumably this reflected the evidence that while more detailed reports and classifications of parks were prepared over the relevant period, no specific allocation reports were prepared in relation to recreation facilities. No recreation facilities were allocated as regional facilities.

[73] I accept that if adopting the Council's nomenclature in its allocation tables, Chamberlain Park might be more appropriately classified as a recreation facility. But Chamberlain Park was, at all material times, included within the list of parks. No challenge is made to that categorisation. The issue is not whether Chamberlain Park was properly classified as a park or a recreation facility, but rather whether allocation to the AELB complied with the principles in s 17. After all, the "activity" or "park" tags were classification labels adopted by the Council, not by the LGAC. Furthermore, as the 2012 LTP records, regional sports facilities are generally the responsibility of Regional Facilities Auckland. That is why no parallel process of identification of which recreational facilities were regional occurred and why no regional recreational facilities are listed in the 2012 LTP.

[74] Counsel also disagreed on the level of scrutiny necessary for the governing body to discharge its allocation responsibility. Ms Anderson submits s 17(2) requires allocation of decision-making responsibility in respect of activities such as the provision of facilities, rather than allocation of particular assets. Mr Long submits that the decision-making process followed was erroneous because the actual characteristics of each asset, including Chamberlain Park, were not considered. He submits that compliance with s 17 requires that level of scrutiny.

[75] Section 17 of the LGAC does not refer to Council assets. It refers to "non-regulatory activities". Neither "non-regulatory activities", nor "activities", are defined in the LGAC. But s 4(2) provides:

> "**4 Interpretation**

…

(2) Unless the context requires another meaning, terms and expressions used and not defined in this Act, but defined in the Local Government Act 2002, have the same meaning as in that Act."

[76] "Activity" is defined in the LGA as:[26]

"**activity** means a good or service provided by, or on behalf of, a local authority or a council-controlled organisation; and includes—

(a) the provision of facilities and amenities; and

(b) the making of grants; and

(c) the performance of regulatory and other governmental functions"

[77] Plainly, s 17 is concerned with activities such as the provision and operation of facilities. This means that an error of law cannot be established merely on the basis that the governing body failed to engage in a detailed inquiry into a particular asset. In broad terms then s 17 contemplates an assessment and classification of non-regulatory activities, rather than a granular assessment of individual assets. However, I accept that in exercising its discretion in accordance with the principles in s 17(2) the governing body will, from time to time, be required to consider and consult on specific assets, such as parks. As Mr Long submits, it is the specific asset which will often inform and define the activity under consideration.

[78] Was such a level of scrutiny necessary in respect of Chamberlain Park? This issue requires a closer scrutiny of the allocation decisions made by the Council.

[79] I agree with Mr Long that the initial allocation by the ATA was, to some extent, tautological in the sense it allocated decision-making in respect of "local" activities to local boards and decision-making in respect of "regional" activities to the governing body. But it is also apparent that some consideration of the nature of the decision-making, including the scope of the impact it would have, occurred; in other words whether decision-making would require alignment or integration with other decisions, and the benefits of co-ordination versus reflecting diverse needs. This approach is apparent in the initial allocation for both recreation and sports and open space.

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[26] Local Government Act 2002, s 5.

[80] In the 2012 LTP, while there is little specificity as to how nominated assets were to be treated (in other words whether they delivered Auckland-wide benefits or not), there is more refined guidance on what non-regulatory activities were within the ambit of local board and governing body decision-making. But in Schedule 1 regional parks are classified in a generic way, as parks subject to Treaty of Waitangi settlement and parks delivering Auckland-wide benefits as regional.

[81] This indicates that the governing body was primarily concerned with non-regulatory activities which would impact on local and regional recreational facilities and parks, rather than the facilities and parks themselves. For example, the use of local parks, and activities conducted within local parks, were allocated to local boards, while the use of and activities conducted within regional parks and the acquisition and divestment of all park land were allocated as governing body responsibilities. This, I believe, illustrates Mr Long's point. Without a framework for assessing which parks are local and which are regional, aspects of this allocation are, perhaps, tautological.

[82] However, the Council's analysis did not end there. Further efforts were made at classifying parks which would deliver Auckland-wide benefits. This is evident from a number of governing body committee reports published in 2012 and 2013. One such example is the RDOC's report which identified a number of issues relating to the application of s 17(2)(b). The report relevantly observed:[27]

> "• There is not always a correlation between the delivery of Auckland wide benefits from specific parks and the requirements of Section 17(2) of the Local Government (Auckland Council) Act 2009 (i.e. a park that is delivering Auckland wide benefits does not necessarily require governing body decision making in order to "*better promote the well-being of the communities across Auckland* …")
>
> • There is no clear distinction between local parks and Auckland wide parks. Both local benefits and Auckland wide benefits are delivered throughout the open space network and the mix of benefits change gradually within the ranking from predominantly Auckland wide to predominantly local.
>
> • Auckland wide benefits may be quite specific in nature, and individual parks that largely deliver local benefits may be delivering important Auckland wide benefits of a specific type. Decision making in relation to such parks should be primarily focused on delivery of local

[27] Affidavit of Philip Richard Wilson, sworn 22 September 2017, at 140.

benefits, while ensuring the specific Auckland wide benefits continue to be delivered.

…

- There is a range of individuals, groups and organisation (communities of interest) from across Auckland who have an interest in either specific parks, or specific areas of interest that are spread across the park network. For specific local parks, local boards will be the appropriate point of contact for communities of interest. However, where interest spans multiple local board areas, decision making allocation should enable a single point of contact representing Auckland Council."

[83] These extracts reveal that the governing body was not only well aware of the complexities and tensions implicit in exercising its allocation powers under s 17, but also that the allocations it made were not simply an exercise in tautology. In particular, it is plain the governing body was alive to the principle that activities and assets could not simply be classified by applying one of the considerations contained in s 17(2)(b) in isolation. It specifically considered that while decisions on specific assets might have an impact on communities beyond the local board's geographic area, it did not follow that in such cases decision-making on an Auckland-wide basis was necessary.

[84] As noted, the governing body called for further consultation with local boards. This was undertaken by the Forum which produced its report on 4 June 2013. The governing body's report of 22 August 2013 recommended the adoption of the allocations proposed by the Forum. These related to specific park areas within the Auckland area and represented the culmination of further investigation work undertaken over the previous two years. As the report noted:[28]

> "The identification of parks delivering Auckland-wide benefits was made through an assessment of decision making allocation options for a range of specific parks against Section 17(2)(b) of the Local Government (Auckland Council) Act 2009. This assessment was tested with Local Boards and councillors through both workshops and formal meetings. The proposed schedule reflects a consensus view with regard to those parks that deliver Auckland wide benefits."

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[28] At 227.

[85] These complexities are discussed by Mr Wilson in his affidavit. He makes the following observations on local versus regional activities:

(a) The Council's business includes the provision of many types of assets supporting leisure, recreation and sport activities. Such assets include community halls, swimming pools, tennis courts, children's playgrounds, fitness centres and parks.

(b) For those assets which the Council classifies as local (with decision-making authority allocated to the local board) it would be extremely rare for any Council asset to be used exclusively by the community it is located in. For example, most sports fields are local parks for which a local board will make decisions. However, sports teams from across the region will travel to the sports fields for games.

(c) Members of the community from across Auckland travel to use playgrounds. An obvious example is the playground at Mission Bay which is a local board asset.

(d) West Wave is the only swimming pool servicing West Auckland. Patrons are drawn across the wider Auckland region although the decision-making in relation to the asset lies with the Henderson-Massey Local Board.

(e) Local boards manage community facilities in their areas. Despite this, any person from across Auckland can book a community hall to use.

[86] Mr Wilson observes that he cannot think of an asset managed by a local board which will be used only by members of that local board's community. He says the effect of Save CP's interpretation would mean that local boards would have no, or very limited, decision-making rights in relation to most Council assets. This would fundamentally reduce and undermine the role of local boards and adversely impact responsiveness at the local level. It would also likely overload the governing body's work programme.

[87] More importantly, in the context of what is essentially an exercise of statutory interpretation, such an approach would be contrary to the s 17 legislative scheme and in particular the s 17(2)(a) principle that the decision-making for non-regulatory activities should presumptively be the responsibility of local boards.

[88] It is for these reasons I am satisfied there was no error in the governing body's exercise of its s 17 powers in respect of Chamberlain Park. It properly directed itself to the operation of the section; that there is a presumption of local board responsibility which is displaced only where decision-making on an Auckland-wide basis would better promote the well-being of communities across Auckland. This "two tier" structure was evident in the Council's allocations which gave effect to the clear legislative intent.[29]

[89] The governing body also correctly approached its allocation on the basis that the factors contained in s 17(2)(b)(i)-(iii) are not mandatory, but rather are principles which operate as a guide to the governing body's assessment of whether decision-making on an Auckland-wide basis would be preferable. Additionally, there was an acknowledgement that in certain cases the benefits of a consistent or co-ordinated approach would be outweighed by the benefit of reflecting the specific needs of the local community. In that regard the governing body properly appreciated the flexibility implicit in s 17.

[90] Moreover, while in its LTPs the governing body was predominantly concerned with activities, the further analysis undertaken in respect of park assets emphasises that the Council was influenced by the activities conducted by the assets when deciding whether particular activities required decision-making on an Auckland-wide basis. It compiled a list of parks which should be allocated to the governing body because decision-making on an Auckland-wide basis would best promote the well-being of communities across Auckland. Plainly the Council was of the view that many parks, while they may well deliver benefits to communities outside the local board

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[29] See Local Government (Auckland Council) Bill 2009 (36-2) (select committee report) at 4-5: "the nature of the functions the local boards ought to have responsibility for should include the range of activities that communities expect to be delivered by local government … we expect the local activities that will be the subject of local board plans would be likely to include the operation and development of local facilities, including sports and recreation centres, swimming pools, and parks".

area, were nonetheless best managed by the local boards. The governing body arrived at this conclusion after considering the s 17(2)(b) criteria and undertaking workshops and formal meetings. Those exercises helped identify what types of activities undertaken in parks and open space should be within the control of local board and governing body decision-making, respectively.

[91] The essence of Mr Long's submission is that a considerably more detailed and in-depth analysis should have been undertaken by the governing body before making its allocation decisions. I do not accept that the governing body was required to undertake such a comprehensive analysis. That would require the application of a granular assessment of each of the innumerable parks and recreational facilities dotted across wider Auckland. Such a task is neither contemplated nor required by s 17.

[92] The decision to allocate non-regulatory decision-making to the local board is consistent with s 17(2), particularly when viewed against the backdrop of a succession of reviews and consultation undertaken by the governing body and its consultants.

[93] For these reasons this cause of action must fail.

The AELB, Chamberlain Park and the background to the second, third and fourth causes of action

Introduction

[94] The second, third and fourth causes of action all relate to decisions made by the AELB and the processes it followed in arriving at those decisions. In summary, Save CP's claim is that the AELB failed to collaborate and consult with other local boards under s 16(3) of the LGAC, predetermined its decision and failed to consult on the case for change.

[95] Before considering each of these claims it is necessary to return to the background, some of which has already been discussed.

Early steps

[96] Peter Haynes and Shyrel Burt have given affidavits covering their involvement relative to Chamberlain Park. Dr Haynes has been the chair of the AELB since November 2010 and Ms Burt is a principal policy analyst at Council.

[97] It was the Longdill and Associates report which, in 2011, alerted the Council to the pressure on sports fields in the Auckland region. Discussions between the Council and the AELB led the former to examine the local board's capacity to accommodate sports fields which, in turn, led the AELB to examine the open space at Chamberlain Park as part of its wider review.

[98] Dr Haynes accepts that during 2013 Chamberlain Park was on the AELB's "radar". It learned that from 1 July 2013 the lease over Chamberlain Park would expire and from that time it would be managed by the Council. At a meeting of the AELB on 4 December 2013 Sharon Rimmer, the Sports and Recreation Partnerships Manager for the Council, discussed Chamberlain Park but, it seems, this was only in the context of the golf course's existing use.

[99] However it seems inevitable the AELB was aware that with the change of operational rights, an opportunity was created to include Chamberlain Park in its consideration of the AELB area's open space needs. At some point in 2013 the AELB asked Council policy officers to consider what other uses of Chamberlain Park might be possible. Dr Haynes says this was not because the AELB had made its mind up, but rather because the local board wished to have a proper understanding of the options for open space within its boundaries.

[100] Relatedly, a consultancy firm named O'Connor Sinclair completed two reports for New Zealand Golf in July 2013. One of these was an Auckland Golf Facility Strategy dated 15 July 2013, commissioned for the purpose of providing insight into the challenges and opportunities facing those managing golf facilities in Auckland. The Auckland report analysed the utilisation of various golf facilities, being the number of rounds played as a percentage of total capacity of golf games around Auckland. The reports drew on evidence collected from a survey of 393 golf clubs. Because Chamberlain Park did not respond to the survey O'Connor Sinclair gathered

information through the club's website and Dotgolf, with averages from the rest of the Auckland region applied to it. The other clubs which also did not respond were treated similarly. On the basis of this data, O'Connor Sinclair estimated that one per cent of Auckland's rounds of golf were played at Chamberlain Park. This equated to a utilisation rate of nine per cent.[30] Generally, the Auckland report observed that:[31]

> "… utilisation of golf course across Auckland is very low at 23%. There is an oversupply of relatively homogenous golf services and facilities and therefore an oversupply of rounds at these facilities."

[101] The Auckland report also noted that because Auckland utilised its residential areas more intensively, open space would become more important and that in:[32]

> "… a high population market, where many other sport facility assets have multiple uses … and/or considerable junior participation … there is a risk for golf that a perception of golf clubs as large area, low utilisation facilities emerges."

[102] On 19 February 2014 an AELB workshop took place at which Chamberlain Park was discussed. Ms Rimmer was again present. A minute of the instruction shows what was sought.[33]

> "Sharon Rimmer – Sports & Recreation Partnerships Manager was in attendance to discuss Chamberlain Park.
>
> - Understanding of current provision of sports fields, confirm the Boards priorities for sport and recreation & review of golf provision at Chamberlain Park
> - 6-8 week response
> - Come back to Board at the end of April to present the assessment and discuss options
> - Future options were discussed such as restoration of Oakley Creek and a possible location for the Chinese gardens."

[103] At about this time a number of other reports on the possible development of Chamberlain Park appear. For example, there is a short Jasmax "Concept Design Report" dated October 2013. While its provenance is unclear, it proposed a nine-hole

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30 This figure was the subject of some debate, which I return to later.
31 Affidavit of Richard Quince, sworn 10 August 2017, at 196.
32 At 215.
33 At 155.

course with other possible amenities developed on the balance of the land. An O'Connor Sinclair report, apparently requested by the Council and dated 28 February 2014 records a meeting with Council staff on 29 January 2014. The report makes a number of references to the draft AELB Plan for 2014-2016. In its project purpose section it records:[34]

> "Auckland Council Parks and Recreation and Albert-Eden Local Board are seeking guidance on the best recreational use of the land associated with Chamberlain Park, in alignment with the draft Local Board Plan. It is rare that an opportunity arises to develop 32 hectares of land for public recreation and therefore it is immensely important to ensure the proposed development optimises the land use, reflecting the peoples' needs and enhancing the local community."

[104] O'Connor Sinclair considered a critical preliminary step was to know more about the activities at and the characteristics of Chamberlain Park. Their proposal to undertake this work for the Council was not accepted.

[105] The next relevant event was on 5 May 2014 when Ms Burt and another Principal Policy Analyst at the Council, Rebecca Eng, were asked to undertake an assessment of Chamberlain Park by the Manager of Community Policy and Planning. Ms Burt says she was asked to undertake this assessment as a result of the 19 February 2014 workshop. At the briefing meeting, Ms Burt and Ms Eng were advised the AELB had asked for Chamberlain Park to be assessed because:

(a) the AELB wished to address both the low open space provision in the AELB area, and to identify ways to improve the quality of existing open space;

(b) the AELB had received the Longdill and Associates report which identified a shortfall in sports fields in the Auckland region;

(c) the AELB had received the O'Connor Sinclair reports relating to both Chamberlain Park specifically and Auckland golfing facilities generally, identifying an oversupply of homogenous golf courses and a lack of diversity in golf facilities; and

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[34] At 160.

(d) the draft 2014 AELB Plan identified a number of ways to improve connections and access to open space which included diversifying open space at Chamberlain Park.

[106] Ms Burt adds that AELB made specific requests as to what options the Local Board wished to be included in the report and, in particular, to investigate whether Chamberlain Park could accommodate a nine-hole golf course, a driving range, a Chinese garden, an aquatic centre and eight or nine sports fields. They were asked to prepare a plan setting out how these facilities might fit.

[107] Ms Burt says that she and Ms Eng were guided in their assessment by the hierarchy of strategic plans in local government which inform decision-making. The Council had both a Parks and Open Spaces Strategic Action Plan and an Open Space Provision Policy setting out what parks provide and a framework of actions to deliver a quality network of open space, and guiding local boards and Council on the provision of open space respectively. They also drew on the O'Connor Sinclair reports, a report on sport and recreation in Albert-Eden, an Auckland Council golf course provision discussion paper and open space provision maps.

[108] At about this time there also appears to have been some email communication involving two of the AELB board members and Ms Burt and Ms Eng. In May 2014 Board Member Easte sent "some preliminary thoughts" about the reconfiguration of Chamberlain Park. And a few days later, Dr Haynes raised the question of whether passive recreation could also be included in any analysis.

[109] On 4 June 2014 Ms Burt and Ms Eng produced a Development Options Report ("the Eng/Burt Report"). The salient aspects of this document are included in its executive summary:[35]

> "The Albert-Eden Local Board area has a low open space provision and limited opportunities to acquire new open space. Existing open spaces need to be used in ways that accommodate the needs of a growing and diversifying community. There is also a need to identify ways in which the quality of existing open spaces can be improved. …

[35] Affidavit of Shyrel Deidre Burt, sworn 15 September 2017, at 114.

> In order to address some of these issues, the Albert-Eden Local Board briefed staff to consider development options for the future use of the Chamberlain Park Golf Club. …
>
> The initial concept plan incorporates a 6-12 hole beginner's golf course, driving range, "Starting New at Golf" (SNAG) coaching area, playground, a recreation facility, formal gardens, and six full sized sports fields. …
>
> Staff propose that the initial concept plan be included in the upcoming Albert-Eden Local Board Plan consultation, to provide the community an opportunity to give feedback on the range of potential opportunities, and suggest new ideas, for future development. …"

[110] The report also "assumed that a more detailed environmental and cost benefit analysis would be carried out in future stages of work should the local board wish to progress with a redevelopment proposal for the site."[36]

[111] Significantly, at the AELB's meeting of 4 June 2014, the Board moved to receive the report and the initial concept plan noting that it represented "a starting point for a discussion about alternative uses of Chamberlain Park" but that it did not "represent a developed plan".[37] The AELB resolved to consult with the community on the initial design suggestions during the draft AELB Plan consultation period. This was between 7 July and 6 August 2014. The Board also requested that Community and Cultural Policy officers commence the development of the Chamberlain Park Master Plan, following the initial consultation phase, setting out the various options to be consulted on with the community.

Initial consultation on the draft AELB Plan

[112] A pamphlet containing a summary of the draft AELB Plan was delivered to every household and business in the local board area. It was made available at other local amenities including libraries. Relevantly, it stated that over the following three years the AELB wished to investigate a programme of upgrading sports fields and playgrounds and "review the use of Chamberlain Park and consult with the community on options for maximising its recreational use." The concept plan was made available online.

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36 At 116.

37 Affidavit of Richard Quince, sworn 10 August 2017, at 189.

[113] The pamphlet called for submissions online, or by mail or email between 7 July and 6 August 2014. It also advised that hearings would be held between August and September 2014 to consider all submissions and for finalising the Local Board Plan, which would be adopted by 31 October 2014.

[114] It was through this process that some of the individuals now involved with Save CP learned of the AELB's plans and began their individual engagement with the Local Board.

[115] A community meeting was held on 16 July 2014 to discuss the draft plan. Mr Quince, who would later become the treasurer of Save CP, was present. In his affidavit he describes the meeting, recalling Dr Haynes commenting that strong opposition was expected to the proposed Chamberlain Park redevelopment. He also says Dr Haynes and Mr Easte quoted the O'Connor Sinclair 23 per cent utilisation figure. He says that after the meeting he approached Dr Haynes to discuss Chamberlain Park but was simply advised that "golf courses have a 23 per cent utilisation rate".

[116] Submissions totalling 829 were received on the draft AELB plan. Among these was a submission made by Mr Quince on behalf of the Chamberlain Park Golf Club Inc, the men's club. Mr Quince's submission emphasised the various open space areas within the AELB's boundaries, including the One Tree Hill domain and Western Springs. He also emphasised that the figures relied on in the O'Connor Sinclair report were incorrect because they did not account for the rounds played by casual golfers. When these were accounted for the total number of rounds played per year was closer to 50,000 which translates to a utilisation rate of close to 50 per cent.

[117] On 28 August 2014 the Council staff involved in the consultation on the draft AELB plan presented a report on the key themes emerging from the submissions. At this meeting the Board received further submissions, including from Mr Quince. The report observed:[38]

> "The review of the use of Chamberlain Park appears to be a much debated initiative. The Chamberlain Park Golf Club Incorporated gathered 534

[38] Affidavit of Shyrel Deidre Burt, sworn 15 September 2017, at 296.

> signatures objecting to the proposed changes. On the other hand, a significant number of submitters expressed support for investigating possible alternative uses for the Chamberlain Park Golf Course."

[118] Overall a high number of responses in support of the review of the use of Chamberlain Park to maximise its recreational use was noted.

[119] A further meeting was held on 17 September 2014 for the purpose of providing a summary of the public submissions on the draft plan. The report records that a key theme arising from the feedback was to "investigate possible uses for the Chamberlain Park, including a status quo option". The report observed:[39]

> "While the investigation of possible alternative uses for Chamberlain Park golf course gleaned a high level of support, this initiative also attracted strong opposition. As noted below, it is therefore recommended that the local board investigation all for the site, including the retaining current use."

[120] It also suggested further consideration of other matters, including a "do nothing option in the investigation of options for future recreational uses for Chamberlain Park (i.e. retaining the park as an 18-hole golf course)." Consideration of whether to include Rawalpindi Reserve in the Chamberlain Park review was also suggested.

[121] The AELB then resolved to adopt the local board plan on 15 October 2014. Relevantly, the Plan stated:[40]

> "We have Auckland's lowest levels of open space provision, with only 2.8 hectares per 1000 residents.
>
> Our projected population growth and planned housing intensification means we need additional parks and reserves. We cannot readily increase the amount of open space in our area because of budget constraints and lack of suitable land, but will continue to advocate strongly for this over the next three years.
>
> … We are committed to making our existing 109 parks and reserves the best they can be.
>
> …
>
> **Review of Chamberlain Park**
>
> … Because of the critical shortfall of open space in Albert-Eden, we are reviewing the use of the park with the aim of maximising its passive and active recreational use. We will develop a masterplan in consultation with the

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39 Affidavit of Richard Quince, sworn 10 August 2017, at 324.
40 At 365.

> community, which will also include the adjacent Rawalpindi Reserve and the Western Springs Garden site."

[122] Also referred to in the plan was the "Chamberlain Park Master Plan Development". This was recorded as a "key initiative", with the AELB aiming to achieve "more opportunities for more people to enjoy [its] parks and reserves".

[123] The recommendation arising out of the 17 September 2014 meeting, that Rawalpindi Reserve be included in the review, was adopted. No mention was made of including a "do nothing" option in respect of the Chamberlain Park review.

[124] Meanwhile, Council Policy Analysts began preparing the Master Plan, which the AELB had first requested at a meeting of 4 June 2014. Jasmax was engaged to assist with preparing the Master Plan, with a consultation period held through to December 2014.

Further consultation and the preparation of the Master Plan

[125] The consultation process involved four key activities: calls for specific feedback from key stakeholders (including interested persons outside the AELB's area), an open day, a workshop for golf users (including the Chamberlain Park men's and women's clubs) and an online survey.

[126] Workshops were held with groups the AELB considered were key stakeholders. These included the Auckland-Chinese Garden Association, Regional Facilities Auckland, Auckland Cricket, Cycle Action Auckland and Sports Auckland.

[127] A workshop was also held for golf users including a meeting in November 2014 when the clubs met with the Jasmax team to discuss the Master Plan. A submission was received from New Zealand Golf, Auckland Golf and both Chamberlain Park golf clubs. This was supportive of alternative golf facilities and investment in improving the facility. New Zealand Golf supported retaining as much as the golfing footprint of Chamberlain Park as possible, while the remaining three entities supported the maintenance of an 18-hole golf course.

[128] The open day took place on 1 December 2014. The public was notified through flyers at Chamberlain Park, a mail drop in the neighbourhood, notices on the AELB Facebook page, notices in the Central Leader newspaper and on the Neighbourly website. Amongst other things an email was also sent to all those on the AELB's database.

[129] At the open day a number of posters, printed on A1 paper, were placed around the Club. These explained the development of the Master Plan and the process of consultation and design which would take place. One poster outlined the opportunities and constraints of Chamberlain Park. Six presented a range of options under different categories and invited members of the public to indicate their preference by placing coloured stickers on the activity. The details of the posters follow:

(a) *Golf activities*: This presented eight different options for golf activities at Chamberlain Park, ranging from 18-hole courses, a short six, nine or 12-hole course and a mini-golf facility and driving range.

(b) *Sports*: This sought views on eight offerings including football, cricket and baseball.

(c) *Everyday activities*: This poster presented seven activities which Chamberlain Park could provide including walking, cycling, a barbeque area and an off-leash dog exercise area.

(d) *Play spaces*: This inquired of submitters what they most wanted to see at Chamberlain Park, such as nature play, school age play, an obstacle course and other options.

(e) *Cultural activities:* This asked what cultural activities and environmental outcomes submitters wished to see at Chamberlain Park, including a traditional Chinese garden, a performance space, community planting days and art integration.

(f) *Catch all:* The final poster inquired whether the AELB had omitted any activity and whether there were any particular activities submitters did not want to see at Chamberlain Park.

[130] It is apparent that two aspects of this process agitated Save CP. First, there appears to have been a miscommunication about the fact that Chamberlain Park would be closed for play on the afternoon of the open day. This was to permit those interested to walk around the course and inspect the facilities. Save CP complained that without players on the course the impression given was that Chamberlain Park, as a golf course, was underutilised. Secondly, the second poster which asked what sporting options submitters might like to see did not include golf as one of the sporting options.

[131] At the end of the open day, Jasmax took photographs of each of the posters in order to assess the public reaction. The 18-hole option was, by some margin, the next most popular of the golf activities proposed. Meanwhile, "other" was the most popular sports option. And while volleyball, tennis, kayaking, and hockey all featured, golf was the activity which attracted the most votes. On the last poster, which asked whether the AELB had missed anything, many called for the 18-hole course to be retained as is. Others, although fewer, called for a change including a hockey astro turf, a multi-use facility with nine holes and a skate park.

[132] The online survey ran from November 2014 to January 2015. The original intention was to complete the exercise by December. However, that period was extended due to the volume of feedback. The online survey asked the same questions as those posed on the six open day posters with one exception. Rather than inviting comment on which activity people most wanted to see, participants were asked to select *each* golfing activity they preferred. Originally, the option of an 18-hole golf course was not included when the survey went live. However, this option was promptly added following concerns raised by Mr Quince. As with the open day there was also a generic question on any other activities which submitters might wish or not wish to see at Chamberlain Park.

[133] The AELB received 1,365 submissions online. These were consolidated into a summary document. In respect of the question seeking views on golf activities 42

per cent (or 444 submitters) identified an 18-hole course as the golfing activity they would like to see at Chamberlain Park. The next most popular options were a driving range (36 per cent or 382 submitters) and a nine-hole course (27 per cent or 291 submitters).

[134] In respect of the second question, which asked what sports submitters would like to see at Chamberlain Park, 55 per cent or 540 submitters selected "other". Mr Quince suggests that the write-in comments indicate the support was largely for golf. The next most popular options were the multi-use artificial turf (37 per cent) and football (30 per cent).

[135] For the question about every day activities 59 per cent (or 606 submitters) selected walking, 45 per cent indicated they would like to see a Chinese garden and 40 per cent preferred a performance space.

[136] Ms Burt summarised the results of this consultation process as follows:[41]

> "What we found from the consultation was that people wanted golf to still be provided at Chamberlain Park, but to be improved. People also wanted community access to the park, a wider range of sports, Meola Creek to be restored, and a Chinese garden, museum and performance space to be provided."

[137] After this the Council, assisted by Jasmax, developed design objectives to prepare scenarios for consultation. Council Policy Analysts prepared some 10 scenarios and presented these to the AELB at a workshop on 25 March 2015. From these, the AELB selected four which it considered best fitted the design objectives. In terms of golf it was incorrectly recorded that New Zealand Golf preferred a nine-hole course. As previously noted, New Zealand Golf had actually indicated its preference for the retention of as much as the golfing footprint at Chamberlain Park as possible. However, the other three interest groups' preferences for an 18-hole course were correctly recorded.

[138] Council officers asked the AELB what golfing configuration they preferred; a nine, 12 or 18-hole course. One board member suggested the AELB should consult

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41 Affidavit of Shyrel Deidre Burt, sworn 15 September 2017, at [46].

with the public. Another suggested the AELB should reflect on its initial purpose in redeveloping Chamberlain Park and, in particular, the promotion of passive recreation and supporting open space provision within the local board area.

[139] It was agreed that a formal report would be provided at an extraordinary business meeting scheduled for 22 April 2015. The four options selected by the AELB were presented as a Master Plan Options Report to the AELB at that meeting:

(a) *Scenario One:* Mostly golf with a reconfigured 18-hole golf course;

(b) *Scenario Two:* A nine-hole golf course, driving range and practice area;

(c) *Scenario Three:* A smaller redesigned 18-hole golf course and an area providing three multi-use sports fields and carparking; and

(d) *Scenario Four:* A nine-hole golf course and/or driving range and/or practice area, with the area on the eastern side providing two multi-use sports fields, an aquatic centre and carparking.

[140] The report observed the following in relation to the options presented:[42]

> "While all scenarios include some common features they also provide enough variation to ensure the public are able to comment on a range of different scenarios with different opportunities for recreation."

[141] It is noteworthy that all scenarios involved:

(a) development of the western end of Chamberlain Park for passive recreation with a barbecue area, a playground and restoration of the Meola Creek;

(b) a Chinese centre incorporating a Chinese garden, performance space and theatre;

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42 At 1042.

(c) a walking and cycling path through the eastern end of the site providing access to the park from the Northwestern Cycleway and St Lukes Road; and

(d) golfing activities of some description.

[142] The AELB approved in principle a redesign of Chamberlain Park at this meeting when it approved the Master Plan Scenarios for consultation ("the decision in principle"). Two members proposed and seconded amendments to the AELB's resolutions. These were focused on ensuring that costings were known before public consultation; that the transport-related costs were known and that Auckland Transport would be supportive of the transport-related aspects; and that the status quo that is the retention of the golf course in its present configuration, be explicitly included. Those amendments were defeated.

[143] Thus the way was paved for consultation on the remaining four scenarios and a decision on the Master Plan.

Consultation on the four scenarios and the Master Plan

[144] This phase of the consultation was advertised in the same way as the first. Invitations were issued to an open day on 18 May 2015 at Western Springs. Submitters were directed to the same website to complete a survey. At the open day, posters were displayed.

[145] Notably, some of the scenarios consulted on differed from those which the AELB had decided on at its meeting on 22 April 2015. It is uncertain why this was and Ms Burt does not address the issue in her affidavit. The difference was that Scenario Two was not presented as a nine-hole option. Instead it was presented as an 18-hole option. Thus, where previously the public had been consulted on two 18-hole options and two nine-hole options, now only one nine-hole option was presented. Save CP regards this unexplained change as material because, it says, it effectively split the vote by pitting three 18-hole options against a single nine-hole option.

[146] 263 submissions were received online. Ms Burt says the Council team found all four options were popular and while there was no obvious preference, Scenario Four, the nine-hole golf course, attracted the most support. There was also a strong contingent of submitters who expressed their displeasure at any change and called for the retention of Chamberlain Park as an 18-hole course.

[147] On 5 August 2015, policy analysts presented a report to the AELB on the results of the consultation process. Scenario Four was recommended in principle. However, it was also noted that three policy projects; the Sports Facilities Network Plan, an investigation into the provision of swimming pool space in western Auckland, and an investigation of the long-term Council ownership of golf courses, could inform the final decision. Salient observations included:[43]

> "[Consultation on possible redevelopment] was in response to low utilisation of the Chamberlain Park Golf Course and increasing operational costs. The lack of open space provision in the local board area and growing pressure on neighbouring sports field capacity were other key considerations.
>
> … The feedback received in both phases of consultation has indicated there is a desire for change at Chamberlain Park and the community want to see a wider variety of recreation opportunities at the park.
>
> Of all the options, Scenario Four responds to the case for change as well as providing more open space, a wider range of sports and greater community use of Chamberlain Park. This scenario received the highest level of community support."

[148] One matter which Save CP focuses on is the report incorrectly noted that while 35 per cent of submissions opted for Scenario Four, 30 per cent supported an 18-hole course. That is incorrect because 40 per cent of participants selected Scenarios One to Three. Moreover, 25 per cent selected "None of the above" with many submitters preferring retention of the status quo.

[149] The report then turns to consider each of the scenarios. Scenario One and Scenario Two were not recommended because they did not provide for increased open space, a wider range of sports or greater community use of the area. The report also commented that Scenario One did not provide an improved golf experience to address the currently low levels of utilisation and expressed concerns about the scenario's

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[43] At 1175.

financial viability. Meanwhile, Scenario Two was not recommended because it "may not have widespread appeal to existing golf users". Finally, Scenario Three was not recommended because it had the lowest level of public support, would not increase golf revenue streams and might not appeal to existing golf users.

[150] Thus it was considered that Scenario Four represented the highest level of satisfaction of all these objectives. The report noted that with a total par of 35 and a moderate to high level of difficulty, it should appeal to the existing golf user base.

[151] Mr Quince attended the AELB meeting on 5 August 2015. He made submissions on behalf of the Chamberlain Park Golf Clubs.

[152] When the proposal was put to the meeting four board members voted in favour and three against. One abstained.

[153] Jasmax then prepared the Master Plan which was approved in August 2015.

Second cause of action: Did the AELB fail to collaborate and co-operate with other boards?

Introduction

[154] Save CP's second cause of action puts in issue the extent of collaboration and co-operation between the AELB and other local boards when making decisions about Chamberlain Park. It claims the AELB erred in law by failing to meet the requirements of s 16(3) of the LGAC because it did not collaborate or co-operate with one or more local boards.

[155] Section 16 is reproduced in full below:

> "**16 Decision-making responsibilities of local boards**
>
> (1) Each local board is responsible and democratically accountable for—
>
> (a) the decision making of the Auckland Council in relation to the non-regulatory activities of the Auckland Council that are allocated to the local board in accordance with section 17; and

(b) identifying and communicating the interests and preferences of the people in its local board area in relation to the content of the strategies, policies, plans, and bylaws of the Auckland Council; and

(c) identifying and developing bylaws specifically for its local board area, and proposing them to the governing body under section 24; and

(d) the agreement reached with the governing body (as set out in the local board agreement) in respect of local activities for its local board area.

(2) In carrying out the responsibilities described in this section, a local board must comply with the requirements of sections 76 to 82 of the Local Government Act 2002 as if every reference in those sections to a local authority were a reference to a local board.

(3) In carrying out the responsibilities described in this section, a local board should collaborate and co-operate with 1 or more other local boards in the situations where the interests and preferences of communities within each local board area will be better served by doing so."

Submissions

[156] Mr Long submits s 16(3) contains a statutory acknowledgement that there will be occasions when collaboration and co-operation with other local boards is desirable. He says it is not appropriate for a local board to approach matters in a compartmentalised or isolated way, without regard to other boards if that would serve the joint interests of the communities involved. He describes the provision as "directive"; one of the few "connective pieces of tissue" in the LGAC which gives a wider perspective to the operation of local boards. He says it ensures short sighted, myopic decisions are not made by local boards in the parochial service of their own interests where there may be wider ramifications for other boards.

[157] Mr Long adds that because there is no hard evidence the AELB consulted with other local boards in relation to its decisions on Chamberlain Park, the only "excuse for non-compliance" is that this was not a situation caught by s 16(3). He says that on the material before the Court the decisions for the AELB in relation to Chamberlain Park were quintessentially ones intended to be covered by that section.

[158] Ms Anderson emphasises that s 16(3) uses permissive language; the word "should" is used in respect of those responsibilities requiring collaboration and co-operation with other local boards. She adds that the efforts undertaken by AELB should be seen in a context where consultation with interested communities who may sit outside the local board area was carried out. She thus submits the AELB met its responsibilities in terms of the language of s 16(3).

Analysis

[159] Two questions arise for resolution under this heading. These are:

(a) What type of collaborative requirement does s 16(3) place on local boards? And

(b) Did the AELB discharge this requirement in respect of its decisions on Chamberlain Park?

[160] To a considerable extent I have already addressed the first question in my discussion on the allocation decisions. By reference to authority I determined that the use of the word "should" is indicative of a permissive, rather than mandatory, approach to decision-making. I do not consider the use of the word "should" in s 16(3) is materially distinct from its use in s 17(2) or that a different conclusion is available.

[161] Despite Mr Long's submissions to the contrary, in my view the use of the word "must" in s 16(2) provides a helpful juxtaposition. That provision requires local boards, in carrying out their s 16 responsibilities, to comply with the requirements of ss 76 to 82 of the LGA. It has the effect of making compliance with those sections mandatory. By contrast, I consider the use of the word "should" in the same section evinces an intention on the part of the legislature to incorporate a more permissive requirement in s 16(3). No doubt, the discretion is not unfettered. It will circumstantially be an error of law to fail to collaborate and co-operate with other local boards where the interests and preferences of communities within each local board area will be better served by doing so. That is because, as Mr Long submits, s 16(3) is one of the few tools in the LGAC framework (outside of allocation to the governing body under s 17) which ensures a wider than local perspective be adopted when local

government decisions are made. That is entirely consistent with the scheme of the LGAC. It represents an important element or "connective tissue" between the two-tier decision-making system established under the legislation. However, the language of s 16(3) is clear; it provides some margin available to local boards when determining whether collaboration and consultation is necessary.

[162] This leads naturally to the second question for resolution and that is whether, in fact, the AELB discharged this requirement in respect of its decisions regarding Chamberlain Park.

[163] On this point I also agree with Ms Anderson. It is evident from the extensive factual background set out above that the AELB was aware that in relation to decisions affecting Chamberlain Park, there were stakeholders from outside its board area. While Mr Long is correct that there is "no hard evidence" of collaboration or co-operation with other local boards, the core policy of s 16(3) is to ensure the interests and preferences of communities across Auckland which are affected by the decision of one local board are heard and taken into account in decision-making. Collaboration and co-operation with other local boards is only required *where* it will serve the interests and preferences of communities within those local board areas. It may not be necessary where the local board is able to achieve that policy without such collaboration and co-operation.

[164] An examination of the AELB's consultation processes reveals there was no need for collaboration and co-operation with other local boards. That is because the process adopted included workshops and meetings with specific Chamberlain Park users and interest groups, as well as regional and national golfing interest groups and other stakeholders which included the Auckland Chinese Garden Association, Regional Facilities Auckland, Auckland Cricket, Cycle Action Auckland, Sports Auckland and the Auckland Zoo. Plainly the latter groups were ideally placed to present a regional, Auckland-wide perspective.

[165] I agree with Ms Anderson when she submits that it is difficult to see how the interests and preferences of these wider communities, in particular the national and

regional golfing community, could have been better served by consultation with particular local boards rather than their direct constituents.

[166] Furthermore, Mr Long's submission does not identify which other board or boards might properly have been consulted. There are 21 local boards. If players from outside the Albert-Eden area are drawn from across the greater Auckland region, was the AELB bound to engage them all? And, if so, in respect of what issue? That cannot be what s 16(3) in these circumstances requires.

[167] In fairness to Mr Long's argument, primarily advanced in his reply submissions, there is one other local board which, if consulted, might have provided a useful dimension. That is the Kaipātiki Local Board. Located within that Board's area is the Takapuna Golf Course which is another 18-hole public course. Mr Long submits that a consequence of the AELB's decision to create a nine-hole course at Chamberlain Park is the Kaipātiki Local Board is now the only provider of a 18-hole public course in Auckland. The potential effects on that Board may be several including increased usage by those disinclined to play on a reconfigured nine-hole course at Chamberlain Park as well as the possible limitations on that local board's ability to develop its own site.

[168] However, I do not consider that omission, such as it was, gives rise to an error of law. First, there is nothing to suggest, in principle or in fact, that the decisions of the AELB constrained the Kaipātiki Local Board in this way.[44] Secondly, as already noted, among the stakeholders consulted by the AELB included groups which would have been aware of the golfing landscape across the Auckland region.

[169] Moreover, the decisions made on 5 August 2015, when the AELB adopted the Master Plan, were not to be finalised under the Sports Facilities Network Plan until an investigation of the long-term Council ownership of golf courses was completed. This is because the AELB was aware the results could inform its final decision. These features reinforce the clear impression that the AELB acted in a way which served the

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[44] Indeed, the Council's Golf Facilities Investment Plan notes it owns the land on which 10 golf courses operate, and manages three other Crown-owned courses. The report also notes that between 2021 and 2026, over half the golf course leases are due to expire. A number expired in 2016 and 2017.

interests and preferences of communities within other local board areas. For these reasons, specific collaboration and co-operation with other local boards was not required.

[170] I am satisfied that the second cause of action must fail.

Third cause of action: Did the AELB approach its decision-making with a closed mind?

Introduction

[171] Save CP's third cause of action alleges the decision to change the use of Chamberlain Park was predetermined by the AELB. Save CP says the AELB made up its mind to change Chamberlain Park from what it was to something else before February 2014, when it directed preparation of the Eng/Burt report. Save CP also alleges predetermination at all material times from that point. It says the AELB approached its task with a closed mind to maintaining the status quo.

[172] The Council's position is predetermination is not established on the evidence; that at no time until the decision in principle did the AELB close its mind to the possibility of retaining the status quo. It maintains any position the AELB held from February 2014 was a legitimate predisposition and until the decision in principle, an appropriate point to make a decision, the AELB was simply reviewing and consulting on options.

[173] There was some disagreement between Mr Long and Ms Anderson as to whether "status quo" is a reference to the retention of Chamberlain Park in its present configuration or the retention of an 18-hole course, albeit with a different configuration. For the purposes of this decision I accept Mr Long's submission that "status quo" means leaving the golf course as it is or, at the least, not changing the present configuration in a material way. That determination has consequences which I shall return to later in my analysis of this cause of action. In my view the interpretation pressed by Mr Long represents the most natural meaning of the words.

Predetermination – legal principles

[174] Helpfully counsel are largely agreed on the legal principles which apply in cases where predetermination is alleged.

[175] A finding of predetermination requires that any predisposition of the decision-maker is, in effect, a fait accompli.[45] As Tipping J stated, anyone challenging a decision on the basis of predetermination "is required to show actual predetermination or fettering rather than the appearance of the same".[46]

[176] This recognises a contrast with the notion of legitimate predisposition. As Kós J stated, "where Parliament determines that a decision should be made by a Minister, a person of inherently political complexion, it is unavoidable that that person will be influenced by policy and political considerations … it must be taken to have accepted that the decision-maker will bring a policy perspective to his or her determination, and with it a probable predisposition on the merits."[47]

[177] In the context of local authority decision-making, Duffy J put it this way:[48]

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

[178] More generally Philip Joseph observes "some decision-makers, such as … local authorities or planning bodies, routinely announce policy preferences and approach their decision-making so as to promote their policies. Their decisions remain unimpeachable, provided they retain an open mind, are amenable to persuasion and do not commit to a particular outcome in individual cases."[49] That requires, as Lord

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45 Philip Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Thomson Reuters, Wellington, 2014) at [25.5.5].

46 *Travis Holdings Ltd v Christchurch City Council* [1993] 3 NZLR 32 (HC) at 47.

47 *Back Country Helicopters Ltd v Minister of Conservation* [2013] NZHC 982, [2013] NZAR 1474 at [131], [133].

48 *Whakatane District Council v Bay of Plenty Regional Council* [2009] 3 NZLR 799 (HC) at [117].

49 Philip Joseph, above n 45, at [25.5.5].

Thankerton stated in *Franklin v Minister of Town and Country Planning*, that the decision-maker's mind was not "so foreclosed that he gave no genuine consideration" to the material before him.[50]

[179] Baragwanath J has provided perhaps the most succinct statement of what is required:[51]

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

[180] Much of this is explicable by the fact predetermination is conceptually distinct from an allegation of bias.[52] While predetermination is concerned with "closed mind" decision-making, bias is concerned with public perceptions as to impartial decision-making.[53] As the learned authors of *Administrative Law* state:[54]

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

[181] In the leading case on predetermination, *CREEDNZ Inc v Governor-General*, the Court of Appeal considered a challenge to the validity of an Order in Council by-passing all statutory planning procedures under the National Development Act 1979 and fast tracking the approval process for the construction of an aluminium smelter at Aramoana Spit.[55] It was apparent some members of the Government favoured this approach, but as Cooke J stated:[56]

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50 *Franklin v Minister of Town and Country Planning* [1948] AC 87 (HL) at 103.

51 *Friends of the Turitea Reserve Society Inc v Palmerston North City Council* [2008] 2 NZLR 661 (HC) at [102].

52 Mr Long expressly accepted that Save CP does not allege bias on the part of the AELB.

53 Philip Joseph, above n 45, at [25.5.5].

54 HWR Wade and CF Forsyth *Administrative Law* (11th ed, Oxford University Press, Oxford, 2014) at 394.

55 *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172 (CA).

56 At 179.

> "None of this means, however, that the Government was irretrievably committed to advising the necessary Order in Council. What can properly be inferred is that when the question arose in April 1981 the Government was already clearly in favour of the company's project and highly likely to decide in favour of an Order in Council.
>
> But it is fallacious to regard that as a disqualification. The references in the amended statement of claim to a real possibility of suspicion of predetermination or bias are beside the point in relation to a decision of this nature at this governmental project. Projects of this kind for which the National Development Act is intended, whether Government works or private works, are likely to be many months in evolution. They must attract considerable public interest. It would be naïve to suppose that Parliament can have meant Ministers to refrain from forming and expressing, even strongly, views on the desirability of such projects until the stage of advising on an Order in Council.
>
> In relation to decisions under s 3(3) I think that no test of impartiality or apparent absence of predetermination has to be satisfied. Any other approach would make the legislation practically unworkable. The only relevant question can be whether at the time of advising the making of the Order in Council the Ministers genuinely addressed themselves to the statutory criteria and were of the opinion that the criteria were satisfied."

[182] Richardson J meanwhile found:[57]

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

[183] Finally, McMullin J found it would be "unreal to expect those concerned to maintain a lofty detachment from the matter".[58]

[184] There are two further comments on the legal principles which guide the analysis I shall shortly commence. First, as Tipping J made clear in *Travis Holdings* when he qualified his comments by saying "in the particular statutory and factual setting with which this case is concerned",[59] while the overall question is the same, whether or not predetermination is established on the facts must be decided by reference to the particular legislative and factual setting. A similar proposition is evident in Cooke J's findings in *CREEDNZ*, cited above.

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57 At 194.
58 At 214.
59 *Travis Holdings Ltd v Christchurch City Council*, above n 46, at 47.

[185] Secondly, the Court can only properly rely on and examine evidence capable of objective assessment in analysing whether predetermination has been established.[60]

Analysis

[186] Save CP's claim is that predetermination coloured the AELB's processes and decisions both prior to February 2014 and subsequently at every relevant stage. However, because the Council's position is that the AELB made a legitimate primary decision in April 2015, it is more appropriate to address Save CP's claims by reference to the following three temporal stages:

(a) Was there predetermination before February 2014 (when the AELB directed preparation of the Eng/Burt report)?

(b) Was there predetermination at any time between February 2014 and April 2015? And

(c) Was the AELB entitled to make the decision in principle by 22 April 2015?

[187] I shall deal with each of these in turn.

(a) Was there predetermination before February 2014?

[188] A review of the documentary evidence set out in some detail above easily leads me to conclude that Save CP has failed to prove on the balance of probabilities there was predetermination prior to February 2014. My reasons follow.

[189] The AELB was not informed until 1 May 2013 that from 1 July 2013 Chamberlain Park would be managed by the Council. There is no recorded discussion of Chamberlain Park until the workshop on 4 December 2013.

[190] In Save CP's favour, during 2013 the AELB did ask Council policy officers to consider what other uses the park might be put to. There is also Jasmax's Concept

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60 *Whakatane District Council v Bay of Plenty Regional Council*, above n 48, at [117].

Design Report of October 2013 and the O'Connor Sinclair report of 28 February 2014. Mr Long observes that no explanation has been given for the existence of the Jasmax report and that the O'Connor Sinclair report states its purpose is to provide guidance to the Council and the AELB "on the best recreational use of the land associated with Chamberlain Park". He also points out that O'Connor Sinclair appear to have had access to the draft AELB Plan when preparing their report.

[191] That combination of evidence represents the highest point tending to support a finding of predetermination. But on any analysis this evidence, whether taken alone or in combination, falls well short of such a conclusion. There can be nothing objectionable in an elected local board being aware of the competing demands and needs of its constituents. Plainly there was a paucity of open space and it was incumbent on the AELB to explore the opportunity of developing a large piece of land with an existing use. At their highest, the steps taken by the AELB prior to February 2014 could only be described as preliminary, exploratory and investigatory. There is nothing in the evidence to support the claim that by this stage the AELB had closed its mind to the option of retaining Chamberlain Park in its current state.

[192] It is against that background that the uncontradicted evidence of Dr Haynes may be considered. Dr Haynes recalls that in the latter part of 2013, from the time of the local body elections until the end of the year, Board business was taken up with establishing the new local board rather than making decisions of any sort. He points out that not only was the AELB aware of the duty to consult, but that consultation was the primary means by which the Board could reach a decision which best served the communities it represented.[61] I therefore accept Dr Haynes' explanation that the inquiry was not because the AELB had made up its mind, "but in order to have as full as possible [an] understanding of options for open space in Albert-Eden".

[193] Neither do I consider the AELB's decision-making may be impugned because it did not undertake a specific investigation into Chamberlain Park's utilisation as a golf course. Mr Long is wrong when he submits there was no evidence of Chamberlain Park's utilisation and that it was "ignored completely". Shortly before

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[61] This claim is also corroborated by the subsequent steps the AELB took, namely multiple phases of consultation.

these events, O'Connor Sinclair had completed two reports for New Zealand Golf on the challenges and opportunities facing managers of golf facilities in Auckland and New Zealand. At least on an Auckland-wide level, the Council and the AELB particularly were aware of the problems facing golf; low utilisation and an oversupply of relatively homogenous golf courses and facilities which did not necessarily service the changes Auckland is expected to encounter over the coming decades.

[194] Ironically, the survey's findings in relation to Chamberlain Park suffered because it did not respond. As a consequence data had to be drawn from other sources. Problematically, this data seems not to have taken into account non-member usage which, at a public course such as Chamberlain Park, necessarily represents a significant component of its utilisation.

[195] But absent unreasonableness, it is beyond the scope of this Court's function in a judicial review to question whether the AELB might have had an enhanced or more comprehensive body of information before it. The AELB's failure to seek out further evidence about Chamberlain Park's utilisation is relevant only to the extent it reveals predetermination. Mr Long submits that such an inference may properly be drawn from the failure to seek further information despite flaws in the data. I disagree.

[196] First, the AELB continued to reference "underutilisation" at Chamberlain Park throughout the consultation and decision-making process. While the data it relied on may not have been complete, it nevertheless undermines the inference that Mr Long seeks to draw. Instead, it indicates the reason the AELB did not call for further analysis of Chamberlain Park's actual utilisation was because it considered it was already seized of sufficient information rather than because it predetermined change was necessary.

[197] Secondly, in circumstances where the AELB had expert consultancy reports available to it which surveyed the utilisation of golf courses around Auckland and New Zealand, including Chamberlain Park, the fact it did not seek out further evidence is an insufficient foundation for a finding of unreasonableness. While in some respects the data may have been misleading, reliance on it does not meet the high threshold the law requires before a finding of unreasonableness may be made.

[198] Thirdly, there were other, more general, observations in the O'Connor Sinclair reports which would have properly influenced the AELB.

[199] And finally, the actual utilisation of Chamberlain Park was merely one factor which needed to be weighed by the AELB. Amongst other things, it was properly influenced by the contents of the Longdill & Associates report which identified a shortfall of sports fields in Albert-Eden.

(b) Events between February 2014 and April 2015

[200] These have been discussed in detail already. For the purposes of the present discussion a summary of the relevant events follows:

(a) At the workshop on 19 February 2014 Ms Rimmer was directed to prepare an assessment of the current provision of sports fields in the Board's area and to review golf provision at Chamberlain Park. This was the first analysis of the use of Chamberlain Park.

(b) When the Eng/Burt report was presented to the AELB the authors made a case for change which recognised the need to accommodate the growing and diversifying community and improving the use of existing open space such as Chamberlain Park. A more detailed cost benefit analysis was required and an acknowledgement was made that this proposal did not represent a developed plan.

(c) Between July and October 2014 there was an extensive period of consultation which included pamphlet distribution and a community meeting on 16 July 2014. Submissions were received including from the Chamberlain Park golf club criticising the O'Connor Sinclair reports. The Council acknowledged the review of Chamberlain Park was much debated, supporting the investigation of possible alternative uses. The report of 17 September 2014 acknowledged the theme arising from the consultation process that the AELB should investigate possible uses for the Chamberlain Park golf course, including a status quo option. On 15 October 2014 the AELB resolved to review the use

of Chamberlain Park with the aim of maximising its recreational use in its Local Board Plan.

(d) This led to a second stage of consultation in late 2014 and early 2015 involving an online survey, workshops with particular interest groups (including golf users) and an open day at Chamberlain Park. The online survey, which did not initially include an 18-hole option, was amended after Mr Quince complained.

(e) 1,365 submissions were received. The results were analysed. The interest of golfing groups in retaining an 18-hole course was noted. This led to the preparation of scenarios for selection in the Master Plan Options Report, to be considered on 22 April 2015.

[201] As Ms Anderson accepts, this catalogue reveals that there was a clear preference, on the part of at least some members of the AELB, to change the use of Chamberlain Park. The AELB was well aware of a shortfall of open space in its area and the opportunity for redevelopment of Chamberlain Park. This is apparent from the quite prescriptive instructions given to Ms Eng and Ms Burt. The two periods of consultation, before and after the finalisation of the Local Board Plan, and the content of the Plan, reinforce this conclusion. The AELB was minded to change the existing use of Chamberlain Park to accommodate other pressing future needs of its community.

[202] But such an approach does not conflict with the legal test for predetermination, which requires a closed mind on the part of the decision-maker, or unwillingness to genuinely consider changing its mind. It is apparent the AELB had a strong, but legitimate and rational, predisposition for change. This falls well short of the requirement in law that it closed its mind or was unwilling to be convinced.

[203] As Ms Anderson points out, this is a very different situation to that in *Lower Hutt City Council v Bank* where the decision-maker was found to have unlawfully predetermined an issue when it entered into an agreement with a company under which

it undertook all steps necessary to stop a street.[62] The Court of Appeal found that the Council, in entering into the contract, had put itself in a position where it could not fairly discharge the duty placed on it by the governing statute.[63]

[204] *Friends of Turitea Reserve Society Inc v Palmerston North City Council* provides a helpful contrast. There the Council entered into an agreement to receive payments from Mighty River Power to establish wind turbines on reserve land. Baragwanath J, in rejecting the allegation of predetermination, found that unlike *Bank*, the Council did not abdicate its function by committing itself to ensure the change of status of the reserve land took place, because the agreement included a clause that its statutory functions were not fettered by the agreement, and that there would be no liability for delay or prevention of the wind farm by such an exercise.[64] So long as the Council's mind was not closed to argument, its decision would not be invalidated.[65]

[205] Both these decisions are instructive. They reveal that decision-makers are entitled to take significant steps in anticipation of a particular action or decision. Nothing less than a closed mind will meet the predetermination threshold.

[206] I am satisfied a conclusion of predetermination is not available on the evidence before me. It was inevitable the Eng/Burt report would focus on alternative uses given the AELB's desire to explore its options and its sense that it had a reasonable understanding of Chamberlain Park's existing use, as I have discussed above.

[207] As regards the general review undertaken by the AELB as part of its Local Board Plan consultation process, it is plain, as Ms Anderson submits, that the Board had in mind an evaluation of the current use of Chamberlain Park as well as alternative future uses. Survey questions asked about golf, and the AELB's engagement with stakeholders included representatives of the golfing community. I agree with Mr Long that the initial failure to include an 18-hole option on the online survey is capable of inferring strong preference for change, but the AELB's subsequent inclusion of that option online and at the open day demonstrates it had not closed its mind to the

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62 *Lower Hutt City Council v Bank* [1974] 1 NZLR 545 (CA).
63 At 550.
64 *Friends of Turitea Reserve Society Inc v Palmerston North City Council*, above n 51, at [104].
65 At [108]-[109].

possibility of maintaining the status quo. There were also catch all questions. Generally, I agree with Ms Anderson that this approach was consistent with the statutory function of the AELB which is to enable democratic decision-making on behalf of the communities within its area and generally meet the current and future needs of communities.[66]

[208] The various reports presented to the AELB by Council officers revealed the competing views as to how Chamberlain Park should be used, including those supporting the maintenance of the status quo. However, I do not consider that the support for maintaining the status quo was so overwhelming that an inference of predetermination should be drawn from the decision to press on with a review. On the evidence before me, while there was significant opposition to change, it is equally apparent that various other change options appealed to significant elements of the community.

[209] This was not a case of token consultation involving a pretence on the part of AELB when it was in fact deaf to the views of its public. Rather the Board was presented with a complex body of public opinion. In that context, the decision to review the use of Chamberlain Park in the Local Board Plan, and the features of the subsequent review process undertaken, are not compelling evidence the AELB closed its mind. Instead they convey the AELB's natural and legitimate predisposition for change informed by public feedback.

[210] Relatedly, limited weight may be placed on the subjective perceptions of others, including Mr Quince, that their feedback was not taken into account. Just as Mr Long exhorted me to rely on the objective record as the best source of evidence of predetermination, similarly the personal views of those closely connected to these events must be treated with caution. Mr Quince's connections with Chamberlain Park go back to the mid-1970s. He is now a committee member of the men's golf club having held the offices of secretary and more latterly treasurer. It is perfectly understandable he holds strong views about the retention of Chamberlain Park in its present configuration. That he has invested his time and energy in supporting these

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66 Local Government (Auckland Council) Act 2009, s 10 and Local Government Act 2002, s 10.

proceedings is to be admired. But as with the evidence of Council staff and AELB members, only limited weight may be given to subjective views absent corroboration by the documentary record.

[211] The final, but important, reason which operates against a finding of predetermination is that the AELB was involved in a multi-layered decision-making process which it discharged effectively by consulting at each stage of the process. The comments of the Court of Appeal in *Bank* are apposite:[67]

> "It is obvious that before a council reaches the stage of deciding to put in motion [a course of action], much investigation will have been undertaken and many decisions made."

[212] I am satisfied that this is what took place here. Notably, throughout each of the various stages, there was substantial consultation. Before resolving to review the use of Chamberlain Park with the aim of maximising its recreational use, the AELB consulted and received feedback. Following the adoption of the Local Board Plan, it consulted widely on the review. It is evident from the documentary record that through these stages feedback was then analysed and reported on the AELB did not close its mind to the possibility of retaining the status quo.

[213] At first blush it may seem that when the AELB advanced the four scenarios for consultation at its workshop in March 2015, it had unlawfully predetermined that the status quo would not be considered. An examination of what in fact occurred at the 22 April 2015 meeting, when the AELB approved in principle the redesign of Chamberlain Park, displaces such a conclusion. At that meeting two members of the AELB proposed an amendment to include the status quo as an option in the Master Plan. Mr Long characterises this as the two members, having previously made their minds up, re-opening them in an attempt to "fix the situation". In my view that is a courageous submission. A much more plausible inference to be drawn from these events is that the AELB had not unlawfully predetermined the issue given two members were of the view that the status quo should be included in the Master Plan. Moreover, the decision in principle only passed by a four to three majority, with one member abstaining. Consistent with the democratic processes of the AELB, there

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[67] *Lower Hutt City Council v Bank*, above n 62, at 549.

remained a healthy disagreement within the decision-making body. That is an artefact of a healthy democratic process. That the vote was not unanimous points firmly against predetermination.

[214] As Baragwanath J observed in a similar context in *Friends of Turitea Reserve Society Inc*:[68]

> "It is notable that one councillor who had earlier been supportive of the venture was one of the three who in the end voted against it."

[215] It follows I am not satisfied that the AELB exhibited predetermination before 22 April 2015.

(c) The in principle decision of 22 April 2015

[216] The significance of the decision of 22 April 2015 is that this was when the AELB approved in principle the redesign of Chamberlain Park. The preparation of a Master Plan containing four options was approved, and a proposed amendment to include the status quo as one of the options rejected. In other words, the AELB had, by this point, decided the retention of the status quo was not an option. The decision had been made.

[217] Thus it is not necessary to assess whether there was predetermination after this time. Rather, the inquiry is whether the decision was lawful; that is whether this was an appropriate point for the AELB to make a decision or whether it constituted illegitimate predetermination.

[218] Ms Anderson submits the events of April 2015 were some 14 months after Save CP alleges the AELB had predetermined the issue. And yet, over this period, the AELB consulted on and heard submissions in relation to the current and potential uses of Chamberlain Park: by consulting on the draft Local Board Plan between 7 July 2014 and 6 August 2014, and by consulting on the review of Chamberlain Park following approval of the AELB Plan. That second consultation which involved hosting open days, workshops and conducting online surveys.

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[68] *Friends of Turitea Reserve Society Inc v Palmerston North City Council*, above n 51, at [109].

[219] After these two periods of consultation and the evaluation of feedback, the AELB made its decision in principle to redesign Chamberlain Park. Ms Anderson submits that if this Court determines the AELB's decision in principle was an impermissible predetermination it will impose on all local boards an arduous implied duty to consider the status quo in respect of all non-regulatory decision-making at every stage of the decision-making process. This, she says, would give preservation of the status quo a "pseudo-statutory protection", akin to that actually present in the Reserves Act 1977, which Baragwanath J considered in *Friends of Turitea Reserve Society Inc*.[69]

[220] I agree with Ms Anderson. It was permissible for the Council to determine that it would make changes after carrying out two discrete phases of consultation on possible changes, including the option of maintaining the status quo. In fact, Mr Long did not seriously challenge this view. Rather, his submission was that this course would have been appropriate had the earlier stages of consultation been carried out with an open mind.

[221] Having found the AELB did not predetermine the issue throughout the earlier periods of consultation, I am satisfied that by 22 April 2015 it was appropriate for the AELB to make a decision in principle that changes to Chamberlain Park would be made, and then resolve to consult on the nature of those changes. This reflects the reality that local bodies are elected to make decisions on behalf of their constituents. And provided that in the course of their decision-making they comply with their statutory duties, consider all relevant matters and consider no irrelevant matters, maintain an open mind and arrive at a decision which is neither irrational nor unreasonable, such decisions are lawful.

[222] Here there was no special statutory requirement to consider the status quo.[70] I have also found the AELB approached its decision-making with an open mind. Failure to consider all relevant matters or consider irrelevant matters has not been pleaded. And there is nothing irrational or unreasonable about resolving to make changes to the

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69 See also *Devonport Borough Council v Local Government Commission* [1989] 2 NZLR 203 (CA).

70 Some of the duties of in the Local Government Act 2002 are the subject of the fourth cause of action, which I address next.

use of a park after two rounds of consultation and the analysis of the feedback, particularly where, as Ms Anderson emphasises, comprehensive feedback demonstrated a sizeable portion of the community was attracted to various of the proposed changes.

[223] Mr Long also submits the AELB's decision after 22 April 2015 to amend one of the Master Plan scenarios to include only one 9-hole option is evidence of predetermination. He also refers to the process by which the AELB dismissed the three 18-hole options following consultation after finding, for various reasons, they did not satisfy its criteria. I have already accepted Mr Long's submission that "status quo" refers to leaving the golf course as it is, or at least not changing its configuration in a material way. Mr Long's submissions on this point appear to depart from that definition, suggesting it would have been permissible for any 18-hole option to have been retained. Given my earlier comments I have not placed weight on this aspect of the submissions because it is apparent that Save CP's case is founded on the retention of the golf course in its current state rather than the adoption of one of the three 18-hole scenarios.

Conclusion on predetermination

[224] From the evidence I am satisfied the AELB did not close its mind to the possibility of retaining Chamberlain Park in its current form until the decision in principle on 22 April 2015. Undoubtedly the AELB was firmly disposed to change. But throughout, any predisposition was legitimate and the Board, at all material times, was genuinely open to changing its mind. A finding of predetermination is not available on the evidence.

Fourth cause of action: Was there a failure to consult on the case for change?

Introduction

[225] The fourth and final cause of action has two aspects to it. To some extent both overlap with the previous cause of action. Save CP claims there was a "fundamental failure" in the decision not to consult on the status quo at the outset and that there was

a failure to carry out the consultation with an open mind and with a genuine consideration of the responses received.

[226] The Council's position is that the AELB undertook extensive consultation in relation to Chamberlain Park which complied with its decision-making obligations under the LGA and any extant common law obligations. It argues that although there is no duty to consult at the stage when options are identified, the AELB did consult through the initial stages and in relation to the development of reasonably practicable options. It also says its consultations on the status quo were conducted with an open mind.

Consultation obligations: legal principles

[227] I begin by setting out the legal principles governing a local authority's consultation obligations. This was the subject of considerable focus in counsel's submissions. Ms Anderson submits no common law duties of consultation have survived the Court of Appeal's decision in *Wellington City Council v Minotaur Custodians Ltd*.[71] Mr Long submits to the contrary.

[228] For that reason it is necessary to review both the statutory principles as well as the common law before embarking on an assessment of the evidence.

(a) LGA principles

[229] The leading decision concerning the obligation on local authorities to consult is *Minotaur*. There the Court of Appeal comprehensively analysed the provisions of pt 6 of the LGA relating to decision-making.

[230] It is beyond serious doubt that although *Minotaur* related to decision-making by a local council, it has equal force in the context of local boards. In carrying out decision-making in respect of non-regulatory activities of Council, local boards are required to comply with the requirements of ss 76 to 82 of the LGA, the same provisions which were considered in *Minotaur*.[72] In fact, s 16(2) of the LGAC

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71 *Wellington City Council v Minotaur Custodians Ltd* [2017] NZCA 302, [2017] 3 NZLR 464.
72 Local Government (Auckland Council) Act 2009, s 16(2).

expressly states that ss 76-82 of the LGA should be read "as if every reference in those sections to a local authority were a reference to a local board".

[231] Part 6 of the LGA sets out "planning, decision-making and accountability" obligations of local authorities. For present purposes, this includes obligations in relation to all decision-making processes, including consultation with interested and affected persons. Section 76 sets out the basic framework for decision-making:

> "**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.
>
> (5) Where a local authority is authorised or required to make a decision in the exercise of any power, authority, or jurisdiction given to it by this Act or any other enactment or by any bylaws, the provisions of subsections (1) to (4) and the provisions applied by those subsections, unless inconsistent with specific requirements of the Act, enactment, or bylaws under which the decision is to be made, apply in relation to the making of the decision.
>
> (6) This section and the sections applied by this section do not limit any duty or obligation imposed on a local authority by any other enactment."

[232] The Court in *Minotaur* summarised the provision in this way:[73]

> "Relevantly for present purposes, subs (1) and (2) provide that consultation decisions must be made in accordance with ss 78 and 82, subject, in the case of compliance with s 78, to the ameliorating effect of s 79. Subsection (3) sets

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[73] *Wellington City Council v Minotaur Custodians Ltd*, above n 71, at [33].

> two standards of performance. In respect of "significant decisions", the local authority must ensure that the provisions contained in subs (1) have been "appropriately observed". This is the higher of the two standards. Where the matter is not "significant", the standard is more aspirational: decision-making is only required to "promote compliance" with the provisions referred to in subs (1). Even that lower standard is subject to s 79 as noted."

[233] I pause at this point to observe that Save CP did not claim the decision not to consult on the status quo from the outset was a "significant decision" within the scheme of pt 6 of the LGA. I agree with Ms Anderson that in the absence of Save CP advancing any reasons why the decision is "significant", there are no considerations before me which would justify elevating it to a "significant decision" status.[74] Accordingly, except for the "ameliorating effect of s 79", the "promote compliance" standard should be applied to the decisions made by the AELB in question.

[234] As noted, by virtue of s 76(2), compliance with both ss 77 and 78 is subject to s 79.[75] Relevant for present purposes, s 77(1) states that a local authority must, in the course of the decision-making process, seek to identify all reasonably practicable options for the achievement of the objective of a decision.

[235] Section 78 then relates to community views. It relevantly provides:[76]

> "**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.
>
> …"

[236] The Court in *Minotaur* noted that while s 78(1) requires a local authority, in the course of its decision-making, to give consideration to the views and preferences

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74 Local Government Act 2002, s 5 defines "significant" as follows: "**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". Significance is also defined in s 5.

75 This point is also emphasised by ss 77(2) and 78(4).

76 I return below to subs (2), which has been repealed and so has no bearing on this proceeding, but which was discussed in a number of decisions referred to the parties in the course of argument.

of those affected or with an interest, s 78(3) makes clear that s 78 does not, in itself, create an obligation to consult or indeed adopt any particular consultation process.[77] Rather, the Court stated "consultation is one of a number of options for obtaining information about the views and preferences of those affected or with an interest".[78]

[237] Where a local authority decides to consult, the principles of consultation in s 82(1) are engaged:

> "**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."

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77 *Wellington City Council v Minotaur Custodians Ltd*, above n 71, at [35]-[36].
78 At [36].

[238] But the obligation to undertake consultation in accordance with these principles is subject to s 82(3) to (5):

> "(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."

[239] The operation of s 82 was helpfully described in *Minotaur*:[79]

> "The effect of this provision is that, when a council does choose to consult, certain "principles" apply to the particular forms of consultation the council adopts: most relevantly, those affected should have access to relevant information in an appropriate format and be encouraged to present their views having been given clear information as to both the purpose of the consultation and the scope of any likely decision. Further, a council must ensure that interested or affected parties have a reasonable opportunity to present their views, and that those views are received by council with an open mind.
>
> In substance, these principles are really basic performance standards. Subsection (3) is the counterweight. This restates (now for the third time) that

[79] At [38]-[39].

> the "how" of compliance with these guidelines is a matter for the local authority. That proposition is subject to the … further considerations which the local authority must (relevantly) bear in mind [contained at s 82(4)]."

[240] There is also s 82A, which imposes information requirements on local authorities who decide to consult, but which was not the subject of argument.[80] Relevantly, s 82A(1) provides:

> "**82A Information requirements for consultation required under this Act**
>
> (1) This section applies if this Act requires a local authority to consult in accordance with, or using a process or a manner that gives effect to, the requirements of section 82.
>
> (2) The local authority must, for the purposes of section 82(1) (a) and (c), make the following publicly available:
>
> (a) the proposal and the reasons for the proposal; and
>
> (b) an analysis of the reasonably practicable options, including the proposal, identified under section 77(1); and
>
> (c) if a plan or policy or similar document is proposed to be adopted, a draft of the proposed plan, policy, or other document; and
>
> (d) if a plan or policy or similar document is proposed to be amended, details of the proposed changes to the plan, policy, or other document."

[241] Completing the scheme is s 79, to which ss 77 and 78 are subject. It provides that it is the responsibility of local authorities to decide in their discretion how ss 77 and 78 are to be complied with, though regard must be had to the matters in s 79(2):

> **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,—

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[80] This section was inserted on 8 August 2014 by s 24 of the Local Government Amendment Act 2014. In terms of the present timeline, this was during the first period of consultation on the draft AELB plan, after pamphlets had been distributed advising of the draft plan and calling for submissions.

(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.

[242] Having set out this legal framework, the Court in *Minotaur* made the following observation, of central relevance to this proceeding:[81]

> "In summary, pt 6 of the LGA carefully and repeatedly rejects the idea that there is to be found in its provisions any duty to consult with affected or interested parties. Instead, local authorities are given a deliberately broad discretion as to whether to consult, and, if so, how. That does not mean, however, that there are no limits on a council's discretion. Like all statutory decisions, consultation decisions must be rational and consistent with the objects of the LGA and the particular controlling provisions."

[243] It was of the view that:[82]

> "Parliament's clear and repeated preference for protecting the Council's right to decide how it wishes to consult must count for something. In this case, it means that if an inference can be drawn that there was a rational basis for different treatment between affected classes within the community, that inference should be drawn."

[244] In other words, while the ordinary controls of judicial review, such as illegality (in terms of compliance with the objects and controlling provisions of the LGA), irrationality and unreasonableness apply to consultation decisions of local authorities,

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81 *Wellington City Council v Minotaur Custodians Ltd*, above n 71, at [42].
82 At [68].

the LGA provides a wide berth for local authorities to decide when and how they should consult. Similar comments were made by Baragwanath J for the Court of Appeal in *Whakatane District Council v Bay of Plenty Regional Council*:[83]

> "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 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."

[245] One further remark worthy of inclusion in this patchwork of judicial commentary is Whata J's in *Bailey v Christchurch City Council*:[84]

> "The obligation to consider the views of affected persons is an aspect of local government democracy. Section 79 confers on the Council a discretion as to how it considers those views, not whether they should be considered. The method must be largely proportionate to the significance of the matters affected by the decision. Whether therefore the Council was "obliged" in the circumstances to "consult" depended on the proportionality assessment … While it is the task of the Council to make the proportionality assessment, given the importance attached by the Act to consideration of the views of affected persons, a proportionate method is a legal condition prerequisite to a valid s 79 decision."

[246] That observation contextualises the analysis in *Minotaur*. It would be incorrect to read the Court of Appeal's decision as removing all fetters from local authorities' decision-making powers at ss 76 to 82. The matters in ss 77 and 78 *must* be considered by local authorities in the course of their decision-making process, or at least local authorities must ensure their decision-making processes *promote compliance* with those sections.[85] There is also a requirement that the methods adopted are *largely in proportion* to the significance of the issue.[86] Those are illegality controls. What the Court of Appeal in *Minotaur* emphasises, in different language to Whata J in *Bailey* but in the same vein, is that whether to consult, and how, is a matter for the local authority's discretion, subject to ordinary judicial controls on the exercise of

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83 *Whakatane District Council v Bay of Plenty Regional Council* [2010] NZCA 346, [2010] 3 NZLR 826 at [76].

84 *Bailey v Christchurch City Council* [2013] NZHC 1933, [2013] 3 NZLR 679 at [56].

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

86 Section 79(1)(a).

administrative powers. In short, as s 79 makes plain, consultation is not the only mechanism by which ss 77 and 78 may be satisfied.

[247] I am guided in my application of ss 76 to 82 of the LGA by these judicial statements.

(b) A common law duty of consultation?

[248] At common law there exists a duty of consultation which broadly involves the affected party knowing what is proposed, being given a reasonably ample and sufficient opportunity to express their views, and freedom to express what they think.[87] This may also involve the need to equip the parties with relevant information. As with the duty generally, what equates to adequate information is a fact-intensive enquiry.[88] But while, as Taylor writes, the statutory and factual circumstances are vital, "certain generalities are possible and helpful".[89]

[249] More recently, the United Kingdom Supreme Court has characterised it as a "duty cast by the common law upon a public authority to act fairly", a duty it described as "often illuminated by the doctrine of legitimate expectation".[90]

[250] The other legal question addressed by the Court in *Minotaur*, although in obiter, is the question of whether common law duties of consultation owed by local authorities have survived the enactment of the LGA. While it considered common law duties of consultation could arise on the particular facts, its general position was:[91]

> "Because the clear intention of pt 6 is to give councils a wide discretion in this field, it will always be difficult to establish a concurrent common law duty to consult except in truly exceptional cases such as *Pascoe*."

[251] The Court also questioned whether the "fairness-based obligation to consult" identified in *R (Stirling) v Haringey London Borough Council* was applicable, as

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87 *Wellington International Airport Ltd v Air New Zealand* [1993] 1 NZLR 671 (CA) at 674, citing *Port Louis Corp v Attorney-General of Mauritius* [1965] AC 1111 (PC) at 1124.

88 GDS Taylor *Judicial Review: A New Zealand Perspective* (3rd ed, LexisNexis, Wellington, 2014) at [13.80].

89 At [13.78].

90 *R (Stirling) v Haringey London Borough Council* [2014] UKSC 56, [2014] 1 WLR 3947 at [23].

91 *Wellington City Council v Minotaur Custodians Ltd*, above n 71, at [48], citing *Pascoe Properties Ltd v Nelson City Council* [2012] NZRMA 232 (HC), in which MacKenzie J found the Council

similar facts in New Zealand would have breached s 82(1)(c) of the LGA, and therefore possibly the performance obligation at s 76(3).[92]

[252] The *Minotaur* decision does not stand for the proposition that any common law duty of local authorities to consult has been extinguished by the LGA. But it does put it beyond doubt that the starting point when assessing whether a local body has complied with its consultation obligations is the LGA, and the broad, discretionary approach it takes to compliance with consultation requirements under ss 77, 78, 79 and 82. It is only where, on the particular facts of the case, which in the Court of Appeal's words will be "truly exceptional", a concurrent duty at common law may be made out.

Consultation: assessment

[253] Mr Long submits that as a matter of law, the AELB was required to:

(a) under s 77, "seek to identify all reasonably practical options" (which he submits must include the status quo option) for the achievement of the objective of a decision;

(b) under s 78, "give consideration to the views and preferences of interested persons";

(c) under s 79(1)(b)(i), actually consider what all reasonable options for Chamberlain Park were; and

(d) under s 79(2)(c), have regard to the significance of all relevant matters and the extent to which the nature of its decision allows it scope and opportunity to consider a range of options and the views and preferences of other people.

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was obliged to consult with adjoining businesses on a decision to change the use of council-owned land from customer car park to an ordinary park. The Court of Appeal in *Minotaur*, at [46], characterised this as a case of legitimate expectation arising on unique facts, being that the Council had previously struck a special rate levied on the adjoining businesses to fund its purchase of the land for customer parking.

92 At [47].

[254] He submits the AELB erred by failing, in the first place, to properly identify reasonably practicable options for consultation, as the decision-maker in *Whakatane District Council* did.

[255] By failing to identify the status quo as a reasonably practicable option, he submits the AELB's consultation process was fundamentally flawed. It did not put itself in a position to be able to consult on a reasonably practicable option. In this submission he draws an analogy with *R (Stirling)*. There, where a council tax deduction scheme was proposed, the consultation material distributed by the local authority did not provide alternatives to the proposal. Lord Reed found the consultation document "misleadingly implied that there were no possible alternatives to that choice", and that as a result "there was no consultation on the fundamental basis of the scheme".[93]

[256] I have carefully read both decisions cited by Mr Long and I am not convinced either assists Save CP's case.

[257] In two important respects, the decision-making procedures governing the Bay of Plenty Regional Council's decision to move its office from Whakatane to Tauranga in *Whakatane District Council* were more prescribed than in the present case. First, the decision was a significant one, meaning compliance with ss 76(1) had to be "appropriately observed".[94] In contrast, the AELB's decision regarding Chamberlain Park was not significant in terms of the LGA and so the less stringent requirement that compliance with s 76(1) is promoted applies. A more rigorous legal test guided the Court of Appeal's analysis.

[258] Secondly, and importantly, when the *Whakatane District Council* case was decided s 78(2) had not yet been repealed. That provision prescribed the stages at which a local body had to give consideration to the views and preferences of persons likely to be affected by or to have an interest in its decision-making:

> "(2) That consideration must be given at—

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93 *R (Stirling) v Haringey London Borough Council*, above n 90, at [42].
94 Local Government Act 2002, s 76(3)(b).

(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.

[259] Section 78(2) was integral to the Court of Appeal's decision. The essential failing identified by the Court was that the decision-maker had not given consideration to community views and preferences at either the first or second stage of s 78(2).[95] The Court stated:[96]

> "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."

[260] Indeed, no evidence was adduced to show it had, in the course of its decision-making process, given consideration to the views and preferences of persons likely to be affected by or have an interest in the matter at either the first or second stage of s 78(2).[97] The concluding comments show how central the requirements of s 78(2) were to the Court's decision:[98]

> "… 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."

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95 *Whakatane District Council v Bay of Plenty Regional Council*, above n 83, at [71].
96 At [73].
97 At [74].
98 At [77].

[261] The Court of Appeal's decision in *Whakatane District Council* cannot be extracted from that context. When s 78(2) was being repealed, at the committee stage of the second reading of the Local Government Act 2002 Amendment Bill the Minister of Local Government said:[99]

> "Part 1 repeals requirements for local authorities, firstly, to consider the views of interested or affected persons at four specified stages in the decision-making process. … It will be up to the council to decide how many times it will consult."

[262] Mr Long points out that in its February 2014 report, O'Connor Sinclair stated at the first phase of the Chamberlain Park project, it would:[100]

> "… review a number of key documents (some to be identified by research) to gain an overall understanding and appreciation for the activities and characteristics of Chamberlain Park. This will include the following:
>
> …
>
> - Documents on current use and participation at Chamberlain Park;
> - Reports prepared by Auckland Council on utilisation, maintenance and financial reports for the golf course[.]"

[263] He submits the subsequent failure to adopt this recommendation and carry out this sort of procedure at the preliminary stage of the AELB's investigation was a "fundamental error".

[264] Were s 78(2) still in operation, that submission might have been more successful. But it is plain that the repeal of that subsection was intended to provide more flexibility to local authorities when discharging their s 78(1) obligations. In and of itself, failure to undertake that process is not an error provided the approach taken by the AELB generally satisfied s 78(1). I address that question below, but note at this stage, as I have earlier observed, it is factually incorrect that the AELB had no understanding of the current situation at Chamberlain Park.

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99 (16 November 2010) 668 NZPD 15539.

100 Affidavit of Richard Quince, sworn 10 August 2017, at 163.

[265] Likewise I do not consider *R (Stirling)* is apposite in that at no stage, until a decision in principle to redesign Chamberlain Park was made on 22 April 2015, did correspondence by the AELB misleadingly imply there were no possible alternatives. The first round of consultation, on the draft AELB plan, stated the AELB wished to "review the use of Chamberlain Park and consult with the community on options for maximising its recreational use". That language left all options available at that stage. The AELB was merely seeking consultation on "options", and undertaking a "review" of the park's use. Nothing in the language of the draft plan and the pamphlets suggested there were no possible alternatives to change. At most it indicated a predisposition for change.

[266] Ultimately, I am satisfied that the approach followed by the AELB complied with its obligations arising under the relevant provisions of the LGA, namely ss 77 to 79, which Mr Long focused on. There were two relevant consultation stages; one before the adoption of the AELB Plan, which was on the draft plan and one following its adoption during the review of Chamberlain Park.

[267] I have already discussed in detail the factual basis which supports this conclusion, particularly in respect of the third cause of action; predetermination. Thus what follows is simply an abbreviation of my earlier factual analysis.

[268] The first consultation phase involved the delivery of a summary of the draft plan to every household and business in the local board area. The summary was also found at public areas. It noted the AELB wished to review the use of Chamberlain Park and consult with the community on options for maximising its recreational use, and called for submissions. A large number of submissions were received. These were compiled into a summary of submissions which identified key themes. Relevantly, participants used this opportunity to promote the retention of the status quo; this led the summary report to record that the review of Chamberlain Park was a "much debated initiative".

[269] The second phase occurred after the Local Board Plan was adopted, and once the review of Chamberlain Park had been confirmed. At numerous workshops, meetings, an open day and via an online survey, interested and affected persons were invited to comment on what activities they wanted to see at Chamberlain Park. This included questions about the provision of golf. Again, interested parties took the opportunity to express their desire for the retention of the status quo.

[270] This was not a case of the AELB adhering to a preferred option without engaging the community in its decision-making process. Rather, by conducting the two consultation phases discussed, I am satisfied the AELB complied with ss 77 to 79 by:

(a) *Seeking to identify all reasonably practicable options for the achievement of the objective of its decision:* This was easily discharged by holding two rounds of consultation and meeting with interested parties. The status quo option was identified multiple occasions through submissions made during consultation in response to questions framed broadly enough to invite such submissions. It should also be noted that the focus of s 77(1)(a) on reasonably practicable options is qualified by the words which follow, "for the achievement of the objective of a decision". It was a matter for the AELB whether, having sought to identify all options via consultation, maintaining the status quo would achieve the objectives of its decision.

(b) *Assessing the options in terms of their advantages and disadvantages:* The feedback was the subject of summary reports and debate by the members of the AELB. They were also used to influence the next stage in the process (in the case of the first round informing what questions were asked at the second round and, in the case of the second round, informing what scenarios were put forward for Master Plan consultation).

(c) *Giving consideration to the views and preferences of persons likely to be affected by, or to have an interest in, the matter:* The consideration

given to the views and preferences expressed is plain in the way the feedback from each round of consultation was noted and used to inform the next round.

[271] Generally, it must be remembered that compliance with ss 77 and 78 is, by virtue of s 79, a matter for local authorities in their discretion. They are to make judgements about the extent to which different options are identified and assessed, the degree to which benefits and costs are quantified, the extent of detail of information to be considered, and the extent and nature of any written record kept on compliance with these sections.[101] These judgements must be largely in proportion to the significance of the matters affected by the decision.[102] But they are for them, absent an identifiable error. For reasons already discussed I can identify no error in the way the AELB exercised its discretion in complying with ss 77 and 78.

[272] For completeness, this is equally true in respect of the way local authorities undertake consultation in accordance with the principles of consultation at s 82(1). Mr Long has not suggested any way that the approach taken by the AELB in its discretion to comply with those principles, failed to properly observe them, except in relation to the second aspect of this fourth cause of action which I shall shortly consider. Foreshadowing that analysis, I also do not consider there was any error in the approach taken by the AELB in respect of these principles.

Having an open mind: legal principles

[273] The requirement to have an open mind, the focus of the second aspect of the fourth cause of action, is contained in s 82(1)(e) of the LGA. Consultation that a local authority undertakes in relation to any decision or other matter must be undertaken in accordance with the principle that the views presented to the local authority should be received by the local authority with an open mind and should be given due consideration by the local authority when making a decision.

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101 Local Government Act, s 79(1)(b).
102 Section 79(1)(a).

[274] As with the other s 82(1) principles, observation of these rests with the discretion of the local authority. It is what the local authority considers to be appropriate in the particular instance. But in exercising its discretion, the local authority must have regard to the matters in s 82(4), including: the requirements of s 78; 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 are known to the local authority; and the nature and significance of the decision, including its likely impact from the perspective of the persons who will or may be affected by, or have an interest in, the decision.

[275] As the Court of Appeal has observed, to have an open mind, the decision-maker must be "ready to change [its mind] and even start afresh".[103]

Having an open mind: assessment

[276] In my view there are two considerations, which to some extent counterbalance each other, that in accordance with s 82(4) would have influenced the AELB's exercise of its discretion as to how it went about consultation. The first is the fact that it would have had, even at the outset, a reasonable grasp of the views and preferences of the golfing community to the prospect of changes to Chamberlain Park. However, it may not have had a grasp of the diversity of persons who had an interest in Chamberlain Park. The second consideration is that from the outset, it would have been clear that from the perspective of these communities, the likely impact of any changes to Chamberlain Park would be substantial.

[277] In order to consult in accordance with the principle in s 82(1)(e), the approach taken by the AELB required these to be taken into account. Mr Long submits it did not because, from the start, the AELB did not approach its discussions with an open mind. He submits having an open mind is an ongoing and continuing obligation.

[278] I do not accept that submission on the facts. For the same reasons set out in some detail in relation to the third cause of action, I do not consider that at any stage,

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103 *Wellington International Airport Ltd v Air New Zealand*, above n 87, at 675.

until its decision in principle on 22 April 2015, the AELB closed its mind to the possibility of retaining the status quo.

[279] But more specifically, in relation to s 82(1)(e), I consider the consultation processes adopted by the AELB accorded with the principle that it should have an open mind and give those views presented to it due consideration. It also reflected the two considerations noted earlier, with special focus given to the views of the golfing community. The submission process pinpointed, if the AELB was not aware already, the diversity of those persons committed to the retention of Chamberlain Park in its present configuration. Mr Quince prepared a submission on behalf of Chamberlain Park which emphasised this and pointed to the number of casual golfers who utilised the park's facilities. He also spoke at various AELB workshops. Moreover, once the AELB Plan was adopted, the status quo was not off the table and, in fact, the desirability of its retention was emphasised at various workshops, meetings and in feedback. It was also noted by Council officers in their reports and, as already discussed, motivated two members of the AELB to propose an amendment to include the status quo as an option for consultation on the Master Plan.

[280] In the context of what was a lengthy, multi-layered decision-making process, the AELB maintained an open mind until, in its discretion, it considered it was appropriate to advance matters and shift focus to what the redesign of Chamberlain Park should look like. That decision did not fall foul of s 82(1)(e).

[281] The AELB duly considered all relevant matters in arriving at that decision, including the strong interests of certain communities. Inevitability a proportion of the submitters were bitterly disappointed including those with a strong interest in maintaining the status quo. But that is a not uncommon consequence of decision-making. The decision here was made by an elected body exercising its functions on behalf of the wider community in a democratic fashion.

Conclusion

[282] I have determined that the AELB discharged its decision-making responsibilities which arise under ss 76 to 82 of the LGA properly and in accordance with law.

[283] It is appropriate to conclude by reference to the paradigm common law principles of consultation as set out in *Wellington International Airport Ltd*.

[284] The interest groups represented by Save CP were told of the proposed review and were provided with multiple opportunities to express their views. This they did both orally and in writing. The approach taken by the AELB was neither perfunctory or a mere formality. It engaged in a robust process of consultation where multiple interest groups participated in an open and at times hotly contested debate concerning the best use of Chamberlain Park. Moreover, and crucially, consultation must not be equated with negotiation.[104] The process embarked on was not one which had as its object arriving at a solution which represented some form of consensus. There was no requirement for the AELB to accept the views and preferences or even reach a compromise with those who sought the maintenance of the status quo.

[285] For these reasons this cause of action must also fail.

Result

[286] The application for judicial review is dismissed.

[287] The interim orders shall expire 20 working days after the date of this judgment.

Costs

[288] The parties did not address me on the question of costs. The Council, as the successful party, is presumptively entitled to an award of costs. I invite the parties to consult on the question of costs with a view to agreement.

[289] If the parties are unable to agree and if the Council seeks an award, I direct that memoranda of costs not exceeding three pages (exclusive of appendices) are to be filed:

(a) by the Council **within 20 working days** of the date of this judgment; and

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[104] At 676.

(b) by Save CP **within 10 working days** thereafter.

Moore J

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