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**The Local Government Act 2002 –
The unclear scope of the new
general competence power and its limitations in regard
to economic undertakings and the interference with
central government’s responsibilities**

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I INTRODUCTION

The local government reform in 2002 brought about radical changes to the former regime under Local Government Act ("LGA") 1974. One of the reform's major goals was defined as granting local authorities more and broader responsibilities for the purpose of promoting a more effective self-governance.¹

While searching for adequate tools to give effect to this purpose, the New Zealand legislature, much like the legislatures of some other common law societies, decided to take an important step towards a more Continental European approach on local government powers. It was finally resolved that a power of general competence should be bestowed upon local authorities.² Soon after the new LGA 2002 came into force confusion spread among local authorities and the legal community. Did section 12(2) LGA really introduce a power of general competence or does the new regime fall short of fulfilling that promise?³

It will be the first goal of this research paper to approach this issue and to show that there can be little or no doubt that the legislature did in fact hold on to its promise. The examination of this issue will include statutory interpretation as well as historic and theoretical views on the power of general competence with a special focus on the international experience and the power's long-standing tradition in other countries. Regardless of this it is undoubtedly true that the Parliament of New Zealand was very keen on regulating this new general power and to hold on at least partially to the doctrine of ultra vires. But did the legislature succeed in doing so? Or are the limitations which are set out in numerous provisions throughout the LGA rather contributing to the uncertainty and confusion that necessarily come with drastic legal changes as the current one?

¹ Dean Knight and Chris Mitchell *LexisNexis Local Government* (LexisNexisNZ Ltd, Wellington, 2003-), Introduction.

² Grant Hewison "A Power of General Competence – Should It Be Granted to Local Government in New Zealand?" (2000) 9 AULR 498, 527.

³ Dean Knight and Chris Mitchell, above n 1, commentary on s 12.

While it is not possible to examine the scope and efficiency of all limitations and their interrelationship with section 12(2) LGA, this research paper will focus on two important issues that have been and arguably should be regulated in terms of clear statutory limitations.

First, I will look at trading activities undertaken by or on behalf of local authorities. As a result of the worldwide deregulation of markets the local government sector has become increasingly sensible to the idea of performing its tasks in business-like manners through corporate entities engaging in trading activities.⁴ While corporatisation has become an issue of growing importance in recent years, it is not at all a completely new one, but has been subject to legal analysis and political discussions as far back as in the first half of the twentieth century.⁵

Whereas formerly economic activities were tightly restricted and only a short list of permissible activities existed, the power of general competence as a basic principal led to a freeing-up of municipal trading.⁶ This even tempted Professor Ken Palmer to tell the *New Zealand Herald* teasingly that the new legal regime was "broad enough to allow local authorities to enter the used car business should they wish."⁷ But does the LGA 2002 give a carte blanche to local authorities to engage in whatever activity they want just like a private sector company can? Or do the limitation provisions when being applied to economic undertakings not only imply procedural necessities and requirements on transparency and accountability but substantial limitations as well? Given the fact that the traditional role of local government (and arguably still its role today) is to provide for the well-being of their respective local community, it is essential to deal with these issues in order to understand in how far the new legislative regime perpetuates this traditional purpose or extends the role of local government to areas that were formerly reserved to

⁴ *Towards a Power of General Competence for Local Government in New Zealand – A Discussion Paper* (Local Government Division, Department of Internal Affairs, Wellington, 1987) 57.

⁵ See Herman Finer *Municipal Trading* (George Allen & Unwin Ltd, London, 1941).

⁶ *Towards a Power of General Competence for Local Government in New Zealand – A Discussion Paper*, above n 4.

⁷ Julie Chambers and Chris Diack "Historic legislation extends grasp of local body octopus" (21 February 2001) *New Zealand Herald*.

the private sector alone. This research paper tries to provide answers to these questions and especially tries to determine whether local government is authorised by their new power of general competence to engage in trading activities for predominantly or even entirely profit-seeking motives, thus entering into competition with private enterprises on the free market.

This paper will deal both with the abstract statutory interpretation and the leading cases as well. In the course of the latter, it will also draw on two fictitious cases, one of which is derived from hotly debated international experiences that could easily become relevant in New Zealand as well. As a result it will be shown that there are good arguments to support the view that municipal trading activities that are undertaken for the mere purpose of making profits and thereby creating additional public revenue are ultra vires even to the liberal regime the LGA 2002 brought about. Nevertheless it will be concluded that statutory clarification of the matter should be given by way of a future amendment.

A similar conclusion will be drawn relating to the second issue this paper will address with respect to the effectiveness of limitations to the power of the general competence. This second issue concerns the central-local government relationship. An answer shall be framed on the question whether or to what extent the powers of local government are limited where the statutory functions of the Crown or other public bodies are affected.

As an overall conclusion this paper will close with the statement that New Zealand's legal regime has come a long way towards establishing very broad and general powers similar to those provided by central European jurisdictions and that the LGA 2002, although it pays tribute to this fact and attempts to regulate the new power, is in need of a future amendment, or at least a more diversified case law, to clarify the rights and duties of local government.

II THE POWER OF GENERAL COMPETENCE

The power of general competence is the key instrument of ensuring and enhancing local self-administration in the jurisdictions acknowledging it. It can be defined as

“a legal basis for local government [...], in which local authorities are empowered to do anything that they see as being necessary or desirable for the good government of their districts and regions, provided it is not otherwise contrary to the law.”⁸

The power of general competence has no long tradition in New Zealand or anywhere else among the common law societies. While it has been introduced in New Zealand in the course of the LGA reform in 2002 and is also recognised by most of the Australian states⁹ (basically all but New South Wales¹⁰), it took a decade-long struggle and search for compromise to implement a similar ‘power of community initiative’ (the term general competence power seems to have been carefully avoided) in the United Kingdom.¹¹ This derives not least from the fact that the United Kingdom, New Zealand and other common law jurisdictions hold dear the doctrine of parliamentary sovereignty, which partly conflicts with such broad and general empowerment of other bodies.¹² Parliamentary sovereignty means that Parliament’s legislative power cannot be infringed by (other) law and that Parliament’s limitations to power are only political, not legal.¹³ Where another body (like a local authority) is given broad, general and almost inherent powers, these absolute legal powers of Parliament are called into question.

⁸ *Towards a power of general competence for local government in New Zealand – a discussion paper*, above n 4.

⁹ Grant Hewison, above n 2, 513.

¹⁰ R Eames, K O’Shea, R Quick “The Capacity of Government Owned Corporations and Local Governments to Enter Into Joint Ventures” in: W D Duncan (ed.) *Joint Ventures Law in Australia* (2 ed, The Federation Press, Sydney, 2005) 393. See also pages 394-404 for details on the general competence provisions of the other Australian state jurisdictions.

¹¹ Ian Leigh “The New Local Government” in Jeffrey Jowell and Dawn Oliver (eds) *The Changing Constitution* (6 ed, OUP, Oxford, 2007) 293, 299.

¹² See generally Grant Hewison, above n 2, 515.

¹³ Matthew Palmer “What is New Zealand’s Constitution and Who Interprets it? Constitutional Realism and the Importance of Public Office-Holders” (2006) 17 PLR 133, 140.

Accordingly, the concept of local general competence powers stems rather from continental European legal traditions. For instance, it has been in force for a long time in France.¹⁴ In Germany moreover it was first introduced 200 years ago by the so-called Stein-Hardenberg reforms in former Prussia, which brought about the *Preußische Städteordnung von 1808* or Prussian Local Government Act 1808.¹⁵ Today the German Constitution, the so-called *Grundgesetz* or Basic Law, endows local authorities with “the right to regulate on their own responsibility all the affairs of the local community within the limits set by law...”.¹⁶ Respectively, the Local Government Acts of the sixteen German states all include provisions on the power of general competence. The Local Government Act of the south-western State of Rhineland-Palatinate, for instance, provides in plain language that “the councils have the right to take on each and every public task of the local community in their area, as far as this task is not explicitly and exclusively assigned by law to other bodies on the basis of an urging public interest.”¹⁷ Aside from a similar provision, the Local Government Act of the State of Hessen states in its opening section that “[t]he local community is the basis for the democratic state. It promotes the well-being of its people in free self-administration through the bodies elected by its citizens.”¹⁸

Instead of acknowledging a power of general competence, New Zealand and other common law societies traditionally valued (and to some extent still value) the doctrine of *ultra vires*, which stands in heavy contrast to the dogmatic foundations of the power of general competence. According to the *ultra vires* rule there is no general enabling power given by law to the local communities. Any measure taken by local government has to be

¹⁴ Grant Hewison, above n 2, 511; Herman Finer, above n 2, 68.

¹⁵ See *Preußische Städteordnung von 1808*, s 108, which provided councils with “the unlimited mandate to act on all matters relating to the local community.” Source is accessible in German language only on <http://www.lwl.org/westfaelische-geschichte/que/normal/que1028.pdf> (last accessed on 04/07/08).

¹⁶ *Grundgesetz für die Bundesrepublik Deutschland*, art. 28; translation into English taken from Grant Hewison, above n 2, 511.

¹⁷ *Gemeindeordnung Rheinland-Pfalz*, s 2(1); accessible in German language only on <http://www.jura.uni-osnabrueck.de/institut/jkr/gorhein.pdf> (last accessed 04/07/08).

¹⁸ *Hessische Gemeindeordnung*, s 1(1); accessible in German language only on http://www.hessenrecht.hessen.de/gesetze/33_kommunalwesen/331-1-hgo/hgo.htm (last accessed on 04/07/08).

explicitly justified by positive law or be a nullity.¹⁹ As has once been stated in accordance with this doctrine local government “exists for no other purpose...[than]...the fulfilment of duties which it owes to others...” and “has no heritage of legal rights which it enjoys for its own sake...”²⁰

With the introduction of a general competence power set out in section 12(2) LGA, New Zealand has left the path of the Anglophone legal tradition concerning local government and made a significant step towards continental European attitudes. This has been referred to by some authors as a “New Zealand model” of local government.²¹ But where does New Zealand exactly stand with its model? How do the new general competence power and the ultra vires rule (which has not been explicitly revoked either) interact? What are the limits to the power of general competence? And most importantly: Do these limitations apply to profit-seeking trading activities? These questions shall be dealt with in the following chapter.

III LIMITATION PROVISIONS TO THE GENERAL COMPETENCE POWER IN TERMS OF ECONOMIC UNDERTAKINGS

Several provisions within the LGA 2002 narrow the broad powers given to local authorities by section 12(2). In the following these limitation provisions will be examined with a special focus on their capability to limit municipal economic activities.

A Section 12(3) LGA

The most simple and yet most profound limitation is set out in subsection following the general competence power. Section 12(3) provides that “[s]ubsection (2) is

¹⁹ R Eames, K O’Shea, R Quick, above n 10, 380; Howard A Street *A Treatise on the Doctrine of Ultra Vires* (Sweet & Maxwell Ltd, London, 1930) 1.

²⁰ Ian Leigh, above n 11, 298.

²¹ Claudia Scott, et al “Positioning New Zealand Local Government” (Working Paper, October 2004, Local Futures, School of Government, Victoria University of Wellington) 166.

subject to this Act, any other enactment, and the general law.” This subsection clarifies that the general competence power is not situated above the law, but subject to it - just like any other executive power is. Irrespective of the fact that section 12(3) has a rather declaratory function, it can be seen as the basis for all the other more specific limitation provisions.

In regard to economic undertakings it must be said though, that aside from the provisions within the LGA 2002 itself that are discussed below, there are no other applicable statutory limitations that would need to be considered. Most importantly, the State-owned Enterprises Act 1986 (“SOE”) does not apply to local authority trading enterprises. One might think of this Act as it deals with trading organisations that are run by central government and possibly includes limitations on their capabilities. Section 2 SOE provides though that state enterprises in terms of this act are only those which are listed in schedule 1.²² Schedule 1 enumerates currently 19 enterprises, none of which are operated by local authorities.²³

B Section 12(4) LGA

According to section 12(4) a local authority has to “exercise its power under this section wholly or principally for the benefit of its district.” Therefore, this subsection provides both a substantial framework (as the local authority’s acts must be basically beneficial) and a geographical framework as well.

Interestingly though, this rule is not meant to apply to council-controlled organisations as is expressly stated by subsection 6. It can only be assumed when looking at the other exceptions set out in this subsection which allow for joint ventures of two or more local authorities that the legal privileges given to council-controlled organisations were meant to liberate them from the geographical restrictions of council activities and by doing so account for the fact that such organisations need to be endowed with the

²² State-Owned Enterprises Act 1986, s 2.

²³ State-Owned Enterprises Act 1986, sch 1.

power to freely contract with whomever they wish in order to perform well and to survive on the free market.

Therefore, whenever a council chooses to perform activities through a legally independent entity, in which it holds a majority of voting rights, these activities will not be limited by section 12(4) LGA. As a council can and in most cases will establish such an organisation under the legal form of a private sector company, this provision does not effectively limit the feasibility of municipal economic undertakings.

C Sections 11(a) and 10(b) LGA

Arguably the broadest and most far-stretching limitation to the power of general competence comes from section 11(a) in connection with section 10(b) LGA.

Section 10(b) identifies the purpose of local government as being “to promote the social, economic, environmental, and cultural well-being of communities, in the present and for the future.”²⁴ These so-called “four well-beings” constitute a cornerstone for all local authority activities and provide the context, in which the following sections and parts of the LGA have to be seen.²⁵

But how are these four well-beings exactly connected to the power of general competence in section 12(2) and are they truly to be regarded as a substantial limitation? As for the latter question it has to be said that the capability to limit general local government powers has been in doubt regarding a purpose-stating provision in section 8(3) of the State of Victoria’s Local Government Act 1989 in Australia due to the generality of the wording.²⁶ At least as far as the New Zealand legal regime is concerned though, it must be assumed that section 10(b) is meant to bestow a binding general framework on the following provisions. This derives not least from the interrelated

²⁴ Local Government Act 2002, s 10(b).

²⁵ Dean Knight and Chris Mitchell, above n 1, commentary on s 10.

²⁶ Grant Hewison, above n 2, 510; Local Government Act 1989 (Victoria), s 8(3).

wording of the relevant sections. Section 12(2) endows local authorities with general powers "for the purpose of performing [their] role...". The role of local authority is described by section 11(a) as "to give effect, in relation to its district or region, to the purpose of local government stated in section 10...". Hence, the general enabling provision in section 12(2) can be read as saying that local government has full capacity to undertake any activity as long as it is meant to serve the purpose of promoting the well-being of the local community. This suggests a limitative character.²⁷

Furthermore, a comparative look at continental European experiences suggests the same. As has been elaborated above the power of general competence is taken from continental European legal tradition. The French courts, for one thing, have traditionally been interpreting the French general competence rule in a very restrictive way.²⁸ Even the German general competence provisions in spite of being very broadly worded and demanding only that the tasks performed are "public tasks of the local communities"²⁹ (without providing any further definition of this) are undisputedly regarded as being subject to substantial limitations interpreted by the case law made by the Administrative Law Courts. Consequently, local government activities based on the general competence power are subject to judicial review to the extent of determining whether they are dealing with local issues. If it is held that they are not, the undertakings in question are regarded as being *ultra vires* to the local authority's powers. Since it is not apparent from the controversial discussions preceding the general competence principle's implementation in New Zealand that it is supposed to go beyond the examples set by other countries traditionally recognising it,³⁰ it must be reasoned that section 10 has a limitative and not a merely descriptive function.

In a further step, the meaning and content of the "four well-beings" have to be ascertained in order to determine whether they restrict any sort of economic undertakings. Unfortunately, both literature and case law on section 10 are still thin and sketchy at the

²⁷ With arguably similar conclusion Dean Knight and Chris Mitchell, above n 1, commentary on s 10.

²⁸ Herman Finer, above n 2, 68.

²⁹ See chapter II above for further details and references.

³⁰ See generally Grant Hewison, above n 2.

most. Regarding an almost identical set of provisions referring to the economic, social and environmental well-being in the United Kingdom's Local Government Act 2000³¹ it has been found that:

"Together, these sections allow local authorities to undertake a wide range of activities for the benefit of their local area and to improve the quality of life of local residents, businesses and those who commute to or visit the area."³²

This implies a wide range of discretion.

But is there anything in section 10 that would suggest restrictions on municipal economic undertakings? This question cannot be answered without taking a further look at the history, nature and purpose of the provision. In fact, the liberalisation and deregulation of municipal trading activities has been one of the propulsive ideas behind the establishment of a general competence power.³³ Further to this it has been proposed prior to the reform that conditions of "competitive neutrality" could be created in order to make sure that local authority enterprises do not use privileges deriving from their public ownership to deform the free market and circumvent its rules to the detriment of private competitors.³⁴ As a matter of fact, many of the ideas proposed in the course of this discussion (like high accountability and transparency standards even to those imposed on the private sector, prohibition on guarantees) have been implemented and can now be found in Part 5 of the LGA, which will be discussed below. From this one could reason that the legislature considered these restrictions to be sufficient and did not intend to limit economic activities of local authorities any further.

On the other hand there are also several aspects pointing towards the opposite conclusion. First of all, not all the central aspects of the proposed model of competitive neutrality were enacted in the course of the 2002 local government reform. For instance,

³¹ Local Government Act 2000 (UK), s 2(1).

³² *Explanatory Notes to the Local Government Act 2000*, commentary on sections 2 and 3, para 15.

³³ *Towards a Power of General Competence for Local Government in New Zealand – A Discussion Paper*, above n 4, 57.

³⁴ *Ibid*, 58.

there is no provision firmly requiring the establishment of an arms-length corporation to conduct the local authority's business activities.³⁵ Moreover, a former legal restriction under the LGA 1974 regime on the number of councillors to be appointed as directors of such an organisation has even been lifted in 2002. This suggests that the legislature did either intend not to rely solely on measures to create a condition of competitive neutrality, but on other more substantial restrictions as well, or that the legislature did not even bother to ensure fair and neutral competition at all.

The latter possibility does not seem to be likely as there has been given no indication that former concerns about unlimited business engagements by local government shall be entirely or at least mostly set aside and ignored in the present and future. Those long-established reasons for not unconditionally opening up the free market for participation by local authorities are two-fold: First, there are concerns about negative effects on the private market due to competitive advantages of municipal trading organisations resulting from their privileged position (which includes, for example, the lacking threat of going bankrupt or being taken over by competitors).³⁶ Secondly, there are concerns about the local authority as well, because of the financial risk that comes with trading activities.³⁷

In the light of all this, how should the requirement of promoting the economic well-being of the community be interpreted? On the one hand, one could still argue that it is economically beneficial to the local community, if local authority trading enterprises create additional revenue that can be spend on other activities. One could even go as far as saying that such conduct could even be able to promote the social, environmental and cultural well-being of the community as the additional income could easily be used for projects relating to those. On the other hand such an argumentation can be deemed a bit simple. The DecisionMaker Guide to Local Government understands the promotion of economic well-being rather as raising funds on economic development programmes and

³⁵ On the proposal of such a requirement see *Towards a Power of General Competence for Local Government in New Zealand – A Discussion Paper*, above n 4, 59.

³⁶ *Ibid.*, 57.

³⁷ *Ibid.*

creating general conditions for economic growth in the local area.³⁸ Aside from that, the traditional concerns about unrestricted profit-making attempts by local authorities prevail to the present. Where local private enterprises are threatened to be displaced, the economic well-being of the community itself is threatened as well. Further, if the council-controlled trading organisation underperforms, the financial risk resulting from that can threaten the council's capabilities to perform its essential purposes and thereby affect the well-being of the community.

While there is not yet a firmly settled case law specifically dealing with the question of profit-making activities and the simultaneous promotion of the community's social, economic, environmental or cultural well-being as set out in section 10 LGA, there are certain cases which can provide some assistance in interpreting the legal requirements and setting a framework. These will be discussed in connection with the fictitious case study in chapter IV.

Consequently it could be reasoned that a merely or at least primarily profit-seeking activity of a local authority is restricted by section 10 LGA and ultra vires to local government despite of the general competence power. A similar view is expressed or at least implied by other publications.³⁹ It is well line with the concluding statements of the Department of Internal Affairs' working paper, which suggested the acceptability of profit-making activities only for such cases in which there is a connected intrinsic public interest.⁴⁰

D Part 5 (sections 55-74) LGA

Although Part specifically deals with trading undertakings and other forms of participation of local authorities on the private sector, it is not much more specific on

³⁸ *A DecisionMaker Guide to Local Government in New Zealand* (DecisionMaker Publications, Wellington, 2004) 51.

³⁹ Dean Knight and Chris Mitchell, above n 1, commentary on s 59.

⁴⁰ *Towards a Power of General Competence for Local Government in New Zealand – A Discussion Paper*, above n 4, 65.

substantial limitations than section 10 LGA. As the part's opening section states, its purpose is to establish "requirements for the governance and accountability of council-controlled organisations and council organisation" as well as "*procedures* for the transfer of local authority undertakings to council-controlled organisations (emphasis added)."⁴¹

Accordingly, the provisions in sections 55 to 74 predominantly deal with the need of special consultative procedures prior to the establishment of a council-controlled organisation, with the need to have and abide by a statement of intent, with appointment and role of directors, with performance monitoring and financial reporting.

Aside from that there are only a few substantial limitations. Section 62 prohibits local authorities – as mentioned earlier – from giving guarantees, indemnities or securities "in respect of the performance of any obligation by a council-controlled trading organisation." This is clearly putting any such organisation at arms-length from the council and counteracts certain potential advantages in competition. Section 63 deals with restrictions on lending and other sorts of financial accommodation provided to council-controlled trading organisations and provides that nothing the like must be given to "on terms and conditions that are more favourable to the council-controlled trading organisation than those that would apply if the local authority were (without charging any rate or rate revenue as security) borrowing the money or obtaining the financial accommodation." Interestingly, this section does not call for terms and conditions that would apply if private sector companies were obtaining the money (as would make sense in order to achieve competitive neutrality with the private sector), but puts the controlling local authority at the organisation's place. This means that this section is not meant to and not able to counteract competitive advantages that arise from the fact that a public body (that is not potentially threatened by bankruptcy) will almost always be able to arrange a loan for itself and, moreover, is probably able to negotiate terms more favourable than those applying to private companies. Therefore, section 63 prevents large-scale subsidies (especially hidden ones) and thereby partly protects the council's financial capabilities,

⁴¹ Local Government Act 2002, s 55.

but it does not protect the private sector from every sort of competitive interference and unfair competition.

Another substantial limitation (albeit a vague one) is set out in section 59, which identifies the "primary objectives" of council-controlled organisations. Aside from tying the organisation to the goals specified in its statement of intent, requiring it to be a "good employer" and to stick to "sound business practice" (in case of trading organisations), the provision wants council-controlled organisations to "exhibit a sense of social and environmental responsibility by having regard to the interests of the community in which it operates and by endeavouring to accommodate or encourage these when able to do so...". While all this expresses the expectation that a publicly owned enterprise does not adopt strategies, attitudes and business practices that are per se selfish and harmful to their employees or generally to their environment, there is little to suggest that the organisation's objectives would have to be in a narrower sense beneficial to the community and imply a restriction on profit-making.

IV PROFIT-SEEKING ACTIVITIES – A CASE STUDY

The following cases (which have a real background to some extent) shall illustrate the limitative effects on the power of general competence provided by the legal provisions discussed in the last chapter and their implementation in regard to profit-seeking activities.

A Clean money for clean energy – the prospects of a council-controlled wind farm

W City Council decides to establish a trading organisation in order to operate a wind farm on a nearby mountain range within the boundaries of its district. The wind is supposed to sell its electricity at market prices. W City Council's hopes to create additional revenue (to be spent on local social projects) by supplying customers not only in the city itself but in the neighbouring districts and the entire region as well, which is

why the electricity will be fed into the nation-wide power grid. Only approximately 20% of the energy generated by the wind turbines is expected to be needed and used by the inhabitants of W. Is this project covered by the general competence powers in section 12(2) LGA or is it ultra vires?

First, one might ask themselves whether such a project is in compliance with sections 12(3) and 12(4) LGA.

As there is no specific provision in either the LGA or any other act expressly preventing a local authority or an entity under its control from running a wind farm, section 12(3) does not impose any restrictions on the applicability of the general competence power set out in section 12(2).

Under section 12(4) LGA local authorities are – as has been discussed above – required to act wholly or at least principally for the benefit of their districts. At least in terms of the energy supply this is not the case here, since the wind turbines produce five times as much energy as is being needed in W. The question whether the revenue stream which will entirely flow to W can make up for this can be disregarded in this context, because not the local authority itself is running the wind farm, but a council-controlled trading organisation. Section 12(6) provides that council-controlled organisations are exempted from the requirements of section 12(4).

Further, the wind farm project would need to be in compliance with the role and purpose of local government defined by section 11(a) in connection with section 10(b) LGA. This means that it has to promote the social, economic, environmental, or cultural well-being of the community.

A similar decision on whether such purposes were achieved had to be made by Baragwanath J in *Friends of Turitea Reserve Society Incorporated v Palmerston North City Council*.⁴² In this case the Palmerston North City Council entered into an agreement with a State-owned enterprise to erect wind turbines in the Tararua Reserve which is

⁴² *Friends of Turitea Reserve Society Incorporated v Palmerston North City Council* CIV-2006-454-879 (HC) Baragwanath J (25 July 2007).

located within its boundaries. Aside from other legal issues arising from the Reserves Act 1977, it also employed section 10 LGA in order to ascertain whether such a project was compliant with the law.⁴³ For this purpose, the Court placed some reliance on the definitions made in the case of *Waitakere City Council v Brunel*.⁴⁴

Baragwanath J first approached this issue by negatively defining that the requirements of a “local purpose” (as provided by section 23 Reserves Act 1977⁴⁵ and further defined and specified in the light of section 10 LGA) were not met at least in such cases in which the council’s activities served a “government purpose”.⁴⁶ It was then argued that one could think of a non-local purpose, because of the wind farm’s connection to the general national grid, which resulted in the power “automatically [flowing] to wherever in New Zealand it is being consumed at the time...”.⁴⁷ The only real benefit for the district itself in terms of power supply came from the fact that the plant was “generating that amount of energy that is close to the amount [Palmerston North] uses, a purely mathematical ratio.”⁴⁸

Contrary to this an expert heard by the Court created a so-called “swimming pool analogy” by stating that input and output of the national power grid were somewhat comparable to a leaking swimming pool that is constantly filled up by water hoses. Although water coming from one hose inadvertently intermingles with the other water in the pool, “one can be confident that the closer a hose is to a hole the greater its share of outflow.”⁴⁹ The same could be said regarding electricity. Therefore, it was likely that Palmerston North received more electricity from the wind farm than other regions in New Zealand.

⁴³ *Ibid*, para 38.

⁴⁴ *Waitakere City Council v Brunel* [2007] NZRMA 235, para 57.

⁴⁵ Reserves Act 1977, s 23.

⁴⁶ *Ibid*, para 41.

⁴⁷ *Ibid*, para 42.

⁴⁸ *Ibid*, para 43.

⁴⁹ *Ibid*, para 45.

It was for this swimming pool analogy but only combined with the fact that the revenue it generated was serving other local purposes in addition to this (especially environmental purposes relating to the ecological protection of the Turitea Reserve) that the court held that the whole project served a local purpose.⁵⁰

Baragwanath J then turned his attention to the question whether the project was serving (as he found necessary) a public interest as opposed to a possible private interest resulting from the profit-making intentions. To put it in other terms Baragwanath J thereby ascertained whether, how and to what extent a desire to make profits is compliant with the Reserves Act 1977's requirement of serving a public interest as specified by the purpose of local government which is defined by the LGA and especially section 10.

The following examination brought two other cases into focus. In *Woollahra Municipal Council v Minister for the Environment*⁵¹ the erection of a school building within the boundaries of a national park was regarded to be unlawful. In this case, too, the revenue was intended to help protecting the national park. Nevertheless it was held by the court that since the establishment of the school taken *by itself* did not promote or at least comply with the purposes of the national park (which were seen as conserving the natural landscape and flora and fauna and their enjoyment by the public in terms of recreation), the decision was *ultra vires*.⁵²

In contrast to this in the case of *Ski Enterprises Ltd v Tongariro National Park Board*⁵³ the court came to a different resolution. Its bottom-line was that the installation of ski lifts on Mount Ruapehu did in fact promote the intrinsic purpose of the national park as it improved the public accessibility of the park and thereby served its recreational

⁵⁰ *Ibid*, para 51.

⁵¹ *Woollahra Municipal Council v Minister for the Environment* [1991] 23 NSWLR 710 (CA).

⁵² *Ibid*.

⁵³ *Ski Enterprises Ltd v Tongariro National Park Board* (1964) NZLR 884.

function.⁵⁴ Had it not been for this but for the revenue alone, it is likely that the court would have reached a similar conclusion as in *Woollahra*.⁵⁵

As for the *Friends of Turitea* case, Baragwanath J reasoned that the circumstances of the Palmerston North wind farm were less like the circumstances in *Woollahra* and more like those in *Ski Enterprises* as the purpose of generating electricity was within the purposes of local government.⁵⁶ Nevertheless, Baragwanath J noted that “[h]ad the purpose of receipt of revenue resulted from an ultra vires purpose the case would have been indistinguishable from *Woollahra*.”⁵⁷

As a bottom line one can say that the way the *Friends of Turitea* case handled the issues before the Court, and especially the way it figured out the important differences between the *Ski Enterprises* and *Woollahra* cases and drew upon them for its own decision-making, shows where the line must be drawn in regard to profit-making undertakings. When the project itself (regardless of any intentions of raising revenue) serves the intrinsic purpose of the Act which empowers the public authority to realise this project (in our case this would be the LGA empowering local authorities) than – like in *Ski Enterprises* – the additional purpose of making profits is of no concern. Otherwise, if – like in *Woollahra* – the project itself is not of direct benefit to the underlying statutory purpose than the mere expectation of raising revenue in order to better fulfil the statutory purpose by financing other projects is not sufficient. In terms of our initial question this is far from giving a carte blanche to local authorities to run whatever business they wish.

If one considers all that, one must assume accordingly that in our case of the wind farm run by an organisation controlled by W City Council, the result has to be that the erection and operation of this wind farm serves the well-being of the community. According to the swimming pool analogy there is a considerable output of electricity flowing to W, which enhances both the economic and the environmental well-being as it

⁵⁴ Ibid.

⁵⁵ For a similar assumption on this see *Friends of Turitea Reserve Society Incorporated v Palmerston North City Council*, above n 42, paras 81-86.

⁵⁶ Ibid, para 86.

⁵⁷ Ibid.

provides for cheap and clean energy alike. This is sufficient to justify the whole project, even though it is meant to fulfil another (even more important) purpose of profit-making, at least as long as (as it is the case here) the revenue itself is also meant to be spent for local purposes.

Last, one could think of possible non-compliance with Part 5 of the LGA. But as there are no indications in this case that procedural requirements have not been met or that sections 59, 62 or 63 have been disregarded, the wind farm is in compliance with Part 5. It is especially worth noting that the requirements of section 59(c) are fulfilled since the use of wind energy clearly exhibits a sense of environmental responsibility.

Just like in the *Friends of Turitea* case, it can be reasoned that W City Council would be permitted to run the proposed wind farm in accordance with section 12(2) LGA. Even the fact that W City Council's prime purpose is to raise revenue, the limitations provided by sections 11(a) and 12(b) LGA do not lead to a converse result. The crucial point for this assessment is that the profit-making purpose is accompanied by another purpose (albeit a subordinate one) to secure and improve W's energy supply. This supplemental purpose aims at promoting the well-being of W's local community and thereby assures that the project does not contradict the general purpose of local government.

B “Wellygreen Ltd” – the feasibility of a council-controlled gardening enterprise

W City Council happens to have free capacities in their parks and gardens department. Instead of reducing their workforce the Council decides to reorganise the department and expand its responsibilities. They establish a council-controlled trading organisation called “Wellygreen Ltd” that takes over the existing personnel, assets and the responsibility to maintain W's public parks and gardens. Aside from that W City Council – being the single shareholder – pushes Wellygreen to adopt another purpose in the organisation's statement of intent. According to that Wellygreen shall operate a

trading business on the free market, offering gardening services to private households in the vicinity.

In the following months Wellygreen proves to be quite efficient on the market. Due to the fact that the company is the sole provider for maintaining the city's public greens, it receives much revenue for these services from W City Council. Therefore, Wellygreen is able to offer its services to private customers for relatively low prices that include only a small profit margin, thus attracting many new businesses.

After securing the existing jobs in the course of this early success, Wellygreen Ltd. soon decides to expand its business and employ further staff. W City Council approves of this step in order to receive higher dividends and thereby raise its own revenue.

A and B both operate private gardening enterprises that have a long tradition within the city. Both companies suffer from major economic setbacks resulting in job losses and a growing risk of insolvency. They argue that these recent developments are triggered by the "unfair competition" from Wellygreen, that mainly comes from the fact that Wellygreen receives lots of funds from W City Council for maintaining the public greens and uses the assets (especially machinery and other equipment) formerly acquired by W City Council and passed on to Wellygreen without a charge. Aside from that they argue that offering gardening services to W's citizens is not at all serving local government purposes but ultra vires W City Council's powers under the LGA 2002 regime.

Are A and B right in saying that W City Council (through Wellygreen Ltd.) is exceeding their powers?

The case at hand stems from a real case that went before the German State of Northrhine-Westphalia's Court of Appeal in 1998 and today is considered one of the leading cases in German local government law. The events described above took place in the north-western city of Gelsenkirchen, where the City Council established a trading organisation called Gelsengrün. The case has therefore come to be known as the

Gelsengrün case.⁵⁸ In its decision the Court held, in short terms, that the given activities were ultra vires Gelsenkirchen City Council's power of general competence. The Bench based its decision both on the *Gesetz gegen den unlauteren Wettbewerb* ("UWG") or German Federal Act against Unfair Competition and a limitative provision in section 107 of the State's Local Government Act. At this time the section stated that "local authorities may establish, take over or substantially extend trading organisations only (1) if such undertaking is justified by a public purpose, (2) if the undertaking stands in an appropriate relationship to the capacity of the local authority and to its foreseeable needs, and (3) if the public purpose is not and cannot be served equally good and economically efficient by a another party."⁵⁹

In a succeeding case in 2002 the *Bundesgerichtshof* or German Federal Court of Justice had to deal with services offered by a public utility company owned by Munich City Council.⁶⁰ The company had been established as a GmbH (which is similar to a Ltd) in 1998 and replaced the City Council's public utility department. Soon after its privatisation the new company began to offer electrical installation and maintenance services to private customers and attracted many new businesses. Among these new businesses was a particularly lucrative one that consisted of the installation of electric distribution boards and other appliances for the use by vendors at Munich's Oktoberfest. E, who had been operating a business as an electrician in Munich for many years and used to be in charge of the electrical works at the Oktoberfest in the years before, took legal action in what came to be known as the *Oktoberfest* case. He claimed that Munich City Council's trading activities were ultra vires.

Overruling the preceding decision of the Munich-based Bavarian Court of Appeal, the Federal Court of Justice allowed a further appeal by the Council's trading

⁵⁸ OLG Hamm NJW 1998, 3504.

⁵⁹ Gemeindeordnung Nordrhein-Westfalen, s 107, accessible in German language only on [http://www.kreis-steinfurt.de/C12573D40046BB0C/files/gemeindeordnung.pdf/\\$file/gemeindeordnung.pdf](http://www.kreis-steinfurt.de/C12573D40046BB0C/files/gemeindeordnung.pdf/$file/gemeindeordnung.pdf) (last accessed 23/09/08).

⁶⁰ BGH NJW 2002, 2645.

organisation and thereby dismissed the initial case.⁶¹ The Court based its decision on two considerations. First, it held that the Act against Unfair Competition were not applicable to the case as it were not an act to bind public authorities.⁶² Second, it held that the limitative provision in section 87 of the Bavarian Local Government Act (which used to be worded exactly like section 107 of the Northrhine-Westphalian Local Government Act cited above) were not explicit enough on the question of judicial reviewability.⁶³ In the latter context the Court ruled that the wording "another party" was too broad and general to endow private competitors with rights to appeal and therefore local authorities had a wide range of discretion.⁶⁴

In the aftermath of this decision the Bavarian State Parliament passed an amendment which clarified that private competitors should be entitled to seek judicial review in relation to municipal trading undertakings.⁶⁵ In the course of this the last paragraph of section 87 which included the wording "another party" was changed and now reads "private third party" instead.⁶⁶ According to the prevailing theories and settled case law on German administrative court procedures (the so-called *Verwaltungsgerichtsordnung*) the clear mentioning of a specific group of people protected by a legal provision endows every member of this group with rights to appeal.⁶⁷ Thus, the change in wording opened the door for judicial review of every decision made by local authorities involving trading activities in areas where interests of private competitors are concerned. The Bavarian example was later followed by most other German states which used to have similarly worded provisions.⁶⁸

⁶¹ Ibid.

⁶² Ibid.

⁶³ Ibid.

⁶⁴ Ibid.

⁶⁵ For reference on the similar discussion and amendment process in the State of Saxony see Frank Sollondz "Neues kommunales Unternehmensrecht im Freistaat Sachsen" (2003) LKV 297, 302.

⁶⁶ Bavarian Local Government Act, s 87, accessible in German language only on www.jura.uni-osnabrueck.de/institut/jkr/kommunalrecht/gobay.pdf (last accessed 23/09/08).

⁶⁷ Ferdinand Kopp and Wolf-Rudiger Schenke *Verwaltungsgerichtsordnung* (15ed, Beck-Verlag, Munich, 2007) commentary on s 42(2).

⁶⁸ Frank Sollondz, above n 65.

It is noteworthy that the decisions outlined above were made by ordinary courts similar to the ones in common law jurisdictions and not by administrative courts as the cases were based partly on the Act against Unfair Competition. After the decision in the *Oktoberfest* case and the following statutory amendments, future appeals will have to be settled by the administrative courts.

The important question to be dealt with in the following is how such a case would possibly be treated under New Zealand's LGA 2002 regime.

First, one might think again of possible limitations coming from sections 12(3) and 12(4) LGA. There are no limitations to the general competence power with regard to running a gardening business. As with the wind farm project discussed above, the State-owned Enterprises Act does not apply either so that there can be no restrictions coming section 12(3) LGA.

It could be debatable whether the provision that a local authority must use its powers "wholly or principally for the benefit of its district" applies to the case at hand. Section 12(6) LGA states that this restriction is not applicable to council-controlled organisations.⁶⁹ Since W City Council is Wellygreen's single shareholder, Wellygreen embodies a council-controlled organisation. Therefore, section 12(4) LGA does not apply and consequently needs not to be complied with.

The most significant question again is whether the activities circumscribed above are compliant with the requirement that they need to promote the so-called four well-beings. According to the decisions in the *Friends of Turitea*, *Woollahra* and *Ski Enterprises* cases a mere profit-making purpose (with arguably indirect benefits to the intrinsic purpose) cannot be regarded as promoting the well-being of the community. Therefore it deems appropriate to differ between the two subsequent steps taken by W City Council.

⁶⁹ Local Government Act 2002, s 12(6).

First, it should be ascertained whether the initial establishment of Wellygreen and its subsequent business operation with the City Council's formerly existing workforce can be justified.

Both W City Council and Wellygreen argued that their business engagement fulfilled the prime purpose of securing the jobs of the existing workforce which would have been impossible otherwise since the workforce capacity exceeded the needs of the parks and gardening department. From this one could reason that the initial trading activities of Wellygreen promoted the social well-being of the community as they sought to counter the risk of rising unemployment rates within the city. On the other hand one could always argue that, if not the social well-being itself, than at least the economic well-being of the community is threatened when public authorities intervene in the free market and challenge local private enterprises. In this regard one could also say that the overall demand for gardening services will most probably not rise only because a new provider enters the market. Accordingly, it could be seen to be likely that the effect of securing jobs at Wellygreen is accompanied by job losses at other companies, thus affecting the social well-being of the local community as well.

Nevertheless at the stage that is examined at the moment none of these possible effects on the social and/or economic well-being of the community are certain to occur from an *ex ante* perspective. Many decisions taken by public authorities require a projective consideration and prognosis of possible effects. Section 10 LGA which has to be read in accordance with the power of general competence in section 12 LGA endows local authorities with wide discretionary powers.⁷⁰ In the case at hand W City Council had to consider and weigh several partly contravening aspects on how to best promote the well-being of the community. It is not apparent from the case that W City Council based its decision on irrelevant or inappropriate considerations or otherwise exercised its discretionary powers in an improper way. Hence, W City Council's decision as Wellygreen's single shareholder to have the company offer services on the free market to

⁷⁰ Grant Hewison, above n 2, 509.

secure the jobs of its current staff reflect one of many possible legitimate outcomes of this discretionary process. A different conclusion could have been drawn only, if W City Council's decision had obviously and under any possible circumstances been certain to prove detrimental to the city's well-being.

In a second step it could be questioned though whether the following decision to hire new staff in order to expand Wellygreen's business and to thereby create additional revenue for W City Council necessarily leads to the same conclusion.

The *Friends of Turitea*, *Woollahra* and *Ski Enterprises* cases have shown that profit-making purposes can only be justified when they are accompanied by the promotion of intrinsic purposes (which for local authorities are local purposes defined by the four well-beings). While one could still argue that creating new jobs similarly contributes to the social well-being of the community as the former objective of securing existing jobs did, the situation has slightly changed. W City Council at this point is no longer confronted with what could be described as a lose-lose-situation. In the former situation the local authority had two equally dissatisfying alternatives. It could either idly stand by and let part of its workforce lose their positions, or interfere with private local enterprises by taking away businesses from them. In the current situation though there is no acute threat to Wellygreen's existing workforce anymore, whereas there are clear signs of economic hardships among private competitors arising from the fact that Wellygreen (still) benefits from the lucrative business of maintaining the city's public greens and (still) uses the assets originally funded by public expenditures. This leads to the conclusion that in the current situation the community's social well-being is much more at stake and will unlikely be promoted by future expansions of Wellygreen's business operation. Furthermore, other than before at this point the economic well-being of the community comes into focus as well. As shown above the term economic well-being does not merely mean a good current financial situation for public and private households, but rather a vivid and versatile private business sector.⁷¹ W City Council's actions are threatening small and middle-sized businesses which have existed within the

⁷¹ *A DecisionMaker Guide to Local Government in New Zealand* above n 38.

community for a long time. Such a prospect seems to be in contradiction to the goal of promoting W's economic well-being.

This leaves the question what this assessment means for W City Council exercising its discretionary powers. As stated above discretionary powers need to be considered as very limited where there is little option for alternative decisions within the existing legal framework. W City Council's decision to expand Wellygreen's business activities for the primary purpose of raising additional revenue is almost certain to be detrimental to both the social and economic well-being of the municipality. Therefore it must be reasoned that this decision is ultra vires despite of the Council's discretionary powers, although it must be admitted that there is little indication of how much deference a court might show in practice, if confronted with such a decision.

Aside from concerns about compliance with section 10 LGA, one could also think about possible violations of provisions in Part 5 of the LGA. As in the former case it can at least be said that there seem to be no violations of procedural requirements, which make up the largest proportion of Part 5. Yet, in terms of substantial requirements both section 59 and 63 seem to be at least problematic.

Firstly, section 59(a) LGA requires the council-controlled organisation to "achieve the objectives of its shareholders, both commercial and non-commercial, as specified in the statement of intent...".⁷² What could be critical in this regard is that Wellygreen seems to pursue no non-commercial goals at all from the point at which it decides to hire additional staff. As it has been argued, purely commercial objectives are questionable due to the role and purpose of local government.⁷³ It can be reasoned that since section 59(a) requires a council-controlled organisation to achieve non-commercial goals, the absence of such goals from the organisation's statement of intent and the impossibility of pursuing such objectives resulting from that fact lead to the conclusion that section 59(a) itself is being disregarded.

⁷² Local Government Act 2002, s 59.

⁷³ Dean Knight and Chris Mitchell, above n 1, commentary on s 59.

Secondly, section 59(c) LGA requires the council-controlled organisation “to exhibit a sense of social and environmental responsibility by having regard to the interests of the community in which it operates and by endeavouring to accommodate or encourage these when able to do so...”.⁷⁴ Since environmental issues are not concerned, the critical question in the applicable case is whether or not Wellygreen shows a sense of social responsibility. This could easily be answered in the affirmative as far and as long as the primary objective is to secure the jobs of the existing workforce. Nevertheless the whole situation arguably changes after the jobs have been secured and when additional employees are hired in order to raise more revenue. In this whole context the author refers to the preceding chapter and the discussion about the community’s social well-being. There is one important difference though which is worth noting and necessary to consider and this comes from the last half-sentence “when able to do so”. From this phrase it can be reasoned that as far as section 59(c) LGA is concerned the sense of social responsibility is of only secondary significance and needs not to be exhibited in particular where it collides with its shareholders’ objectives for the organisation.⁷⁵ As these objectives are to maximise profits, they could not be fulfilled entirely, if the organisation decided to limit its business operation for the sake of private competitors. Therefore section 59(c) should not be considered as being violated.

Thirdly, it must be ascertained that section 59(d) LGA does not seem to be disregarded either. This provision requires council-controlled trading organisations to “conduct [their] affairs in accordance with sound business practice.”⁷⁶ Although German courts have ruled in the *Gelsengrün* case that the practice qualified as an act of unfair competition,⁷⁷ there is no indication in domestic literature or common law court decisions that section 59(d) could have been disregarded in the case at hand. This assumption is supported by comparative looks at the earlier legal regime under the LGA 1974. Under the old regime the so-called Local Authority Trading Enterprises (or LATEs) were

⁷⁴ Local Government Act 2002, s 59.

⁷⁵ Dean Knight and Chris Mitchell, above n 1, commentary on s 59.

⁷⁶ Local Government Act 2002, s 59.

⁷⁷ OLG Hamm NJW 1998, 3504.

required to operate a "successful business".⁷⁸ The legislative change aimed at acknowledging the fact that there can also be non-commercial objectives and therefore meant to reduce the legal requirements on that account.⁷⁹ It is not apparent though that the change in legislation intended to introduce new restrictions in terms of preventing business practices that could be harmful to private competitors. Accordingly one must assume that the term "sound business practice" is meant to ensure that a director of a CCTO fulfils their duties in a similar way that "a prudent well-advised director" of a privately owned enterprise would do.⁸⁰ There can be little doubt that a private enterprise in a similar situation would seek to maximise its profits as well and would not back away from harming other competitors when necessary. Hence, Wellygreen conducts its business in accordance with sound business practice as it is understood by section 59(d) LGA.

Fourth and last, W City Council could be acting in violation of section 63 LGA. As it has already been discussed above, this section deals with restrictions on lending and other sorts of financial accommodation provided to council-controlled trading organisations by local authorities. One might think that W City Council fails to comply with this provision when it hands on to Wellygreen machinery and other assets formerly used by its parks and gardens department. But then it must be said that section 63 LGA deals only with financial accommodation and not with other sorts of assets. Furthermore section 63 LGA only prohibits "terms and conditions that are more favourable to the council-controlled trading organisation than those that would apply if the local authority were (without charging any rate or rate revenue as security) borrowing the money or obtaining the financial accommodation." Since the assets in this case had been in use by the City Council for several years before and therefore had probably already been written off in terms of bookkeeping the situation is not even comparable enough to justify an analogous application of section 63 LGA to this case. As it has been ascertained above

⁷⁸ Dean Knight and Chris Mitchell, above n 1, introduction to part 5; Brookers Local Government Law in New Zealand, Volume 1 (Brookers, Wellington, 2006), LGPt 5.03.

⁷⁹ Ibid.

⁸⁰ Dean Knight and Chris Mitchell, above n 1, commentary on s 59.

the only apparent purpose of section 63 LGA is to prevent large-scale hidden subsidies that could have detrimental effects on public budgets, whereas the protection of private enterprises is not an issue that section 63 LGA seems to be concerned of. Accordingly, W City Council's (mere) outsourcing strategy is assumingly compliant with this provision.

As there are no further provisions in sections 55 to 74 LGA that could be considered to be problematic in this context, the actions of W City Council and Wellygreen are not in violation of Part 5 of the LGA.

As a bottom line it must be said, that in terms of legal feasibility the actions of W City Council and Wellygreen must be differentiated. While at the first stage where the profit-making purpose is accompanied by the (social) purpose of securing jobs the situation is comparable to the wind farm case and the ruling in the *Friends of Turitea* case, this assessment changes when Wellygreen expands its business for the sole remaining purpose of raising additional revenue for its single shareholder W City Council. Like in *Woollahra* there is no intrinsic purpose (which in this case would have needed to be a local purpose) connected to those actions, thus making it ultra vires. The limitation provisions which are arguably violated in this later stage of business conduct are sections 10(b) and 59(a) LGA.

V CONCLUSION WITH REGARD TO ECONOMIC UNDERTAKINGS

The question whether and especially how far local government activities that are undertaken for primarily profit-making purposes are compliant with the legal framework of the LGA 2002 can only be answered vaguely at this point.

The rulings in the *Friends of Turitea* case and the two similar cases discussed in this context suggest that the traditionally cautious approach towards such conduct still prevails under the new regime. A look at the theoretical background of the general competence power, the discussion preceding its implementation in New Zealand, and especially the international experience hints towards the same result. Nevertheless the author admits that the legal conclusions drawn from this are arguably contestable.

It can be reasoned that profit-making activities of local authorities, regardless whether they are the prime purpose of the undertaking or just a subordinate one, are justifiable only if they are accompanied by another purpose which directly contributes to the promotion of the community's well-being. Professor Palmer's apparently mocking statement mentioned at the beginning, according to which local authorities could now enter the used car business, therefore seems to be at least slightly exaggerated.

Interestingly though, it must be said that the LGA 2002 despite of its clear attempt to limit and regulate the new powers of local government through a vast number of procedural and even substantial restrictions does not include explicit provisions on this matter. The LGA 2002 is composed of 314 sections accompanied by 20 schedules.⁸¹ Although some jurisdictions that have been acknowledging general competence powers of local authorities for a much longer period of time tend to have significantly shorter Local Government Acts,⁸² they nonetheless include clear substantial provisions on municipal economic undertakings. Some of these (like section 87 of the Bavarian Local Government Act) have been presented above.

A similarly designed provision could bring more clarity to New Zealand as well and make any inconveniently lengthy explanation on the purposes of local government set out in section 10 obsolete.

VI LIMITATION PROVISIONS IN TERMS OF RESPONSIBILITIES OF THE CROWN AND OTHER PUBLIC BODIES

It is necessary when writing about limitations to the new power of general competence to at least touch upon the issues concerning the changing central-local government relationship.

⁸¹ See Local Government Act 2002.

⁸² The Local Government Act of the German State of Hessen, for instance, is comprised of 156 sections and the State of Rhineland-Palatinate's LGA includes even a lesser number of 133 sections. See *Hessische Gemeindeordnung* (above n 18) and *Gemeindeordnung Rheinland-Pfalz* (above n 17) for reference.

Whereas under the old regime of the Local Government Act 1974 matters of competence and authority were clearly regulated by law, things have become much more complicated since the 2002 reform. Until then, the relationship between the central government in Wellington and local authorities across the country was pretty hierarchical in nature. As pointed out earlier in this paper, due to the absence of a power of general competence local authorities were authorised to do only what the (national) law expressly conferred upon them and which was sometimes circumscribed with a somewhat derogative attitude as “the three R’s”, meaning “roads, rates and rubbish”.⁸³ Every activity that was performed outside these clearly established legal boundaries was inevitably subject to the strict application of the ultra vires doctrine. Since 2002, local government in New Zealand has undoubtedly overcome the old prejudices of only being responsible for and, moreover, capable of dealing merely with roads, rats and rubbish. This being said, it is all the more obvious that the dividing line between central government’s responsibilities and local government’s responsibilities has become a little bit obscure.

With their general powers conferred upon them by section 12(2) LGA local authorities nowadays can do virtually everything they believe to be beneficial to the promotion of their community’s well-being. This necessarily raises the question what happens, if a local authority should feel the need to regulate something (for instance by creating a local bylaw) that touches matters of national politics, be it that it deals with issues of national importance that have not been subject to a nation-wide legislation yet, or even more delicately, that have already been addressed otherwise by national legislation.

The following chapter will aim at exploring the legal issues behind that problem by employing the written provisions of the LGA 2002, certain court decisions, general

⁸³ Peter McKinley *Adapting to New Powers of General Competence: Examining the Implications of New Freedoms and Constraints under the New Legislation*, p 2, http://www.mdl.co.nz/library/librarydocs/local_governance/Adapting_to_new_powers_general_competence2003.pdf (last accessed 16/09/08).

theoretical legal principles and, eventually, solutions offered by international experiences with this topic. It will conclude that the legal situation is quite unclear at the moment, but that both the domestic and international sources at least indicate that local authorities should be careful when crossing the line towards areas of national interest.

A Legislation

As for possible answers given by the written law there are certain provisions in the LGA 2002 that are worth looking at when thinking of constraints to local authorities' powers relating to central government issues.

As a starting point one could think of section 12(3) LGA which provides that the general powers set out in section 12(2) are "subject to this Act, any other enactment and the general law."⁸⁴ There are two different possible approaches to examine the limitative character of this subsection. First, one could look for any specific enactments that expressly state that bylaws and other decisions made and activities undertaken by local authorities *generally* must be consistent with the laws of New Zealand. Because of section 12(3) these enactments would then be applicable to the general competence power in section 12(2) despite the possibility that they might be of an older date than the LGA 2002 and could otherwise (if it was not for subsection 3) be regarded as impliedly repealed. Second, one could discuss the limitative character that subsection 3 imposes by itself. This paper will start with the former approach and then afterwards continue with the latter.

Consequently, the first question to deal with is whether there is any legal provision which expressly requires local authorities to act and regulate in compliance with national law. As for the LGA 2002 a provision that at least partly sets up such requirements can be found in section 155(3). This clause states that "no bylaw may be made which is inconsistent with the New Zealand Bill of Rights Act 1990,

⁸⁴ Local Government Act 2002, s 12(3).

notwithstanding section 4 of that Act.”⁸⁵ While the principles of Parliamentary Sovereignty, that prevail in New Zealand till the present day, prevent the Bill of Rights Act from being a supreme law and thereby from invalidating inconsistent Acts of Parliament, section 155(3) LGA clarifies that respective privileges are not bestowed upon local authorities and their power of making bylaws. Obviously though this provision only addresses bylaws and those only in terms of their need to be consistent with the Bill of Rights Act. Section 155(3) does not constitute a general need for any municipal activities to be consistent with any piece of national legislation. A second provision that is imposing requirements on local authorities is section 14 of the Bylaws Act 1910. According to section 144 LGA this provision is applicable wherever local authorities make use of their general powers by way of creating a bylaw.⁸⁶ Section 14 of the Bylaws Act 1910 provides that “no bylaw shall be invalid merely because it deals with a matter already dealt with by the laws of New Zealand, *unless it is repugnant to the provisions of those laws* (emphasis added).”⁸⁷

So what does this mean in relation to the initial question what happens, if a local authority regulates something that touches matters of national politics either by addressing issues of national importance that have not been subject to a nation-wide legislation yet, or that have already been addressed otherwise by national legislation? Apparently section 14 poses no difficulties where an issue just could be regarded as being of national importance, but where no national legislation exists at all. Therefore, as an example, if a local bylaw provided that no nuclear plants should be allowed to build within the district or region and if no national law dealing with issues of nuclear energy existed, than section 14 would not invalidate such a bylaw just because it seems to touch issues of national importance. Similarly, if there was a national enactment dealing with these issues or parts of it, the local bylaw would be valid as long and as far as it does not contradict this piece of national legislation. In other words, the bylaw would be effective, if it has the same content as the national enactment, or if it adds more detail to it or

⁸⁵ Local Government Act 2002, s 155(3).

⁸⁶ See Local Government Act 2002, s 144.

⁸⁷ Bylaw Act 1910, s 14.

expands its range of application. To stay with our former example, this would mean in practice, that if there was a national enactment preventing nuclear plants, a local bylaw would be valid as long as it did not question that basic principle, but were based on it and for instance carried Parliament's intention further by implementing a prohibition of nuclear waste disposal within the boundaries of the council. Of course, in practice it can be questionable in particular cases whether or to what extent a local bylaw just builds upon a national act and develops it further and from which point it starts to be repugnant to the act. Apart from such cases the only area where section 14 of the Bylaws Act 1910 draws a definite and distinctive line between central and local government and their respective responsibilities is where a bylaw contradicts with national legislation. For example, section 14 would be violated in case that a local bylaw prohibited the erection of nuclear power plants whereas national legislation allowed for it, or vice versa. Apart from that limited (substantial) area of applicability, one needs to remind oneself as well that the provision only applies to local bylaws in the first place and not to other decisions and activities undertaken by local authorities. If, for example, a local authority should decide to build a nuclear power plant based on its general power to promote the well-being of the community by improving the energy supply, at least section 14 of the Bylaws Act 1910 would not prevent it from doing so. Nevertheless this provision seems to be the most general limitation that can be found in relation to local government's general powers in areas of national importance.

One could argue though that section 12(3) LGA by itself effectively limits local government's powers wherever subject-matters of national legislation are concerned. There is no doubt that section 12(3) has to be regarded as a constraint on the general powers.⁸⁸ As has been pointed out above subsection 3 shows that the general powers of local government like any other executive powers are not above the law, but subject to it.⁸⁹ Consequently, it must be reasoned that the provision has a limitative function by itself when it is applied to another specific provision that is prohibiting certain sorts of

⁸⁸ Dean Knight and Chris Mitchell, above n 1, commentary on s 12.

⁸⁹ See chapter III.A.

activities, but that is not *expressly* addressing local government powers as section 144 LGA in connection with section 14 Bylaws Act 1910 are. This is far from being a broad and effective limitation to local authorities' powers concerning national issues though. Although its wording is more undifferentiated on central-local government relations than the wording of section 14 Bylaws Act 1910, its effect is similar. Section 12(3) LGA does not prevent local authorities from dealing with issues of nation-wide impact, but only so, if there already is a national enactment that would be violated, albeit impliedly. Just as section 14 Bylaws Act 1910, it does not straightforwardly answer any question that might arise within the "grey zone" where a local government body deals with matters that have already been touched by national legislation, but not to the extent that the local council deems appropriate. On the other hand, section 12(3) provides a solution to the problem that springs from the gap left by section 14 Bylaws Act 1910 mentioned above. While the latter provision apparently deals only with constraints on bylaws, section 12(3) covers all other sorts of regulations and activities as well. Therefore, should a local authority wish to erect a nuclear power plant although national law prohibits the use of nuclear energy, than section 12(3) would prevent the local authority from doing so.

Further, it would be conceivable to derive constraints from the application of section 12(4) LGA, according to which a territorial authority "must exercise its powers under this section wholly or principally for the benefit of its district."⁹⁰ But in how far does this prevent local authorities from taking on issues of nation-wide importance? Interpreting the wording of the provision one must at least conclude that local government may not engage in activities that are unrelated to its district. For instance, a decision to fund the Tibetan independence movement or to send humanitarian aid to the former Soviet republic of Georgia after the recent clashes with the Russian military would probably be off limits as it is not only touching upon foreign policy issues that are reserved for central government to deal with, but apart from that it is also entirely unrelated to the local community. Most issues of national importance tend to have an impact on local communities though. A decision to ban genetically engineered food from

⁹⁰ Local Government Act 2002, s 12(4).

local supermarkets and dairies could be regarded as beneficial for the district from a certain perspective. While most people would agree that political issues related to gen food are of national importance, there can be little doubt nonetheless that there is an impact of related political decisions and national law-making on any local community within the country. Section 12(4) LGA does not help in any way to draw a dividing line between central and local responsibilities here.

Last but not least, one might turn their attention to section 10 LGA and the four well-beings for another time. As far as the wording is concerned one will probably come to the same conclusions that were drawn in relation to section 12(4) LGA above. The goal of promoting the community's well-being does not necessarily and by itself imply that related issues must be of an exclusive kind with little or no impact on neighbouring communities or the whole country. But then the identification of this goal as the role and purpose of local government (the very purpose that the empowerment section 12(2) LGA itself states as the basis for the general powers) could lead to a narrow interpretation of section 10(b) LGA in areas of central government issues. Such an interpretation could only be drawn from the nature and purpose of the provision though and would need to be developed carefully and continually by the case law. The following paragraphs will take a deeper look at what domestic and international case law can contribute to a possible solution of the dilemma.

B Case Law

Unfortunately the domestic case law has only slightly been touching upon the subject-matter of this examination so far, so that the possible conclusions that can be drawn from it are pretty sketchy.

One decision that has been discussed in this regard⁹¹ is *Scott v Auckland City Council*.⁹² In this case five residents were seeking interim relief regarding pending

⁹¹ See Dean Knight and Chris Mitchell, above n 1, commentary on s 12.

decisions by both Auckland City Council and Auckland Regional Council.⁹³ Both local authorities had been asked by central government to indicate their opinion on plans to build a new rugby stadium (the so-called Stadium Aotearoa) for the 2011 Rugby World Cup hosted by New Zealand.⁹⁴ The reaction was expected to be delivered to the government within a fortnight.⁹⁵ The plaintiffs argued that necessary special consultative procedures had been disregarded and that therefore a decision (regardless of the outcome) would be unlawful.⁹⁶ Although Priestley J expressed concerns about the decision-making procedures in his ruling, he nevertheless dismissed the case.⁹⁷ As the time frame did not allow for broad consultations of the public, a decision other than that would have had the effect to deny the two councils any decision at all. Priestley J showed some deference at this point to the council's intention to deliver the requested statements to central government, when he held that the two councils were executing statutory functions conferred upon them by the general powers of section 12(2) LGA.⁹⁸ In this regard Priestley J found that in case of doubt any decision is better than no decision at all.⁹⁹

But what answers does this judgement provide for the purpose of identifying a clear dividing line between local government's powers of general competence and the responsibilities of central government? First, the decision put some weight on the new general powers granted by section 12(2) LGA and thereby opened the door for a rather broad than narrow interpretation of this provision. This can undoubtedly be important in other cases as well, such as when determining the limits of this power in relation to central government's functions. Second, it expressed the notion that whenever there is

⁹² *Scott v Auckland City Council* (23 November 2006) HC Auckland CIV 2006-4004-7226 Priestley J.

⁹³ Dean Knight "Local authority decision-making, community views, and Stadium Aotearoa" (2007) NZLJ 354, 356.

⁹⁴ *Ibid.*

⁹⁵ *Ibid.*

⁹⁶ *Summary of case law on Local Government Act 2002 decision-making and consultation provisions*, website of the Controller and Auditor-General, <http://www.oag.govt.nz/2007/decision-making/appendix2.htm> (last accessed 17/09/08).

⁹⁷ *Ibid.*

⁹⁸ Dean Knight and Chris Mitchell, above n 1, commentary on s 12.

⁹⁹ *Summary of case law on Local Government Act 2002 decision-making and consultation provisions*, above n 96.

some uncertainty about the capacity to make a certain decision at a certain time, the new general powers should be reason enough to allow for the decision-making instead of preventing it. This could be especially important in the above mentioned "grey zone", when a local authority enters an area of policy-making that has already *partially* been dealt with by central government. A similar conclusion in such a case would be one that upholds a decision made by a local authority as long and as far as there can be any reasonable doubt or uncertainty left regarding the question whether this local decision conflicts with national law or statutory functions of central government. Nonetheless it must be noted that in *Scott* the court only had to deal with an application for interim relief. Priestley J expressly stated that the decisions would be subject to judicial review after being made and therefore could be challenged afterwards.¹⁰⁰ Consequently, it remains uncertain what the outcome of such a case would have been and whether or not the court had shown the same degree of deference had it not been a call for interim relief.

Another case that touches upon particular aspects of the issue at hand without really providing a comprehensive answer to it is *Napier City Council v Residual Health Management Unit*.¹⁰¹ In this case Napier City Council, which was opposed to plans made by Healthcare Hawkes Bay Ltd. to close Napier Hospital in the course of consolidating hospital services in neighbouring Hastings, took legal action to prevent the sale of the hospital's premises.¹⁰² The Council's legal action was taken not on behalf of itself, but (as for reasons not relevant to our discussion) on behalf of its constituents.¹⁰³ The argument was that as a democratically elected and constituted body, the Council preserved the right to take action on behalf of the citizens of Napier.¹⁰⁴ Although there was no explicit reference to section 12(2) LGA by either the Council's counsels nor by the Court, one could have based this argument on the new general powers of local government. But the Court plainly stated that "a statutory duty to represent the citizens of

¹⁰⁰ Ibid.

¹⁰¹ *Napier City Council v Residual Health Management Unit* (30 March 2004) HC Napier CIV-2004-441-35.

¹⁰² Ibid, paras 1-9.

¹⁰³ Ibid, para 5.

¹⁰⁴ Ibid, para 13.

Napier does not equate to a right to act on their behalf where interests in land are concerned.”¹⁰⁵ These interests were subject to a statutory trust under section 98 Reserves and Other Lands Disposal and Public Bodies Empowering Act 1920.¹⁰⁶ The Court held that there was no other way to transfer the land without the trust than removing or altering the trust through an act of Parliament.¹⁰⁷ Accordingly, the bottom line to be drawn from this case in terms of the limits of local government’s new powers in relation to central government and bodies empowered by national legislation is two-fold: First, the general powers and their purpose of promoting the community’s well-being do not empower local authorities to take legal action on behalf of their citizens whenever they believe something to be detrimental to their well-being. Second, the Court’s remarks on the preceding powers of Parliament and the responsibilities and functions of the trust which are established by statute arguably illustrate that the Court regards the general powers of local authorities as bounded by the very point where responsibilities are assigned otherwise by national legislation.

C General legal principles

Another possibility to help determining the limits of the general competence power in relation to central government is to look at general legal principles. Especially one such principle is literally obtruding to anyone seeking an answer to the questions before us and this is the doctrine of Parliamentary Sovereignty.

The exact scope and meaning of parliamentary sovereignty has been moot especially in recent years, when two big schools of theorists, the Diceyans and Neo-Diceyans on the one hand and the so-called manner and form group on the other, have been struggling over the question what a sovereign Parliament can exactly do or not.

¹⁰⁵ Ibid, para 24.

¹⁰⁶ Ibid, para 1.

¹⁰⁷ Ibid, para 31.

¹⁰⁸ Consequently, there is no generally accepted definition of the term parliamentary sovereignty. The essence though is in short terms that Parliament is the ultimate decision-maker endowed with virtually unlimited legal powers typical for a sovereign, and in this context that no Parliament can ever bind its (equally sovereign) successors.¹⁰⁹ This principle that is derived from British Westminster constitutionalism is generally acknowledged as being a fundamental cornerstone of New Zealand's legal system.¹¹⁰

But how does it affect local government's powers? Logic demands that all powers exercised by local authorities must be derived from and be traceable back to the House of Representatives, if the latter one in accordance with the principle of parliamentary sovereignty shall be regarded as on top of the chain of command. As a matter of fact the (only recently established) power of general competence is not inherent to local authorities, but conferred upon them by section 12(2) LGA, a statute enacted by Parliament. Any action performed by a local authority on the grounds of this statutory provision is therefore derived from the law-making powers of Parliament and can accordingly be considered as compliant with the principle of parliamentary sovereignty. This principle does not require Parliament to exercise all public power by itself or to be the only law-making institution within the legal system.¹¹¹ It has always been possible for Parliament to empower other bodies like the executive branch of government or other public agencies with a certain degree of regulatory powers (for instance, the power to make bylaws).¹¹² Under this aspect the empowerment of local authorities through section 12(2) LGA is not problematic, but only creates another example. Parliamentary sovereignty provides though that Parliament must have the last say. It is this point that creates problems and uncertainties when local authorities take on matters within the responsibilities of central government. When such undertakings are in direct conflict with

¹⁰⁸ F M Brookfield "Parliamentary Supremacy and Constitutional Entrenchment: A Jurisprudential Approach" (1984) 5 Otago Law Review 603, 607.

¹⁰⁹ Anthony Bradley "The Sovereignty of Parliament – Form or Substance?" in Jeffrey Jowell and Dawn Oliver (eds) *The Changing Constitution* (6 ed, OUP, Oxford, 2007) 25, 29.

¹¹⁰ B V Harris "The Law-Making Powers of the New Zealand General Assembly: Time to Think About Change" (1984) 5 Otago Law Review 565, 565.

¹¹¹ Grant Hewison, above n 2, 509.

¹¹² *Ibid.*

national legislation there are two cases to be differentiated. First, it is possible that the occurring conflict involves a parliamentary statute that is of a younger date than the LGA 2002. In this case the doctrine of implied repeal (which is partially based upon the principle of parliamentary sovereignty and especially the idea that no Parliament can bind its successors) demands that the younger act prevails.¹¹³ This would lead to the effect that the municipal activity automatically had to be regarded as *ultra vires*. Second, it is possible that the activity collides with legislation that was enacted earlier than the LGA 2002. Theoretically, one might argue that in such a case the empowerment provision in section 12(2) LGA prevails over the older statutory provision. But then the doctrine of implied repeal could only be applied to such a case, if one understood the power of general competence as something so tremendously broad that it virtually gave a *carte blanche* to local authorities to override national legislation at their own discretion, thus questioning parliamentary sovereignty itself. Setting aside the moot question, whether Parliament could effectively divest itself of its sovereign powers even if it deliberately attempted to do so¹¹⁴, either way there can be no serious argument that Parliament ever had something like this in mind when it enacted the LGA 2002.¹¹⁵ Consequently, it must be reasoned that the doctrine of parliamentary sovereignty demands in either case that no activity undertaken or bylaw made by a local authority may ever disregard legal provisions set out in an Act of Parliament.

Apart from that the principle of parliamentary sovereignty gives no further reason for concern. Neither does it prevent local authorities from assuming responsibilities that could simply be regarded as issues of national importance but have never actually been dealt with by Parliament, nor does it imply that local authorities should not be allowed to build more complex rules and regulations upon national legislation where the latter has been providing only a rough framework.

¹¹³ Anthony Bradley, above n 109.

¹¹⁴ F M Brookfield, above n 108, 607-609.

¹¹⁵ Grant Hewison, above n 2, 515.

D International Experience

A further possible source of insight could spring from the international experience with related matters. First, it seems appropriate to look at other common law societies, especially the United Kingdom. Such an undertaking proves to be difficult though as municipal powers of general competence do not have a long tradition in any of the common law jurisdictions, least of all in Great Britain. Nevertheless it is worth remembering that the United Kingdom had a local government law reform during the last decade as well. The Local Government 2000 (UK) introduced at least "a small number 'general' powers" of local authorities as the official explanatory notes put it.¹¹⁶ As mentioned before section 2(1) LGA 2000 (UK) pretty much resembles section 10(b) of New Zealand's LGA 2002 as it too refers to the objective to promote the well-being.¹¹⁷ The drafters of the LGA 2002 seem to have been inspired at least to some extent by this previously enacted statute of the United Kingdom. In terms of restriction of this 'general power' in relation to national legislation the United Kingdom's Act is a bit more specific. Section 3(1) provides¹¹⁸:

The power under section 2(1) does not enable a local authority to do anything which they are unable to do by virtue of any prohibition, restriction or limitation on their powers which is contained in any enactment (whenever passed or made).

Different to section 12(3) LGA this section expressly provides that the doctrine of implied repeal shall not apply to anything undertaken or regulated by a local authority by making use of the general powers conferred upon them. This can be taken from the last bracketed clause "whenever passed or made". Apart from that the comparative look at the United Kingdom's Act does not provide any further help. Even the official explanatory notes give no further hint as how to draw the line between central and local issues.¹¹⁹ It can only be assumed that section 3(1) was considered to be self-explanatory in the light that the United Kingdom never intended to endow local authorities with a true and broad

¹¹⁶ *Explanatory Notes to the Local Government Act 2000*, above n 32, para 7.

¹¹⁷ Local Government 2000 (UK), s 2(1).

¹¹⁸ Local Government Act 2000 (UK), s 3(1).

¹¹⁹ *Explanatory Notes to the Local Government Act 2000*, above n 32, commentary on s 3.

power of general competence. It is mainly for this reason that the comparison between the United Kingdom and New Zealand (where the legislature's intentions have been somewhat different) is only of limited help.

Again, as the power of general competence is derived from Continental European traditions, it might prove helpful to look at experiences from these legislations as well. For these purposes, the following paragraphs will once more resort to the example of Germany. In this context it is noteworthy that the Local Government Acts of the sixteen German states only partially deal with the matters at hand in an explicit way. As mentioned before the Local Government Act of Rhineland-Palatinate provides in its section 2(1) that "councils have the right to take on each and every public task of the local community in their area, as far as this task is not explicitly and exclusively assigned by law to other bodies on the basis of an urging public interest."¹²⁰ In terms of determining what shall happen, if a local authority takes on issues of national importance that have not yet been dealt with by central government or for which national legislation just provides a rough framework, this section seems to be a little bit more helpful than their British and New Zealand counterparts. The need for a task to be *explicitly* assigned to another agency implies that no conflict occurs between local and central government as long as there is no state or federal legislation already dealing with the same issue regardless whether it should be considered as an issue of provincial or national importance. Even more importantly, the need for a task to be *exclusively* assigned to another agency or body implies that a local authority may even deal with matters that have been legislated by the State Parliament or Federal Parliament as long as legislation does not expressly provide for the sole competence of state or central government and, of course, as long as both regulations are not opposed to each other. The latter assessment can at least be derived from section 1(2) Local Government Act of Rhineland-Palatinate which provides that local authorities are "subject to the Constitution and all other enactments".¹²¹ When taking a first glimpse at the wording of the aforementioned

¹²⁰ Gemeindeordnung Rheinland-Pfalz, above n 17, s 2(1).

¹²¹ Gemeindeordnung Rheinland-Pfalz, above n 17, s 1(2).

provisions, one might come to the conclusion that local government in Rhineland-Palatinate (and other parts of Germany) seems to have a very broad degree of competence and a lot of discretion when it comes to the question what tasks should be for them to take on. Such a conclusion could mean that local authorities in New Zealand (who have been endowed with similar powers since the LGA 2002 adopted the very same principles) can use wide discretionary powers as well when determining the limits of their authority in relation to central government. Unfortunately, the reality in Germany (in terms of legal practice and case law) has been quite different though and therefore does not support such an argument drawn from legal traditions of the power of general competence.

The German courts have put strong emphasis on the interpretation of the first half of the provision and on the related questions of the nature and purpose of local government. To take a look at the example of Rhineland-Palatinate again, section 2(1) begins with the statement that local authorities "have the right to take on each and every *public task of the local community in their area* (emphasis added)" and it is those tasks that are then (in the second half of the provision) subjected to the general law and the explicit and exclusive competences of other bodies. The German administrative courts have seen it as upon them to determine whether a local authority (just like every other body or agency of the executive branch of government) oversteps their authority. There have been several cases where local decision-making has not withstood judicial review. One particularly leading case which has been associated with the keywords "*Atomwaffenfreie Zone*" (or nuclear weapon-free area) has been decided by the German Federal Administrative Court back in 1990.¹²² In this case the Court had to deal with a second appeal by Munich City Council against the Bavarian State Government which used their powers under the Bavarian Local Government Act to repeal a decision made by the Council for the reason of alleged inconsistency with the law. The initial action of the Council and a first appeal had already been dismissed by the Munich Administrative

¹²² BVerwGE 87, 288.

Court and the Bavarian Administrative Court of Appeal.¹²³ Following a nation-wide debate concerning the so-called NATO Double-Track Decision (which combined both an offer to the Soviets to begin negotiations about a mutual limitation of nuclear weapons in Europe and a threat to station even more medium-range missiles in Western Europe, and especially Germany, if talks should fail) Munich City Council in 1982 passed a resolution in which it expressed towards both the German and United States' Armies its "categorical refusal" to any possible future plans to deploy nuclear weapons within the boundaries of the City of Munich or to transport such weapons through its territory.¹²⁴ In this context Munich City Council also expressly declared the city to be a "nuclear weapon-free area".¹²⁵ The Federal Administrative Court held that "the universality of the power of general competence means that local authorities can assume responsibilities related to their area as long as they have not yet been assumed otherwise."¹²⁶ Further to this the Court accepted that "to an extent to be determined hereinafter local authorities may also deal with issues that have been allocated by law to other public authorities."¹²⁷ It shall be noted in this regard that the German Constitution provides that matters of military defence are a national responsibility allocated to the federal government.¹²⁸ Accordingly the Court reasoned that the federal government's authority to deal with matters of military defence did not automatically eliminate the possibility of local government to deal with related issues as long as they had a substantial connection to issues of the local community. Nevertheless the Court pointed out in this regard that only tasks of the local community were upon councils to deal with. In accordance with a definition provided by the settled case law of the German Constitutional Court it established that such tasks required "needs or interests that originate in the local community and are specifically connected to it in a way that they are common to the citizens of the community as such

¹²³ Ibid.

¹²⁴ Ibid.

¹²⁵ Ibid.

¹²⁶ Ibid.

¹²⁷ Ibid.

¹²⁸ See Grundgesetz fuer die Bundesrepublik Deutschland, art 73(1), para 1.

and concern their living together as members of this very community.”¹²⁹ The Court went on to say that the mere fact that the Council speaks on behalf of the community and is democratically elected by its constituents is not sufficient to regard a matter as originating in the local community, because otherwise councils would be enabled to deal with any sort and number of general political issues.¹³⁰ Again following the Constitutional Court’s settled case law the Court held that “Councils have a mandate on issues concerning municipal politics, but not a general political mandate.”¹³¹ As a bottom line it was then ruled by the Court that “any resolution, the wording of which resembles the character of a general political statement is per se ultra vires” and that the “mere theoretical possibility of a future deployment of nuclear weapons within the city is not sufficient to justify a statement with regard to this possibility.”¹³² Even if there had been definite plans of deployment (which was not the case) the Court considered that the “threshold for judicial review would be low”.¹³³ Thus, the appeal by Munich City Council was dismissed and the Council’s resolution was declared null and void.¹³⁴

Which conclusions can be drawn from this German case law in regard to possible similar situations in New Zealand? The only obvious connection between the two is that the power of general competence, which has been constrained by German courts in the way outlined above, follows the same paradigmatic background and tradition that New Zealand at least partly thrived to adopt by its 2002 local government reform. As Germany is not a common law society New Zealand courts will probably not directly draw on these cases even should they face a similar situation. Nonetheless the way German courts have dealt with the problem at hand might provide a source of inspiration given their long experience with local authority’s general powers in Germany and the apparent lack of court cases from common law jurisdictions.

¹²⁹ BVerfGE 79,127,151; BVerfGE 8,122,134.

¹³⁰ BVerwGE 87, 288.

¹³¹ BVerfGE 79,127,147; BVerfGE 8,122,134.

¹³² BVerwGE 87, 288.

¹³³ Ibid.

¹³⁴ Ibid.

E Conclusion with regard to central-local government relationship

As an interim conclusion it must be ascertained that the LGA 2002 is not at all explicit on the limitations of local government in respect to the functions and responsibilities of central government and other statutory agencies. Neither is the case law, which might result from the fact that courts in New Zealand have not been bothered with alleged breaches of national law yet. The only conclusion that can definitely be drawn from the national experience so far, especially from a look at section 12(3) LGA, the *Napier City Council* case and general thoughts about Parliamentary Sovereignty, is that local authorities may not act or legislate in open contradiction to statutory enactments made by Parliament. Nonetheless even in the "grey area" where local authorities deal with matters of higher importance that have not yet been legislated on national level or that have been legislated only roughly and generally, a look at international experiences should at least advise New Zealand local authorities to exercise caution when entering such areas.

VII CRITICAL ANALYSIS

As for both issues this research paper deals with, there seems to be a lack of consideration among New Zealand's legal community. Scholars, judges and, most importantly, legislators alike have given little attention to them so far. So does that hint towards the possible fact that these issues could be only minors ones Parliament has been wise not to bother itself with and local authorities respectively? In my opinion this attitude is not very far-sighted and Parliament was ill-advised not to consider those issues more carefully as they are likely to create problems and uncertainties over time wherever a jurisdiction adopts a power of general competence.

As far as the first issue of profit-seeking trading activities is concerned, it is astonishingly contradictory, in my belief, to show such serious and general concerns about a power of general competence that it first takes years of political struggles to

implement it and then a vast number of limitation provisions to bridle it (which in terms of trading activities go as far as providing procedural regulations on the appointment of directors), but despite of all this not to bother with providing a comprehensive legal framework for the permissible scope of municipal trading activities as such. To have a free market economy not to be interfered with too extensively is a common feature of most western-style democracies and most of these countries protect the freedom of their economy on central government level, be it by means of a supreme written constitution or by means of convention. The current legal situations in New Zealand though raises certain concerns in this regard as it is unclear on how far local authorities could go to distort and dominate local markets by possibly abusing their privileged position for the sake of raising additional revenue.

Regarding the latter issue of limits of local government's general powers in relation to central government's responsibilities, virtually the same arguments seem to apply. Despite of the numerous limitation provisions applicable to local government's general powers, there are only few clearly defined checks and balances concerning possible excursions into matters of national politics and responsibilities of central government by local politicians seeking to distinguish themselves in order to put themselves forward for higher positions. In Germany where MPs are almost always recruited from the ranks of merited councillors or mayors who have succeeded in climbing up the greasy pole (something which is considered to be essential by all major parties and is referred to partly admiringly and partly sarcastically as the *Ochsentour* or oxen's slog), similar problems have been a constant source of annoyance. It might not be long after local authorities in New Zealand start to fully appreciate their new wide powers that similar problems could arise.

VIII CONCLUSION

This paper has shown that New Zealand has made remarkable reforms in the area of local government law and has, indeed, endowed its local authorities with a power of general competence as it is understood by the legal traditions in Continental Europe. This

paper has also shown though, that the new legal regime under the LGA 2002 contains numerous limitations, both procedural and substantial, on these new municipal powers.

As far as the two main issues of this paper are concerned though, this paper comes to the conclusion that although there are various indications that local government's powers are indeed not unlimited in these areas, there is not enough evidence from legislation or case law that would provide absolute certainty with regard to this assessment.

It is worth to appreciate New Zealand's new approach towards bestowing similar general powers on their local authorities as they have been in place in some parts of Continental Europe for a long period of time. Local government in New Zealand shall grow and prosper with their new general competence through which they have a powerful means to do so. Nevertheless such a radical and bold change of legal traditions necessarily comes with initial difficulties and shortcomings. Both the questions regarding municipal economic undertakings and the overlapping of responsibilities between central and local government have caused much trouble in Germany in years past and have finally led to statutory amendments and a more diversified case law respectively.

Although in New Zealand those two issues do not seem to have been causing too many difficulties in practice so far, the LGA 2002 is arguably in need of some clarifying amendments in order to spare the country's legal community a similarly stony path as the German legal community had to walk.

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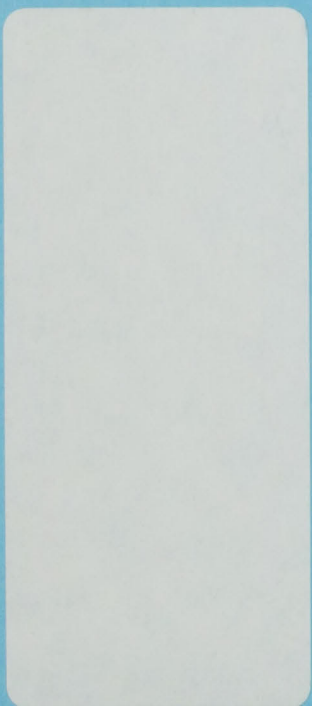
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