IN THE DISTRICT COURT
AT AUCKLAND

I TE KŌTI-Ā-ROHE
KI TĀMAKI MAKAURAU

CIV 2025-004-1836
[2025] NZDC 25062

UNDER	the Local Electoral Act 2001
IN THE MATTER	of an Application for a Recount of the Votes in the Local Government Election of 2025 for the Maungakiekie Tāmaki Local Board (Maungakiekie Subdivision)
BETWEEN	MALAINA MALELEGA TAUFA Applicant
AND	DALE OFSOSKE, Electoral Officer Respondent

Hearing:	On the Papers
Appearances:	SR Mitchell KC and A Drumm for the Applicant Respondent in person
Judgment:	30 October 2025

JUDGMENT OF JUDGE K D KELLY
[on application for a recount of votes cast for the Maungakiekie Tāmaki Local Board (Maungakiekie Subdivision) at the 2025 local body election]

Introduction

[1] On 21 October 2025, pursuant to s 90 of the Local Electoral Act 2001 (the Act) Ms Malaina Malelega Taufa applied for a recount of the votes cast at the 2025 elections for the Maungakiekie Tāmaki Local Board (Maungakiekie Subdivision) of the Auckland Council in which she was a candidate.

[2] The Maungakiekie Tāmaki Local Board (Maungakiekie Subdivision) of the Council is electing three members from six candidates. Ms Taufa was the fourth ranked

candidate behind Mr Tony Woodcock who was the lowest ranked elected candidate. There are nine votes separating Mr Woodcock and Ms Taufa.

[3] Mr Dale Ofsoske is the Electoral Officer for the election. Mr Ofsoske takes a neutral position in relation to whether there ought to be a recount, and the outcome of any recount (if ordered).

Ms Taufa's application

[4] The ground for the Ms Taufa's application is that she says there are reasonable grounds to believe that the declaration is incorrect and that on a recount she might be elected.

[5] In Ms Taufa's affidavit in support, Ms Taufa says that:

(a) the nine vote difference between her and Mr Woodcock is exceptionally narrow and means that there is a significant likelihood of an error that will have a material impact on the outcome of the election;

(b) there are only recorded to be 13 informal votes and that there may be eligible votes that have been recorded as being invalid or informal when they ought to have been accepted;

(c) the declaration from the Auckland Council shows that nearly half of special votes were discounted and there is no ability to scrutinise vote counting such that these votes need to be examined to consider whether they are in fact informal votes; and

(d) that she is aware that mistakes can arise when sorting between different subdivisions (in this case the Maungakiekie-Tāmaki Local Board having Maungakiekie and Tāmaki subdivisions) and occasionally ballot papers can be sorted to the wrong subdivision.

[6] Ms Taufa says that there is a need for "public confidence and electoral fairness in our local government elections" and in situations where the margins are so close, integrity of the democratic process is in the public interest.

Electoral Officer's report

[7] On 23 October 2025 I directed the Electoral Officer, Mr Dale Ofsoske, to file a report on the conduct of the election.

[8] Mr Ofsoske confirms that for the Maungakiekie Tāmaki Local Board (Maungakiekie Subdivision) there were 212 special votes. Of these, 144 were allowed (68%). Of the 68 votes (32%) that were disallowed:

(a) 36 people were not on the roll (and hence disallowed by the Electoral Commission as being unqualified to vote);

(b) 31 declarations accompanying the votes were incomplete; and

(c) 1 contained no declaration or special vote.

[9] Mr Ofsoske also reports that prior to each triennial election, the software and vote processes are certified as 'fit for purpose' by an independent auditor, and that this happened in this case.

[10] At the election, candidates are able to appoint scrutineers to observe the vote counting process, including the counting process after the voting closed. Mr Ofsoske reports that 4 scrutineers were appointed by candidates from Auckland Council – one of who was for Ms Glenda Fryer who stood in the Maungakiekie Tāmaki Local Board (Maungakiekie Subdivision).

Legal framework

[11] Section 90 of the Act provides:

90 Application for recount

(1) If any candidate has reason to believe that the public declaration by the electoral officer of the number of votes received by any candidate is incorrect, and that on a recount of those votes the first-mentioned candidate might be elected, he or she may, within 3 days after the public declaration, apply to a District Court Judge for a recount of the votes.

...

(3) If the District Court Judge is satisfied that the applicant has reasonable grounds to believe that the declaration is incorrect and that on a recount the applicant might be elected, the District Court Judge must, as soon as practicable after receiving the application, and the deposit required by subsection (2),—

(a) cause a recount of the votes to be made; and

(b) give notice in writing to the electoral officer and to each of the candidates and to each scrutineer appointed under section 66 or section 91 of the time and place at which the recount will be made.

[12] The test in s 90(3) of the Act is not whether a judge believes that the declaration by the electoral officer may be incorrect and that on a recount the applicant might be elected. Rather, a judge must be satisfied that the applicant has reasonable grounds to believe that the declaration is incorrect and that he or she might be elected on a recount.

[13] As Judge Tuohy noted in *Smith v Lampp*, a decision pertaining to local government elections in 2022:[1]

> [28] There have been several decisions of District Court judges over the last decade or so in which the application of this test has been discussed. In *Butler v Jordan*[2], Coyle DCJ said that the Judge needs to be satisfied on the balance of probabilities that there is sufficient evidence to justify a conclusion that the applicant has reasonable grounds to believe that the declaration is incorrect. This necessitates the applicant adducing evidence to enable the Judge to be satisfied that the grounds have been established. The reasonableness of the applicant's subjective belief must be assessed in the light of that evidence. 'Reasonableness' is to be construed in accordance with the usual objective test.[3]
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> [29] In *Kelliher v Jordan*,[4] Kellar DCJ departed from *Butler v Jordan* on the issue of the onus and standard of proof under s 90. Relying upon the Court

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[1] *Robyn Anne Smith v Warwick Lampp for Greater Wellington Regional Council 2022 Local Government Elections* [2022] NZDC 22080 at [28] and following
[2] *Butler v Jordan* [2011] DCR 399
[3] *Butler v Jordan* supra, at [8]
[4] *Kelliher v Jordan* [2017] DCR 44

> of Appeal's approach in *R v White*[5] and *R v Leitch*[6] to the application of the term '*the Court is satisfied*', Kellar DCJ considered that the expression does not carry any implication of proof to any particular standard. Rather, a District Court Judge is merely required to make up his or her mind on reasonable grounds or in other words to come to a judicial decision on the matter at issue, that is, whether the applicant has reasonable grounds for her belief that the declaration is incorrect **and** that the applicant might be elected on a recount.
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> [30] Kellar DCJ also held that closeness of the voting by itself does not provide reasonable grounds to believe that the declaration is incorrect and that on a recount the applicant might be elected, a conclusion with which other judges have agreed in subsequent decisions.[7]
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> [31] As to the second limb of the test in s 90, that is, whether there are reasonable grounds to believe that on a recount the applicant might be elected, in *Butler v Jordan,* Coyle DCJ considered that the threshold is low if there are prima facie reasonable grounds for the applicant to believe that the declaration is incorrect.[8]

[14] As Judge Tuohy did, I also agree with the approach of Judge Kellar in respect of the judge's task in deciding whether the test in s 90(3) has been satisfied. Otherwise, I also see no apparent reason to depart from the principles recognised in the previous decisions to which Judge Tuohy referred.

[15] In addition, in *Smith v Lampp,* Judge Tuohy noted that there is a significant difference in the language Parliament has used in formulating the two limbs of the test in s 90(3). As his Honour said: "The applicant must have reasonable grounds to believe that the declaration **is** incorrect but only that she **might** be elected on a recount. The latter refers to a possibility, the former to an actuality."[9] I agree with this.

Submissions for Ms Taufa

[16] Counsel for Ms Taufa acknowledges that something more than the closeness of the vote is required to establish the reasonable basis for considering that the number of votes received by the applicant is incorrect. Counsel for Ms Taufa also acknowledges that it is important to distinguish between objective irregularities and suspicion.

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[5] [1988] 1 NZLR 264 (CA)
[6] [1988] 1 NZLR 42 (CA)
[7] *Lewers v Queenstown Lakes District Council* [2019] NZDC 20986 at[12] (M Callaghan DCJ); *Lester v Lampp and Foster* [2019] NZDC 22157 at [52] (KD Kelly DCJ).
[8] *Butler v Jordan supra* n 2 at [11] approved by KD Kelly DCJ in *Hicks v Gore District Council and Bell* [2022] NZDC 21348 at [28]
[9] Above n 1, at [35]

[17] It is submitted for Ms Taufa that in this case there are clear factors that tip the balance in favour of a recount. These, it is submitted, are as set out in Ms Taufa's affidavit (referred to in paragraph [5] above).

[18] These factors, it is submitted, provide a reasonable basis for Ms Taufa's view, such that the first limb of the test is satisifed. In relation to the last point, in particular, it is submitted that the Electoral Officer has provided nothing to rebut the suggestion that there can be mix-ups between divisions and that the applicant is entitled to rely on her reasonable belief that there can be mix-ups in a subdivision count.

[19] In relation to the second limb of the test, it is submitted that the threshold is low, and that on a recount the applicant might be elected.

[20] Counsel for Ms Taufa further submits that the report filed by Mr Ofsoske shows a gradual increase, or a clear trend, of improvement in votes in Ms Taufa's favour down to a single digit difference. If just 10 of the 13 informal votes or 31 incomplete declarations were wrongly determined, it is submitted, the outcome will change as between Ms Taufa and Mr Woodcock. When special votes are counted at speed, it is submitted that there can be a reasonable basis for belief that an error has occurred.

Discussion

[21] The issue for determination is whether the evidence satisfies me that Ms Taufa has reasonable grounds to believe both that the declaration of final result is incorrect and that on a recount she might be elected.

[22] As noted in *Butler v Jordan*, there needs to be sufficient evidence to justify such a belief.

[23] At the core of Ms Taufa's concern is that she was not elected by a slim margin and that mistakes may have been made. I am not persuaded by this. To use Judge Tuohy's expression, this does not reasonably support a believe that the declaration 'is' incorrect but only that it 'might be.' This does not refer to an actuality but only a possibility and is tantamount to saying that closeness of the voting provides reasonable grounds to believe that the declaration is incorrect.

[24] Ms Taufa's evidence does not expand on why she holds the subjective belief that errors have occurred in data entry, scanning, tallying of votes, or excluding votes. Ms Taufa has provided no evidence of any irregularity in the vote counting process, but merely suggests that there may have been one. As Judge Tuohy said in *Smith v Lampp*:[10]

> … suspicion is not enough. That is not the test as explained above. The test is whether [the applicant] has an objective and credible basis for believing that the declaration is incorrect. The possibility or even the likelihood of error does not meet that test. There must be a basis for an objective belief that it is highly likely that the declaration is incorrect.

[25] The submission, taken to its logical conclusion, would apply whenever the results are close. As already noted, however, there have been several decisions of District Court Judges over the last decade or more in which such a ground has been dismissed as being insufficient to prompt a recount.

[26] Ms Taufa is also concerned that there is no ability to scrutinise vote counting in local government elections and the votes need to be examined to consider whether the informal votes are in fact informal.

[27] I disagree.

[28] Section 66 of the Act expressly provides that a candidate may appoint one or more scrutineers for the purposes of an election. In accordance with s 83 of the Act, scrutineers may also choose to be present when the Electoral Officer records, before the counting of the votes, the name of all electors who appear to have voted at the election. As set out in Mr Ofsoske's report, only Ms Fryer appointed a scrutineer for in the Maungakiekie Tāmaki Local Board (Maungakiekie Subdivision). That is to say, Ms Taufa did not.

[29] As to the informal and special votes, nothing in particular is raised by Ms Taufa to suggest that there are grounds to believe that the count was incorrect. I am not persuaded that evidence of a trend between progress results and the final results of itself points to any irregularity or other reasonable basis to belief that the declaration

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[10] Above n 1, at [60]

was incorrect. Again, Ms Taufa has provided no reason as to why she believes that to be the case other than the closeness of the votes and that nearly half of special votes for Auckland were not counted.

[30] Nor does Mr Ofsoske's report suggest any irregularity. I note that in each of the progress, preliminary, and final result, each of the top four candidates including Ms Taufa, were ranked in the same order with Ms Taufa ranked fourth. While the number of special votes may be considered high, Mr Ofsoske's report explains how each of these votes were treated. I am satisfied that each of the reasons provided are legitimate reasons for disallowing votes. Section 20 of the Act governs eligibility to vote, and r 38 of the Local Electoral Regulations 2001 provides the mandatory requirements for any declaration. Ms Taufa's evidence does not provide any basis for a reasonable belief that these requirements were not observed by the Electoral Officer in considering the votes.

[31] As in *Smith v Lampp*, the basis for such an objective belief is simply not available on the evidence before the Court.

[32] For completeness, I am not persuaded by the submission that the respondent's so-called lack of evidence relating to issues identified by the applicant, particularly to rebut the suggestion that there can be mix-ups between different subdivisions, provides a reasonable basis for Ms Taufa's belief. The test is simply whether the evidence satisfies me that Ms Taufa has reasonable grounds to believe both that the declaration of final result is incorrect and that on a recount she might be elected. For the reasons already stated, I am not satisfied that the evidence before me is sufficient to support the reasonableness of such a belief.

Result

[33] The application is dismissed. I decline to order that a judicial recount of the votes for the Maungakiekie Tāmaki Local Board (Maungakiekie Subdivision) be caused.

K D Kelly
District Court Judge