The Supreme Court sitting as Court of Administrative Appeals

AAA 662/11

Before: The Honorable Justice E. Hayut
The Honorable Justice N. Hendel
The Honorable Justice U. Vogelman

The Appellants:
1. Yehudit Sela
2. Sima Ben Haim
3. Peri Shahaf
4. Yinon Sela
5. Yoav Ben Haim
6. Katy Shilo Oliver
7. Michael Ayash
8. David Cohen
9. Amnon Ben Ami
10. Zachary Grayson

v.

The Respondents:
1. Head of the Kfar Vradim Local Council, Sivan Yehieli
2. Kfar Vradim Local Council
3. Oriette Amzalag
4. Shimon Amzalag
5. Victor Haziza
6. Tibi Hertz
7. Jacques Ben Zaken
8. Nissim Avital

Appeal of the judgment of the Haifa Administrative Affairs Court (The Honorable Judge R. Sokol) in AP 21404-06-09 of Dec. 23, 2010.

Date of hearing: 29 Adar 5774 (March 31, 2014)

Attorneys for the Appellants: Avi Weinroth, Adv.; Amir Lockshinsky-Gal, Adv.

Attorney for the Respondents: Haim Pitchon, Adv.

Attorney for the State Attorney's Office: Tadmor Etzion, Adv.

Facts: An appeal of the decision of the Haifa Administrative Affairs Court, dismissing the petition of the Appellants and holding that the court should not intervene in the decision of the Kfar Vradim local council according to which a women's mikve (ritual bath) would not be constructed in the town in the near future.

Held: As a rule, a local council enjoys broad discretion in regard to decisions concerning the allocation of public resources. The initial assumption is that a local council – which is an elected authority whose members represent the public they were chosen to serve – occupies the best position for deciding upon the priorities that will advance the general good, and for striking the proper balance between meeting public needs and maintaining the budgetary framework. Therefore, the Court will not hastily intervene in such decisions, and will refrain from placing itself in the authority's shoes. In the framework of judicial review, the question of whether public resources were allocated wisely, or whether they could have been allocated differently, will not be considered unless the decision regarding the allocation of resources was tainted by a substantive, fundamental flaw that justifies the Court's intervention.

It is clear that the council, like any local authority, is subject to the principles of public law. This restraint in regard to judicial review does not relieve the Court of fulfilling its duty: to ensure that the authority exercises its discretion in accordance with the law. And note: the local authority serves – in all of its actions – as a trustee of public funds, and its job is to advance public purposes for the general good. Even in allocating public resources, the authority is obligated to act in a manner that faithfully serves the entire public and ensures proper governance. Accordingly, the allocation of public resources in public authorities must be carried out in accordance with the principles of reasonableness and proportionality, and in accordance with fair, equal, relevant and transparent criteria. Reasonableness requires that in setting priorities among various subjects for which the authority is responsible, priority be given to the more important subjects.

Although the council's decision relied upon the recommendations of the committee for examining criteria for the construction of public buildings in the village, it is clear that those recommendations cannot absolve it of the duty to exercise its authority to consider every case on its merits. Indeed, an administrative agency will not lightly deviate from the recommendation of a knowledgeable, expert body, established at its request, which was adopted after an in-depth professional evaluation. However, that does not mean that the council is bound by the recommendations of the criteria committee, which is merely an advisory body. Under the circumstances, the decision to rescind its decision to build a mikve in the village, adopt the recommendations of the criteria committee in full, and refrain from taking action in the near future to establish a mikve in the town does not pass the reasonableness test, and does not reasonably balance the needs of the religiously observant female residents of the community, who are required to fulfil their religious obligation of ritual immersion, against the budgetary considerations and the available land resources.

The religious obligation of ritual immersion is an integral part of the life of a religiously observant, married woman, and is an inseparable part of her religious ritual and the expression of her identity and customs. It is substantively related to the right to the free exercise of religion and religious practice. No mikve has ever been built in Kfar Vradim. Given the geographic location of Kfar Vradim and its topographic conditions, there is no reasonable way to go to any of the mikves in the nearby towns on foot. Under the circumstances, the absence of a mikve in the town deprives the female residents of the town of the possibility of performing an obligatory ritual practice that is deemed to be of great importance by the traditionally religious Jewish community.

The primary consideration that led to the decision was the limited resources available to the council. In its deliberations, the council could, indisputably, give weight to the limits upon the available resources, and allocate them in accordance with public needs. However, under the circumstances of the instant case, the resources – both land and money – that were expected to be required for the purpose of building and maintaining a mikve in the town were not significant. Under those circumstances, the weight of the budgetary consideration relative to the opposing interest was limited.

That being so, in circumstances in which appropriate weight was not given to the substantial harm to the religiously observant, female residents of the town by the absence of a mikve that is accessible on the Sabbath and on religious holidays, and where it was found that the allocation of resources was given disproportionate weight even though land was readily available for erecting the mikve without harming other public interests, and without any need for allocating substantial resources by the council due to external funding – The Court held that the council's decision not to erect a mikve was unreasonable and must, therefore, be annulled.

Judgment

Justice U. Vogelman:

An appeal of a judgment of the District Court sitting as a Court Administrative Affairs in Haifa (the Honorable Judge R. Sokol), denying the petition of the Appellants, and holding that the court would not intervene in the decision of the local council of Kfar Vradim (hereinafter: *the Council* or *the Local Council*) not to erect a mikve for the women of the town in the near future.

Background

1. The town of Kfar Vradim was established in the western Galilee following a government decision made in 1978. The town currently has some 6,000 residents. Some of the residents (many dozens of families according to the Appellants) define themselves as religious or traditional. In the past, the authority to plan, develop and market building lots in the town was held by the Kfar Vradim Development Corporation Ltd. In 2008, that authority was transferred to the Council. In 2005, the Local Council and the Ma'ale Yosef Regional Religious Council agreed that the former would be responsible for providing religious services in the village, including "family purity and the instruction of brides". No mikve was ever erected in Kfar Vradim, and the closest mikves [ritual baths] for women are a short drive away, in the neighboring communities. Over the last few years, some of the local residents began working toward the establishment of a mikve in the town.

2. On March 12, 2007, the National Religious Services Authority in the Prime Minister's Office (hereinafter: *the Authority*) undertook to provide an "extraordinary budget" in the amount of NIS 745,000 for the building of a mikve in the town (hereinafter: the *EB*). The Local Council was asked to approve the Authority's offer in order to receive the EB, and on May 22, 2007, it decided to approve it on condition that the Authority agree to exempt the Council from any obligation to finance the construction or maintenance of the mikve. The Council then completed

the necessary application for receiving the EB – deleting the sections regarding the Council's obligation to participate in financing – and returned it to the Authority, while emphasizing the condition that the Council not be required to fund the construction or maintenance of the mikve in any way. At the Council meeting, the chairman at the time informed the Council that, in a meeting with the Minister for Religious Affairs, the Minister informed him that the application to receive the EB would not be approved due to the reservations and deletions made in the application, but added and promised that the maintenance of the mikve would be financed by the Religious Services Authority, and that no funding would be required of the Council. In the course of that Council meeting, Mr. Amnon Ben Ami (Appellant 9, hereinafter: *the Donor*) – a community resident who had contributed monies in the past for the construction of the community's synagogue – asked that the mikve be attached to that synagogue, and agreed to guarantee that the maintenance of the mikve will not require funding by the Council. At the end of the meeting, the Council decided "to approve the EB as is, without any changes, and in the "Stage B zone" (by the term "Stage B", the Council was referring to a particular area in the village).

3. Pursuant to that decision, on Oct. 23, 2008, the Council published a public tender for the construction of the mikve (hereinafter: *the Tender*). A petition submitted in regard to alleged flaws in the tender process was dismissed on Nov. 6, 2008, following a declaration by the Council that it would not open the bid envelopes until after the elections for the Local Council and until a decision was reached by the new Council in regard to opening the envelopes (AAA 10/08 (Haifa Administrative) *Akirav v. Kfar Vradim Local Council* (Nov. 6, 20018)). On Nov. 11, 2008, elections were held for the Local Council, in which a new Council head was elected (Respondent 1). On Nov. 16, 2008, the outgoing Council head requested that the Israel Lands Administration suspend the Council's request to allocate land for the construction of the mikve, and instead, allocate the land for the construction of the Tefen comprehensive high school. This suspension request resulted from a compromise agreement, granted court approval in 2008, under which the Council agreed to allocate land for the construction of the Tefen school in its jurisdiction (AP (Haifa Administrative) 630/08 *Association for the Ma'alot and Region Experimental School (R.A.) v. Industrial Local Council Migdal Tefen* (Sept. 4, 2008)).

4. On Dec. 22, 2008, the new head of the Council informed the bidders of the cancellation of the Tender, and the sealed envelopes were returned to the bidders unopened. In the course of February 2009, a decision was taken to change the location for the construction of the Tefen school, and to allocate other land in the town for that purpose. A Council meeting was held on May 13, 2009. In the course of the discussion of the allocation of land for religious purposes, the head of the Council requested the repeal of the decision of the previous Council in the matter, and added that the Tender for the building of the mikve had been cancelled due to a problem concerning the allocation of the land, and because there was no available budget and the Donor had not provided his share. It was further noted that, in the meantime, the Ministry of Religious Services' commitment to underwrite construction of the mikve had lapsed. At the end of the meeting, the Council decided to repeal the decision of the previous Council from Nov. 18, 2007 in regard to the synagogue and mikve in Stage B (hereinafter: the *Repeal Decision*). As a result of this decision, several dozen residents organized in order to bring about its repeal. When their efforts failed, they submitted a petition against the Council's decision to the Haifa District Court in its capacity as a Court of Administrative Affairs.

Proceedings in the Lower Court

5. In their petition to the lower court, the Appellants argued that the Council's decision to suspend and cancel the Tender for building the mikve should be annulled, and that the Respondents should be ordered to publish a new tender. A hearing was held on Sept 8, 2009. In the course of the hearing, it was argued, *inter alia*, that a decision could not be made to construct a mikve, or any other public building, without clear criteria for the allocation of public resources. In the end, a procedural agreement was reached between the parties under which the proceedings in the case would be adjourned for six months, during which the Council would establish criteria for the allocation of land for public buildings and for budgetary support for public purposes. It was agreed that those criteria would "relate to all the needs of the village, including religious needs, among them the construction of a mikve"; and that "in the framework of the criteria that will be established by the Council, the Council will consider the public desire and all the public needs, and will take the public's constitutional rights into account. In addition, the Council would consider the burden on the public purse […] [and in that regard] the possibility of

obtaining public or other funding for the construction of public buildings, including public funding already approved […], and the possibility of combining different needs together in order to reduce and save expenses". It was made clear that the agreement would not derogate from any of the parties' claims in regard to the petition itself.

6. On Dec. 14, 2009, pursuant to the procedural agreement, the Council decided to establish a committee to evaluate the criteria for constructing public buildings in the town (hereinafter: the *Criteria Committee* or *the Committee*). The Committee comprised nine members, including representatives of the Appellants. Following five meetings and a public discussion to which the entire community was invited, the Committee presented its conclusions. The Committee decided that the priorities for the construction of public buildings in the town should be based upon a group of criteria, and quantified the relative weight that should be given to each criterion, as follows:

Criterion	Relative Weight
1. Expected number of users	30%
2. Necessary for well-being in the town	25%
3. Appropriate to the character of the town	25%
4. Cost relative to number of expected users	10%
5. Possibility of fulfilling the need in neighboring communities	10%

In light of these criteria, the members of the Committee ranked the list of 17 public buildings required by the town. After the mikve placed last under each of the criteria, separately and cumulatively, the mikve was ranked last in priority for the construction of public buildings required for the town.

7. On April 21, 2010, the Council ratified the Committee's recommendations, and explained that the priorities would serve as a "compass" for the Council's decisions in this area, but added that the recommendations do not relieve the Council of its authority to consider each case on its merits. Following the ratification of the recommendations, and in light of the low ranking given

to the construction of the mikve, the Appellants submitted an amended petition in which they reiterated the claims made in the original petition, and added claims against the criteria established and the method for ranking public buildings.

The Judgment of the Lower Court

8. On Dec 23, 2010, the lower court (the Hon. Judge R. Sokol) dismissed the petition and assessed NIS 20,000 against the Appellants for costs. At the beginning of its judgment, the court explained that the fundamental rights of the Appellants to freedom of religion and worship were not in question, but the discussion must be focused upon the question of the criteria for the allocation of public resources in the local authority and the lawfulness of the procedures adopted by the Respondents. The court found that the building of the mikve required the allocation of public resources – land and budget – for construction and maintenance. The court explained that even if the Appellants expect to raise contributions for the project, those contribution are not expected to eliminate the need for public resources, but only to limit the costs. Against this background, the court rejected the Appellants' claims in regard to the Repeal Decision, as well as the Council's decision – made following the recommendations of the Criteria Committee – to rank the mikve as the lowest priority in the list of public building construction in the town (April 21, 2010).

9. As for the Repeal Decision, the court found that since the allocation of land for building of the mikve was contingent upon conditions that were not fulfilled – the money was not provided by the Donor, and the Religious Affairs Authority required an unconditional undertaking that the Council underwrite the construction and maintenance costs – the Council's decisions were lawfully repealed. Moreover, the Council was at liberty to repeal those decisions inasmuch as they were not made in accordance with the criteria established later in accordance with the Council's new policy, and because the circumstances under which the decisions were made had changed after it was decided to allocate the land for the building of a school.

10. All of the Appellant's arguments against ranking the mikve as the lowest priority for the construction of public buildings were dismissed, as well. As for the claim that there was insufficient factual basis, the court found that the Committee's reliance upon the data of the Council, upon oral and written public requests, and upon the Committee members' personal knowledge of the town was reasonable, and that the Appellants had been given an opportunity to

present data to the Committee as they wished. It further held that the statements of the Committee members in regard to the town's future did not testify to the existence of improper considerations in regard to preventing an increase in the number of observant residents in the town, and that that the worldviews of the Committee members in regard to the needs of the community were relevant and required for addressing the matter. As for the Appellants' claim that the criteria established under the procedural agreement were not included in the final list of criteria, the court held that the procedural agreement could not limit the Council's exercise of its discretion, and that the said agreement was not intended to establish the criteria, but rather to set out the considerations that the Council should take into account in deciding upon those criteria, which it did. It was further found in this regard that the Council's decision not to include the availability of resources as a criterion was intended to prevent the use of contributions in order to erect buildings for which there was no real need, and was, therefore, a relevant, legitimate consideration. The court added that the ritual needs of the residents are seen to by the Ma'ale Yosef Regional Religious Council, and that there are mikves in neighboring communities. It held that the absence of a mikve in the town presented a hardship for residents seeking to fulfil the religious obligation of ritual immersion, but it did not prevent the fulfilment of that obligation. Lastly, the court held that, in view of the appropriate judicial restraint to be shown in regard to intervention in administrative discretion, the court should not intervene in the criteria in a manner that would grant priority to the construction of the mikve.

That is the background that led to the appeal before this Court.

Arguments of the Appellants

11. The Appellants ask that the Court set aside the judgment of the lower court, annul the Council's decision of May 13, 2009 (in regard to the EB and the allocation of land for the construction of the mikve), and of April 4, 2010 (in regard to ranking the mikve as the lowest priority for public buildings required in the village), and invalidate the recommendations of the Criteria Committee. The Appellants further ask that we order that the Council erect a public mikve in reliance upon the funding from the Ministry of Religious Services, and apply for an extension for obtaining the EB, as may be necessary.

12. According to the Appellants, the construction of a mikve in the town will protect the right of the residents to freedom of religion and worship, on the one hand, while not affecting the communal resources, on the other. The Appellants argue that the mikve can be combined with another public building, such that it will not detract from the land available for public use, while its construction and maintenance will be funded through state funding and not from the Council's budget. Under those circumstances, they argue, the Council's decision to refrain from building a mikve in the town was disproportionate and unreasonable, and derived from improper, extraneous considerations that arose from a desire to preserve the secular character of the community and keep religiously observant people out of the village. They further raised a series of flaws in the Council's decision-making process in the matter. The Appellants also argued that there were factual errors in the lower court's judgment, among them, the finding that the mikve was to be built in reliance upon funding by a private donor (whereas, they argues, the funding was to be provided by the State); the finding that the Appellants claimed only a burden upon their constitutional right to freedom of religion and worship (whereas, according to the Appellants, they claimed a real infringement and absolute denial of the ability to perform the religious obligation on the Sabbath and holidays); the finding that allocating land for the mikve was contingent upon conditions that were not met (whereas the Council decided, on Nov. 18, 2007, to waive the conditions it had previously set for the building of the mikve).

Arguments of the Respondents

13. The Respondents support the judgment of the lower court. First, they argue that there were no flaws in the work of the Criteria Committee. On point, the Respondents argue that the Criteria Committee rightly decided that the availability of resources should not serve as a criterion for the construction of public buildings, as otherwise, the Council would have to erect every building for which there was outside funding; that the possibility for combining a number of functions in one building should not be considered in the framework of establishing criteria, as it is a preliminary stage; and that the constitutional rights of the residents should not serve, in and of themselves, as a criterion, and it is sufficient that they are taken into account in the framework of the established criteria. It was further argued that, at present, there were other public buildings that remained to be built, for which the residents had long-ago paid the development costs The

Respondents are of the opinion that once the parties decided upon the establishing of the Criteria Committee, there was no longer any justification for reexamining the Council's decisions prior to the establishing of the Committee, and moreover, in light of the decision of the former Council head to build the Tefen school on the lot, the Council had no choice but to cancel the Tender; in any case, the Council is permitted to decide upon a change of policy; and that, in any case, the requisite preconditions for carrying out the repealed decision – full outside funding and available land – were not met.

Proceedings before this Court

14. On Sept. 6, 2012, a hearing was held on the appeal (E. Hayut, U. Vogelman, Z. Zylbertal, JJ), in the course of which the Court recommended that the parties attempt to settle the dispute amicably and out of court, *inter alia*, in light of the suggestion that arose in the course of the hearing that it might be possible to build the mikve privately in the town's commercial center. On Nov. 11, 2012, the parties informed the Court that no agreement had been reached, and that the possibility of building a private mikve as suggested was in doubt inasmuch as it was contingent, *inter alia*, upon obtaining a zoning variance. Following a further hearing before this panel (E. Hayut, U. Vogelman, N. Hendel, JJ) on Nov. 4, 2013, the Court requested that the State (the Ministry of Religious Services, and, if necessary, the Israel Lands Authority) declare its position on the matter.

15. The State submitted its reply on Dec. 24, 2013. The reply stated that the Council could submit a request for funding for the construction of a mikve, which would be considered based upon the criteria of the Ministry of Religious Services, and that it was possible to erect a "standard" public mikve in reliance upon state funding. However, it was noted that there are cases in which the local council participates in certain related costs (such as, environmental development and various complimentary costs), and that, as a matter of course, the Ministry of Religious Services requires that the local authority undertake – as a condition for receiving funding – to pay the difference, if any, between the cost of construction and the funding. It was further made clear that there was no need to allocate specific land for the purpose of submitting the application, and that the salary of the mikve attendant would be provided by the Ministry of Religious Affairs, prorated in accordance with the number of users. It was further explained that

the state does not participate in the construction or maintenance of private mikves. As far as the allocation of land was concerned, the Israel Lands Authority informed the Court that, after investigating the matter with the engineer of the Lower Galilee Local Building and Planning Committee, it found that there are three lots in the town– lots 718, 720 and 856 – that could be appropriate, in terms of planning, for the construction of a mikve. In light of the above, we were informed that "The State is of the opinion that there is a possible course for the erection of a mikve in Kfar Vradim, the construction of which will be funded (entirely or primarily) by funding from the Ministry of Religious Services. This, if an application is duly submitted on the prescribed dates, and subject to its examination in accordance with the criteria, and its approval".

16. Following the State's reply, the Appellants submitted an urgent request for an interim order. The Appellants asked that we order the Respondents to submit an application to the Ministry of Religious Services for funding for the erection of a public mikve in accordance with the State's recommendation, in order to meet the timetable for receiving the funding in 2014. The Respondents opposed the request, arguing that they should not be ordered to submit such a request before the matter is approved by the Council in an appropriate administrative procedure. On Dec. 29, 2013, we dismissed the request for an interim order, and ordered that a date be set for a further hearing of the appeal, in which the State's representative would also participate.

17. In updated notices submitted on Feb. 28, 2014 and March 3, 2014, the parties informed the Court that the attempt to initiate the erection of a private mikve had failed due to the Local Council's decision to deny the request for a zoning variance, and that it the possibility of obtaining such a variance was now unclear inasmuch as it would only be possible to resubmit the request after the completion of the parcelization process for the commercial center. We were further informed that the parties remained divided on the issue of allocating Council resources for the construction and maintenance of a public mikve.

18. On March 31, 2014, this panel conducted a further hearing of the appeal, in which the attorney for the Respondents claimed that there were planning and practical problems in regard to constructing the mikve on lot 856, which had been mentioned in the State's reply. At the conclusion of the hearing, we ordered that the Respondent's attorney submit a notice to the Court, no later than April 6, 2014, detailing the planning and other problems cited in his arguments in regard to lot 856, which had been found suitable, in terms of planning, for the

erection of a mikve, as well as in regard to the other lots in the area that might be suitable, and that the State's attorney then submit an updated notice in regard to the possibility for allocating a lot for the erection of a mikve.

19. On April 6, 2014, the Respondents submitted an update in which they informed the Court that it would not be possible to build a mikve on lot 856, inasmuch as it would require a new urban development plan and the adjustment of infrastructures; because the type of use of the buildings surrounding the lot was not appropriate for the building of a mikve; and because part of the lot had been sold to a private individual. Therefore, according to the Respondents, the possibility of building the mikve in the commercial center would be preferable, since work on the project had begun (without a permit). On May 1, 2014, the State submitted a further notice in which it stated that building a mikve of lot 856 was possible. The State explained that there are no current negotiations for the transfer of parts of the lot to private hands; there is no need for a new, detailed plan for erecting a mikve, as the current plan is sufficient; and that nothing about the type of use of the surrounding lots would prevent the building of a mikve on the lot. It further noted that a mikve could also be built of lots 718 and 720, both from a planning and practical point of view. The State further explained that building a mikve in the area of the commercial center would involve planning and practical problems: under the relevant plan, the area is zoned for "commercial purposes", and therefore the erection of a mikve would require initiating planning proceedings in order to change zoning; the proximity to commercial areas is incompatible with the operation of a mikve; and the ownership of the lot and construction violations had yet to be resolved. As for funding the building of the mikve, the Council could submit an application for funding to the Ministry of Religious Services for 2015, which would be reviewed in accordance with the Ministry's criteria that would be published in the final months of the current year.

Deliberation and Decision

Is the Kfar Vradim Council's decision to rescind its decision to erect a mikve in the town and refrain from acting towards its construction compatible with the rules of public law? That is the question that we must decide.

The Scope of Judicial Review over a Local Authority's Decision in regard to Allocating Public Resources

20. The Kfar Vradim Council is a local council authorized to decide how resources will be allocated, subject to the provisions of the law. Indeed, "What use a local authority will make of its property, and to what extent will it permit an individual to use it and when will it refuse, is the question that the authority itself, through its elected representatives, is authorized to decide" (HCJ 262/62 *Peretz v. Kfar Shmaryahu Local Council*, 16 IsrSC 2101, 2114 (1962) (hereinafter: the *Peretz* case)). As a rule, a local council enjoys broad discretion in regard to decisions concerning the allocation of public resources. The initial assumption is that a local council – which is an elected authority whose members represent the public they were chosen to serve – occupies the best position for deciding upon the priorities that will advance the general good, and for striking the proper balance between meeting public needs and maintaining the budgetary framework. Therefore, the Court will not hastily intervene in such decisions, and will refrain from placing itself in the authority's shoes (whether we are concerned with a local authority or a governmental authority). In the framework of judicial review, the question of whether public resources were allocated wisely, or whether they could have been allocated differently, will not be considered unless the decision regarding the allocation of resources was tainted by a substantive, fundamental flaw that justifies the Court's intervention. Such restraint is a corollary of the principle of the separation of powers. In this regard, the words of Justice S. Netanyahu are apt:

> "The Court will not instruct the authority how to allocated and divide its resources. Requiring an expenditure for a specific purpose must come at the expense of another, perhaps more important, purpose, or perhaps, require enlarging the budget it is granted by the state treasury, which must then come at the expense of other, perhaps more important, purposes. This Court is not the authorized body, and cannot treat of the allocation of the public's resources" (HCJ 3472/92 *Brand v. Minister of Communications*, 47 (3) IsrSC 143, 153 (1993) (hereinafter: the *Brand* case); and see HCJ 2376/01 *Federation of Local*

Authorities in Israel v. Minister of Science, Culture and Sport, 56 (6) IsrSC 803, 811 (2002)).

Despite the broad reach of discretion and the narrow scope of judicial review that it implies, it is clear that the Council, like any local authority, is subject to the principles of public law. This restraint in regard to judicial review does not relieve the Court of fulfilling its duty: to ensure that the authority exercises its discretion in accordance with the law. And note: the local authority serves – in all of its actions – as a trustee of public funds, and its job is to advance public purposes for the general good. As Justice H. Cohn put it:

> "The private sphere is not like the public sphere. In the former, one grants at will and denies at will. The latter exists for no reason other than to serve the public, and has nothing of its own. All it has is held in trust, and it has no other, different or separate rights or obligations than those that derive from that trust or that are granted or imposed by the authority of statutory provisions" (HCJ 142/70 *Shapira v. Bar Association District Committee, Jerusalem*, 25 (1) IsrSC 325, 331 (1971); and see *HCJ Israel Contractors and Builders Center v. State of Israel*, 34 (3) IsrSC 729, 743 (1980); the *Peretz* case, at p. 2115).

Even in allocating public resources, the authority is obligated to act in a manner that faithfully serves the entire public and ensures proper governance. Accordingly, the allocation of public resources in public authorities must be carried out in accordance with the principles of reasonableness and proportionality, and in accordance with fair, equal, relevant and transparent criteria (see: HCJ 3638/99 *Blumethal v. Rehovot Municipality*, 54 (4) IsrSC 220, 228 (2000); HCJ 5325/01 *L.K.N. Association for the Advancement of Women's Basketball v. Ramat Hasharon Local Council*, para. 10 (June 2, 2004); AAA 5949/04 *Mercaz Taxi Ltd. v. Hasharon Taxi Service Ltd*., para. 16 (Nov. 28, 2005); and see and compare: HCJ 59/88 *Tzaban v. Minister of Finance* 42 (4) IsrSC 705, 706 (1989); HCJ 637/89 *A Constitution of the State of Israel v. Minister of Finance*, 46 (1) IsrSC 191, 200 (1991); HCJ 5023/91 *Poraz v. Minister of Construction and Housing*, 46 (2) IsrSC 793, 801 (1992); and also see: Dafna Barak-Erez,

Administrative Law, 231-235 (2010) (Hebrew); Yitzhak Zamir, The Administrative Authority, 246-248 (2d ed., 2010) (Hebrew); for the anchoring of these principles in the Directives of the Ministry of the Interior, see: Circular of the Director General of the Ministry of the Interior 5/2001 "Procedure for the allocation of land and buildings without or for minimal consideration" 4-11 (Sept. 12, 2001)). Before reaching a decision on the allocation of public resources, the authority is required to "establish for itself priorities and precedences, and rules and guiding criteria for their application, which must meet the test of reasonableness, and which it must apply equally. Reasonableness requires that in setting priorities among various subjects for which the authority is responsible, priority be given to the more important subjects" (the *Brand* case, at p. 153).

We will now turn to an examination of whether the decision of the Local Council in the case before us was taken in a proper administrative process, and whether it falls within the scope of the discretion granted the Council.

Review of the Decision of the Local Council

21. I will begin with the conclusion before presenting the analysis: In my opinion, the Council's decision not to move forward with the building of a mikve for women in the town in the near future does not pass the reasonableness test. Under the special circumstances of the case, I find that the Council's decision did not reasonably balance the need of religiously observant women to observe the religious obligation of immersion against the budgetary considerations and the available land resources. Under these circumstances, addressing the other claims of the Appellants in regard to flaws that they believe fell in the decision-making process is superfluous, as I shall explain.

22. As we know, an administrative decision is reasonable if the decision is made as a result of a balance between relevant considerations and interests that have been given appropriate weight under the circumstances (see HCJ 389/80 *Golden Pages Ltd. v. Broadcasting Authority*, 35 (1) 421, 437 (1981)). Indeed, "A decision may be flawed even when the authority weighed only the relevant considerations, without a hint of an extraneous consideration in its deliberations, if the internal balance among the considerations and the internal weight assigned to

each consideration were distorted" (HCJ 1027/04 *Independent Cities Forum v. Israel Lands Authority Council*, para. 42 (June 9, 2011); Barak-Erez, at p. 725). Examining the reasonableness of the Council's decision therefore requires that we look at the nature of the considerations that it weighed when it reached that decision, upon the manner of striking the balance, and upon the weight assigned to each consideration. Although the Council's decision relied upon the recommendations of the Criteria Committee established to set criteria for the construction of public buildings in the town, it is clear that those recommendations cannot absolve it of the duty to exercise its authority to consider every case on its merits.

23. What weight was the Council required to assign to the recommendations of the Criteria Committee in examining the possibility of acting to erect a mikve in the village? Having established the Criteria Committee for that purpose, the Council was required to take note of the Committee's recommendations in deciding upon the manner for allocating the town's resources. Indeed, an administrative agency will not lightly deviate from the recommendation of a knowledgeable, expert body, established at its request, which was adopted after an in-depth professional evaluation. It is decided law that "in the absence of an administrative flaw in the opinion of the advisory body, special reasons and extenuating circumstances are required in order to justify deviation from its opinion, especially when the authority is the one that established the advisory body and authorized it to carry out its task" (HCJ 5657/09 *The Movement for Quality Government in Israel v. Government of Israel*, para. 48 (Nov. 24, 2009); and see HCJ 8912/05 *Mifgashim Association for Educational and Social Involvement v. Minister of Education, Culture and Sport*, para 16 (March 14, 2007)). However, that does not mean that the Council is bound by the recommendations of the Criteria Committee, which is merely an advisory body. On the contrary, the Council is required to exercise its discretion independently. As Justice Y. Zamir aptly stated: "[…] a recommendation is only a recommendation. In other words, a recommendation does not exempt the authority from the duty to exercise its own discretion. The authority must weigh the recommendation and decide if it would be appropriate, under the circumstances, to accept or reject the recommendation" (HCJ 9486/96 *Ayalon v. Registration Committee under the Psychologists Law, 5737-1977*, 52 (1) IsrSC 166, 183 (1988); and for a more detailed discussion, see Zamir, at pp. 1219-1222).

24. Thus, the Local Council was required to examine each request to erect a public building individually, on the basis of the recommendations of the Criteria Committee, while taking into account all the considerations relevant to the decision. In the matter before us, the Council did not discuss the possibility of proceeding with the erection of the mikve in the town in its meeting on April 21, 2010, and from the documents submitted to us, it would appear that this possibility was also not addressed on its merits in the meetings held thereafter. In fact, it would appear that in the Council's opinion – as can be inferred from the responses that it submitted throughout the proceedings in this case – there was no need for any concrete consideration of the possibility of erecting a mikve in the town once the project was ranked last in the list of public priorities. From the moment that the Council failed to consider the request to erect a mikve in the town on its merits, not deciding to consider the subject of erecting a mikve in the town in the near future was tantamount to a "decision" as defined by law (see sec. 2 of the Administrative Courts Law, 5760-2000, according to which the lack of a decision is deemed a "decision of an authority"; and see HCJ 3649/08 *Shamnova v. Ministry of the Interior*, para. 3 (May 20, 2008)). Against the said background, the question before us is whether, under the circumstances of the instant case, the Council's decision to rescind its decision to build a mikve in the village, to accept the recommendations of the Criteria Committee *in toto*, and therefore refrain from acting in the near future toward the erection of a mikve in the village, does not deviate from the scope of its discretion.

The Reasonableness of the Council's Decision – The Proper Balance of Relevant Considerations

A. *Considerations supporting the erecting of a mikve in the town – the needs of the religiously observant residents*

25. Section 7 of the Jewish Religious Services Law [Consolidated Version], 5731-1971 (hereinafter: the *Jewish Religious Services Law*) provides that the religious councils of the local authorities are competent to provide for the religious services of the residents. The subject of "family purity", which concerns the operation of ritual baths, is among the religious services for which the religious councils are responsible (see: HCJ 516/75 *Hupert v. Minister of Religion*, 30

(2) IsrSC 490, 494 (1976); HCJ 6859/98 *Ankonina v. Elections Official*, 52 (5) IsrSC 433, 447-448 (1998); HCJ 4247/97 *Meretz Faction in the Jerusalem Municipal Council v. Minister of Religious Affairs*, 52 (5) IsrSC 241, 251 (1998); HCJ 2957/06 *Hassan v. Ministry of Building and Housing – Religious Buildings Development Section* (July 16, 2006); Shelly Mizrachi, Religious Councils 7-6 (Knesset Research and Information Center, 2012) (Hebrew); Hadar Lifshits and Gideon Sapir, "Jewish Religious Services Law—A Proposed Framework for Privatization Reform", 23 *Mehkarei Mishpat - Bar-Ilan Law Studies* 117, 147-148, 153-154 (2006) (Hebrew)).

26. Mikve services for women are necessary to maintaining the religious lifestyle of Israel's religiously observant population. Ritual immersion in a mikve is a vital need for those who observe the laws of "family purity", which require a women to immerse in a mikve after her monthly period. As is commonly known, the observance of the religious obligation of immersion is deemed very important in Jewish law, to the extent that religious decisors have ruled that erecting a mikve takes precedence even over erecting a synagogue (*Yalkut Yosef*, Reading the Torah and the Synagogue, secs. 152-153) (Hebrew). The obligation to immerse in a mikve forms an integral part of the life of an observant, married Jewish woman, and is an inseparable part of her religious ritual and the expression of her identity and customs. It is substantively related to the right to freedom of religion and worship, which our legal system has recognized as a fundamental right of every person in Israel, although the case law has not yet established that it imposes a positive obligation requiring that the State allocate public resources for the provision of religious services. In the framework of this appeal, I will not attempt to provide a precise definition of the interrelationship between the right to freedom of religion and worship and the State's obligation to provide religious services, as in any event, as will be explained below, an administrative review of the authority's decision in this case, in accordance with the accepted standard of review, leads to the granting of the appeal (on the recognition of the importance of the right to freedom of religion and worship in this Court's decisions, see: CrimA 112/50 *Yosifof v. Attorney General* 5 (1) IsrSC 481, 486 (1951) [http://versa.cardozo.yu.edu/opinions/yosifof-v-attorney-general]; HCJ 866/78 *Morad v. Government of Israel*, 34 (2) IsrSC 657, 663 (1980); HCJ 292/83 *Temple Mount Faithful Association v. Jerusalem District Police Commander*, 34 (2) IsrSC 657, 663 (1980); HCJ *Foundation of the Movement for Progressive Judaism in Israel v. Minister of Religion*, 43 (2) IsrSC 661, 692 (1989); HCJ 650/88 *Movement for Progressive Judaism in Israel v. Minister of Religious Affairs*, 42 (3) IsrSC 377, 381 (1988); HCJ 3261/93

Manning v. Minister of Justice, 47 (3) IsrSC 282, 286 (1993); HCJ 4298/93 *Jabarin v. Minister of Education*, 48 (5) IsrSC 199, 203 (1994); HCJ 257/89 *Hoffman v. Director of the Western Wall*, 48 (2) IsrSC 265, 340-341 (1994); HCJ 1514/01 *Gur Aryeh v. Second Television and Radio Authority*, 55 (4) IsrSC 267, 277 (2001) [http://versa.cardozo.yu.edu/opinions/gur-aryeh-v-second-television-and-radio-authority]; HCJ 11585/05 *Israel Movement for Progressive Judaism v. Ministry of Absorption*, para. 16 (May 19, 2009); HCJ 10907/04 *Solodoch v. Rehovot Municipality*, paras. 71-72 (Aug. 1, 2010); and see: Aharon Barak, Human Dignity: The Constitutional Right and its Daughter-Rights, vol. 2, 769-774 (2014) (Hebrew) [published in English translation as: Human Dignity: The Constitutional Value and the Constitutional Right (Cambridge, 2015)]; Amnon Rubenstein and Barak Medina, The Constitutional Law of the State of Israel, 354-378 (6th ed., 2005) (Hebrew); Daniel Statman and Gideon Sapir, "Freedom of Religion, Freedom from Religion and the Protection of Religious Feelings", 21 *Mehkarei Mishpat - Bar-Ilan Law Studies* 5, 7-38 (2004) (Hebrew)).

27. As noted, there is no religious council in Kfar Vradim (the Ma'ale Yosef Regional Religious Council is responsible for providing religious services in the town, under an agreement signed in 2005 with the Local Council). Therefore, the Appellants directed their request to the Local Council. No mikve has ever been built in Kfar Vradim, and the religiously observant residents of the town must travel to neighboring towns in the Ma'ale Yosef Regional Council District in which there are mikves, and that are a short drive from the town. According to the Respondents, inasmuch as there are mikves in the neighboring towns, the harm to the ability of the town's religiously observant residents in observing the obligation of immersion is not significant, and is merely an inconvenience. It is further argued that even if there were a mikve in the town, due to the town's topography and the winter weather, the residents would have to drive to the mikve and could not go on foot. And in any case, the ratio of the number of mikves in the area relative to the population is among the highest in the country when compared to various cities. As opposed to this, the Appellants argue that we are not concerned with a mere "inconvenience" but with an absolute denial of the possibility of performing the religious obligation of ritual immersion. They argue that the absence of a mikve in the town deprives women whose day of immersion falls on a Sabbath eve or on a holiday from performing the obligation at its prescribed time. It is argued that when the immersion day falls on a Sabbath eve or on a holiday, one cannot drive to the mikve, and since it is practically impossible to walk to

the neighboring mikves, the possibility of observing the obligation of immersion on such days is entirely denied them. In this regard, the Appellants explain that Jewish religious law ascribes supreme importance to the observance of the obligation of immersion at its prescribed time, because "[…] it is a religious obligation to immerse at the prescribed time so as not to refrain from procreation even for one night" (*Shulhan Arukh*, Yoreh De'ah, Laws concerning Niddah, 197:2). It is further argued that the said harm is exacerbated because not immersing at the prescribed time deprives the observant families of the ability to observe the obligation of *onah* (marital relations), sometimes for several days (when holidays coincide with the Sabbath eve). Lastly, the Appellants argue that the absence of a mikve in the town even makes it difficult to observe the obligation of immersion on weekdays, as there is no available public transportation by which one can travel to the mikves in the neighboring communities.

28. After considering the arguments, I find that given the geographic location of Kfar Vradim and its topographic conditions, there is no reasonable way to go to any of the mikves in the neighboring communities on foot. Under the circumstances, the absence of a mikve in the town cannot be said merely to "inconvenience" the religiously observant residents. The absence of a mikve in the town – given its particular circumstances – completely deprives the female residents of the town whose prescribed day of immersion falls on a Sabbath eve or holiday of the ability to perform the religious obligation of immersion at its proper time, and as a result, also deprives them of the possibility of performing of the religious obligation of *onah*. Thus, the women of the town are deprived of the possibility of performing an obligatory ritual practice that is deemed to be of great importance by the traditionally religious Jewish community, and which is substantively connected to the expression of their personal and group identity. As Justice E. Arbel aptly stated:

> "We recognize the importance of a mikve for the public, and certainly for the public that uses it. The mikve is of great importance for the traditionally observant family unit, and the authorities are required to provide this service for the interested public as part of the provision of religious services by the authorities. It is also important that the mikve be situated within reasonable walking distance from the homes of the public, for those who are Sabbath observant. However,

these considerations, that should not be underestimated, must be weighed against other needs that are of public importance, and against the character of the community that resides in the place, as well as against other alternatives for the erection of public buildings, as noted" (AAA 2846/11 *Rehovot Religious Council v. Claudio*, para. 19 (Feb. 13, 2013) (hereinafter: the *Claudio* case).

Thus, the need of the religiously observant female residents to observe the obligation of ritual immersion at its prescribed time – a practice whose realization derives from the autonomy granted every person, as such, to follow the dictates of her conscience and faith, and observe the rules and customs of her faith – must be granted significant weight in the framework of the decision-making process in regard to the erection of public buildings in the town (compare: the *Gur Aryeh* case, at p. 278). However, the need of the religiously observant residents for the erection of a mikve in the town must be balanced against the opposing considerations. What, then, are the opposing considerations that tilted the scales in favor of the Council's decision not to move forward on the construction of a mikve in the town in the near future?

B. *The "Budgetary" Consideration*

29. As best we can understand from the Respondent's response, the primary consideration that led to adopting the decision was the limited public resources available to the Council. According to the Respondents, the construction of a mikve in the town would require that the Council allocate public monies and land at the expense of other public construction of greater importance. Indeed, "it is decided law that a public authority may, and even must, consider budgetary restrictions in the framework of its discretion, as part of its public obligation" (see: HCJ 3071/05 *Louzon v. Government of Israel*, 63 (1) IsrSC 1, 39-40 (2008) [http://versa.cardozo.yu.edu/opinions/louzon-v-government-israel]; HCJ 3627/92 *Fruit Growers Association v. Government of Israel*, 47 (3) IsrSC 387, 391 (1993); HCJ 2223/04 *Nissim v. State of Israel*, para. 29 (Sept. 4, 2006); HCJ 9863/06 *Association of Combat Leg Amputees v. The State of Israel*, para. 13 (July 28, 2008); HCJ 1662/05 *Levi v. State of Israel*, para. 51 (March 3,

2009); Barak-Erez, at pp. 661-663, 745-746; Aharon Barak, Proportionality in Law: Infringing Constitutional Rights and its Limits, 460-461 (2010) (Hebrew) [published in English translation as Proportionality: Constitutional Rights and their Limitations (Cambridge, 2012)]). In the matter before us, among its considerations, the Council could certainly give weight to the limits upon the available resources, and allocate them in accordance with public needs. However, as shall be explained below, under the circumstances of the instant case, the Council resources – both land and money – that were expected to be required for the purpose of building and maintaining a mikve in the town were not significant.

30. In regard to the allocation of land for the construction of the building, the State informed us that there are, at present, at least three available lots in the town that would be appropriate for the construction of a mikve, in terms of both existing planning and practicality. In addition, there is a possibility – that the Respondents do not deny – of incorporating the mikve in other public buildings. In such a case, building the mikve will not come at the expense of public land earmarked for other purposes. As for financing, the matter can be divided into two parts: the monies required for constructing the building, and the monies needed for maintenance. As far as financing the construction is concerned, it is clear from the State's response that if the Council's application for funding the construction of a mikve is approved – and there is no reason to believe that it will not be reapproved, in light of the letters from the Ministry of Religious Services and the fact that an EB was already approved in the past for the construction of a mikve in the town – the construction of the mikve will be financed from state funds, and not from the Council's budget. The Local Council will incur expenses only if the cost of construction exceeds the funding due to deviation from the budgetary framework, or if it will be required to bear certain related costs (such as environmental development and complementary costs). As for maintenance costs, according to the State's response and the letters from the Ministry of Religious Services, the salary of the mikve attendant will be paid from the budget of the Ministry of Religious Services, prorated to the number of users, while maintenance (electricity, water, etc.) will be funded in part by users' fees collected by the attendant. Thus, the Council can expect to pay only a small, insignificant part of the ongoing expenses of maintaining the building. Under these circumstances, in which the construction and maintenance are barely likely to come at the expense of the limited resources of the Council, the weight of the budgetary consideration is limited relative to the opposing interest.

2. *Preserving the Secular Character of the Town*

31. The parties are divided on the question of whether the Council's decision gave weight to the consideration of protecting the town's secular character. According to the Appellants, the main consideration that grounded the Council's decision not to erect a mikve in the town was the desire – that they consider an extraneous, improper consideration – to preserve the secular character of the town and to keep the religious community away. As opposed to this, the Respondents claim that the consideration of preserving the secular character of the town had no weight in the Council's decision. The question if and under what circumstances a local authority may entertain the consideration of preserving a particular character of the town is complex (and compare: HCJ 528/88 *Avitan v. Israel Lands Administration*, 43 (4) IsrSC 297 (1989); HCJ 4906/98 *"Am Hofshi" Association for Freedom of Religion, Conscience, Education and Culture v. Ministry of Construction and Housing*, 54 (2) IsrSC 503, 508-509 (2000); and for an opposing view: HCJ 6698/95 *Ka'adan v. Israel Lands Administration*, 54 (1) IsrSC 258 (2000) [http://versa.cardozo.yu.edu/opinions/ka%E2%80%99adan-v-israel-land-administration]; and see: HCJ 650/88 *Movement for Progressive Judaism in Israel v. Minister for Religious Affairs*, 42 (3) IsrSC 377, 381 (1988); HCJ 10907/04 *Solodoch v. Rehovot Municipality*, paras 68-90 (Aug. 1, 2010); the *Claudio* case, at para. 12; Statman and Sapir; Gershon Gontovnik, Discrimination in Housing and Cultural Groups, 113-127, 201-209 (2014) (Hebrew)). We need not decide this issue in the matter before us, as even if we assume – to the Respondent's benefit – that the consideration of preserving the town's character carried no weight in the Council's decision – as they claim – the decision must, nevertheless, be voided because it did not strike a proper balance between the considerations that were taken into account even according to the Respondents, as we shall explain below.

C. *Balancing the various Considerations and Examining the Reasonableness of the Decision*

32. Having reviewed the considerations on both sides of the scales, all that remains is to examine whether the decision struck a reasonable balance between those considerations. In doing so, we should bear in mind that such balancing does not, generally, lead to a single, reasonable result. Indeed, the Council enjoys some latitude in which different and even opposing decisions may coexist. However, in the circumstances of the instant case, I find that the Council's decision not to act toward the erecting of a mikve in the town does not fall within that discretionary latitude. As is commonly known, the weight to be assigned to budgetary considerations is examined, *inter alia*, in relation to the importance of the opposing rights and interests (see: Barak-Erez, at pp. 746-747; and also see the citations at fn 86, *loc. cit*.). In the matter before us, the harm to the religiously observant women in the town, which I discussed above, is of significant force, whereas the "price" involved in erecting the mikve is minor. In this context, we should recall that the Council already decided several years ago to erect a mikve in the town, but chose to rescind that decision for "budgetary" reasons that would seem no longer to exist. In this situation, the Council's decision not to erect a mikve in the near future does not grant adequate weight to the harm caused to the religiously observant women, to the availability of external funding that would render the burden upon the Council insignificant, and to the possibility of incorporating the construction of the mikve within the framework of a building with another purpose, in a manner that would limit the need for a separate allocation of public land, and preserve it for other, necessary public purposes.

33. In the final analysis, in the circumstances of the present case, in which appropriate weight was not assigned to the substantial harm to the religiously observant, female residents of the town due to the absence of mikve that is accessible on the Sabbath and on religious holidays, and where it was found that the allocation of resources was granted disproportionate weight even though land was readily available for erecting the mikve without harming other public interests, and without any need for allocating substantial resources by the Council due to external financing, I find that the Council's decision not to erect a mikve was unreasonable and must, therefore, be quashed. In light of the long "history" of the proceedings in this matter, we do not find it appropriate to remand the matter to Council, yet again, inasmuch as, under the circumstances, the decision required is the erection of the mikve with due haste (and compare, for example: HCJ 1920/00 *Galon v. Release Board*, 54 (2) IsrSC 313, 328 (2000); HCJ 89/01 *Public Committee against Torture in Israel v. Release Board*, 55 (2) 838, 878 (2001); AAA

9135/03 *Council for Higher Education v. Haaretz*, 60 (4) IsrSC 217, 253 (2006) [http://versa.cardozo.yu.edu/opinions/council-higher-education-v-haaretz]; AAA 9353/10 *Yakovlev v. Ministry of the Interior*, para. 19 (Dec. 1, 2013).

Conclusion

34. Given the conclusion reached, I would recommend to my colleagues that we grant the appeal such that the judgment of the lower court be reversed and the appeal granted. The Kfar Vradim Council is ordered to act immediately to erect a mikve on one of the lots in the town listed in the State's reply – or some other lot that it may find appropriate – such that construction will commence as soon as possible, and no later than a year and a half from the date of this judgment. The Council may submit an application for funding support for the erection of the mikve from the Ministry of Religious Services with due speed. Respondent 2 will pay the Appellants' costs in both instances in the amount of NIS 25,000.

Justice

Justice E. Hayut:

I concur.

Justice

Justice N. Hendel:

I concur.

Justice

Decided in accordance with the opinion of Justice U. Vogelman.

Given this 14th day of Elul 5774 (Sept. 9, 2014).