IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2018-404-000841
[2020] NZHC 89

BETWEEN	CP GROUP LIMITED First Applicant
	MILLENNIUM & COPTHORNE HOTELS NEW ZEALAND LIMITED Second Applicant
	MLC SCENIC LIMITED Third Applicant
	T & T CLARRY'S HOLDINGS LIMITED Fourth Applicant
AND	AUCKLAND COUNCIL Respondent

Hearing:	27 to 31 May 2019 and 4 June 2019
Appearances:	A R Galbraith QC, G S A Morrison and T B Fitzgerald for the Applicants J A Farmer QC, J W S Baigent and L Wiessing for the Respondent
Judgment:	5 February 2020

JUDGMENT OF MOORE J

This judgment was delivered by me on 5 February 2020 at 3:00 pm
pursuant to Rule 11.5 of the High Court Rules.

Registrar/ Deputy Registrar

Date:

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Introduction

[1] This is an application for the judicial review of decisions by Auckland Council ("the Council") imposing an Accommodation Provider Targeted Rate ("APTR") on properties used for the purposes of commercial accommodation in the 2017/2018 and 2018/2019 rating years.

[2] The stated purpose of the APTR was to cap general rate increases by adopting a "user-pays" rates regime to fund the activities of the Auckland Tourism, Events and Economic Development Limited ("ATEED"), a Council Controlled Organisation ("CCO") owned and operated by the Council for the purpose of promoting Auckland as a tourist destination.

[3] The applicants claim the Council's decision to impose the APTR was unreasonable. They also claim it breached its statutory financial planning and consultation obligations.

The applicants

[4] The application is brought by four ratepayers who are subject to the APTR. They range from those who operate large tourist hotels to relatively small, owner-operated accommodation businesses.

The first applicant: CP Group Limited

[5] CP Group Limited ("CP Group") is part of the CP Group which owns or manages commercial accommodation in Auckland and elsewhere in New Zealand. It operates the Pullman and Sofitel (Auckland) hotels amongst others. Through its entities, the CP Group is:

(a) an owner/operator of hotels and motels;

(b) an owner contracting with third parties to operate accommodation businesses; and

(c) an owner/facilitator of strata titles, owning some units and acting as a facilitator of others who own such units managed by third parties.

The second applicant: Millennium and Copthorne Hotels New Zealand Limited ("MCK")

[6] MCK and associate subsidiaries own and/or operate 21 hotels across New Zealand. In Auckland these include the Millennium Hotel, the Copthorne Hotel and the Grand Millennium. Some of the hotels it operates are owned by unrelated third parties.

The third applicant: MLC Scenic Limited

[7] The third applicant is part of the Scenic Group. It operates 18 hotels throughout New Zealand and the South Pacific. It operates two hotels in Auckland; Heartland Hotel Airport and the Scenic Hotel.

The fourth applicant: T&T Clarry's Holdings Limited ("T&T")

[8] The fourth applicant is an owner and operator of a North Shore motel, the Whangaparaoa Lodge. This is a 14-room motel on Little Manly Beach. T&T is owned by Mr and Mrs Clarry. Mr Clarry is the Chair of the Auckland Accommodation Sector of Hospitality New Zealand and since 2017 has sat on ATEED's destination committee.

The commercial accommodation market in Auckland

[9] A total of 28 affidavits (in chief and in reply) were filed by and on behalf of the four applicants. In addition to those directly connected to the applicants, evidence was received from other Auckland commercial accommodation providers and from experts such as economists, consultants with experience in the local tourism and hospitality sector and Tourism Industry Aotearoa ("TIA") which is the membership organisation representing businesses and other entities in the New Zealand tourism accommodation market.

[10] According to Steven Hamilton,[1] a business consultant specialising in the hotel, tourism and leisure sector, the commercial accommodation market in Auckland is substantial, diversified and highly competitive. It is geographically concentrated around the CBD (71 per cent) and the airport (17 per cent). Citing Statistics New Zealand,[2] Mr Hamilton records that, as at the end of December 2017, there were 19,387 available commercial accommodation "stay units" in Auckland in 300 establishments. This included 9,410 rooms in 77 hotels and 3,517 units in 165 motels and serviced apartments. This may be compared with the 13,366 rooms available in 8,717 Airbnb rentals in the Auckland region as at 18 April 2018. Mr Hamilton's evidence is that the online informal accommodation sector continues to grow. For example, as at 15 December 2017, the Airbnb rooms available in Auckland exceeded the available hotel rooms by approximately 29 per cent. On 15 March 2018, a tourism industry daily news website reported that there had been a 71 per cent year on year growth in Airbnb listings in Auckland.

[11] Figures from TIA had 42 members linked to its hotel division. These included hotels and serviced apartments. Out of a total of 6,215 hotel rooms and 815 units and serviced apartments, there were:

(a) 1,755 rooms in 5-star hotels all located in the CBD;

(b) 2,764 rooms in 4-star+ hotels and 518 units in serviced apartments; and

(c) 1,190 rooms in 4-star hotels and 255 units in serviced apartments.

Operating and Management Models

[12] Mr Hamilton described the four ownership and management models operating in Auckland. These are:

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1 Affidavit sworn on 7 May 2018.

2 https://www.stats.govt.nz/assets/uploads/accommodation-survey/accommodation-survey-december-2017/download-data/accommodation-survey-december-2017-rto-and-accommodation-type-pivot-table.xlsx

Owner/operators

[13] This is the simplest ownership structure. It involves a single entity owning the relevant property and operating the commercial accommodation business from it. Examples given include the CP Group's mid-size hotels such as the Hotel Grand Windsor on Queen Street, the Greenlane Suites on Great South Road, the Station Backpackers on Anzac Avenue and T&T's Whangaparaoa Lodge.

Management contract

[14] This is the most common model for the larger tourist hotels in Auckland. It involves the owner of the property entering into a contract with a third party for the management of the hotel. Typically, the owner has little influence over the management of the accommodation business. Examples include the Hilton and Crowne Plaza. The CP Group's Grand Mercure, Pullman, Novotel and Ibis Ellerslie are also examples.

Leased property

[15] This common model involves the owner leasing the property to a third party who runs the hotel. Again, the property owner (or lessor) generally has little control over the lessee's business. The hotel operates under a management agreement with a third party which is responsible for setting room prices. Examples include Haka which leases and operates Haka Hotels in Newmarket and Karangahape Road. Another is the Russell Group which, through a subsidiary, leases 162 units in the Adina Hotel.

Management rights via strata titles

[16] This is a variation on the leased property model. The owners of strata title units arrange for a third party to operate an accommodation business in respect of a property. Often this involves a large number of small investors each of whom owns one or more properties which are included in a pool of units used for the collective accommodation business. Examples include the Waldorf Apartment complexes and the Accor group.

Chronological background and context

[17] Before examining the Council's decisions which are under review, it is necessary to set out in some detail the background and context in which the decisions were made.

[18] This section draws heavily on the evidence of Mr Walker, Group Chief Financial Officer of the Council and Mr Wood, the Director of Finance and Policy with the Mayoral Office. However, where necessary, it is supplemented by aspects of the applicants' evidence.

Organisational constitution and functions structure

[19] The Council was established on 1 November 2010 under the Local Government (Auckland Council) Act 2009 ("the LGACA") following the amalgamation of seven territorial authorities[3] and the Auckland Regional Council in 2010. Under that bespoke legislation the Council's jurisdiction covers the Auckland region which extends to Te Hana to the north, Pukekohe to the south, Kawakawa Bay to the east and Piha to the west.[4] The LGACA sets out the Council's structure, functions, duties and powers. These differ from the general provisions which apply to other local authorities operating under the Local Government Act 2002 ("the LGA") and other enactments.

[20] The Council's shared governance structure consists of:

(a) the Governing Body (consisting of the Mayor elected by all Aucklanders and 20 Councillors elected on a Ward basis);[5] and

(b) 21 local boards, which are responsible for local decision-making, comprising 149 elected members.

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3 Auckland City Council, Franklin District Council, Manukau City Council, North Shore City Council, Papakura District Council, Rodney District Council and Waitākere City Council.

4 As defined in the Local Government (Auckland Boundaries) Determination of 2010.

5 As defined in ss 4 and 8 of the LGACA as the entity comprising of the members of the Council being the Mayor and Council members elected in accordance with the Local Electoral Act 2001.

[21] Under the LGACA the Governing Body is responsible for:

(a) the financial management of the Council, including preparing and adopting the Long Term Plan ("LTP") once every three years or an Annual Plan ("AP") for each financial year. It is also responsible for the annual budget and annual report;

(b) setting rates;

(c) governance of all CCOs; and

(d) consulting with and considering the views of local boards before making a decision which affects communities in the local board.

[22] The Council has five substantive CCOs. It is the sole shareholder of each. One is ATEED.

ATEED

[23] ATEED was established by Order in Council. Its objectives are to lift Auckland's well-being, to support and enhance the city's performance as a key contributor to the New Zealand economy and to support and enhance Auckland's ability to compete internationally as a desirable place to live, work, invest and do business.

[24] It supports the economic development of Auckland. This includes the sustainable growth of visitor numbers and marketing Auckland as a visitor destination. To meet its purposes ATEED undertakes various projects and programmes. It partners with agencies such as Tourism New Zealand ("TNZ"), Auckland International Airport, airlines, travel companies and the like. It markets Auckland both internationally and domestically. It sponsors major events and provides operational support for cultural activities and festivals. It partners with the education sector to attract international students to the city.

[25] ATEED is funded by the Council. For the 2016/2017 year it received $54,285,142 of which $33,178,283 was spent on promoting the visitor economy.

[26] Options for funding ATEED, other than by the Council, have been discussed since ATEED was established. In 2016, at the Council's direction, ATEED identified three possible options for sustainable long term funding:

(a) a compulsory levy such as a bed tax;

(b) a targeted rate (on all tourist accommodation businesses); or

(c) funding via an industry opt-in or membership-based fee.

[27] In April 2016 it resolved that the preferred option was a bed tax. However, because this could only be imposed by central government, it was not pursued.

[28] The question of voluntary contributions from commercial accommodation providers was then examined with discussions across the sector. However, this initiative was not explored further following the re-election of the Hon Phil Goff to the mayoralty.

The Finance and Performance Committee

[29] Some of the Governing Body's powers and responsibilities are delegated to committees. One is the Finance and Performance Committee ("the FPC"). The membership of the FPC includes the Mayor and all Councillors. The FPC's delegated authority includes, amongst other things, advising on and supporting the Mayor with the development of the LTP and annual budget, financial policy relating to the LTP, the annual budget and the setting of rates.

[30] The Governing Body and FPC meet regularly. Decisions are recorded in Minutes. Agenda items are distributed to members in advance of each meeting.

[31] The Governing Body and FPC also hold workshops. These involve members of both entities meeting with relevant Council staff. It is a reasonably informal forum

designed to educate and inform elected members on issues requiring Governing Body decisions. These are not formal Council meetings. Neither are they open to the public.

Council's financial planning processes

(a) The Long Term Plan

[32] The Council's planning, decision-making and accountability obligations are set out in Part 6 of the LGA.

[33] The LGA requires every local authority to consult on and adopt an LTP every three years.[6] An LTP must cover a period of at least 10 consecutive financial years.[7]

[34] The LTP sets the local authority's long term strategic direction.

[35] In preparing and adopting the LTP, the local authority must include in the plan such detail as it reasonably considers to be appropriate.[8] However, it must include the Council's revenue and financing policy ("RFP").[9] This is to provide predictability and certainty around sources and levels of funding.[10] The RFP contains the local authority's policies for funding the operating and capital expenditure. The revenue sources to fund this expenditure include rates (both general and targeted), charges and fees. The RFP also sets out how policy decisions have been arrived at by reference to the financial management considerations set out in s 101(3) of the LGA. Before adopting or amending an RFP, the Council must engage in consultation.[11]

[36] The LTP must also include a funding impact statement ("FIS") in relation to each year covered by the plan.[12] This identifies the sources of funding to be used by the local authority, the amount of funds expected to be produced and how they are to be applied.

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6 Local Government Act 2002, s 93(1).
7 Section 93(7(a).
8 Section 93(8).
9 Section 93(7)(b); see also sch 10, cl 10.
10 Section 102(1).
11 Section 102(4)(a).
12 Schedule 10, cl 15.

(b) Annual Plan

[37] Each year, local authorities must adopt an AP.[13]

[38] With limited exceptions which do not apply in this case, the community must be consulted before the adoption of an AP.[14] This includes changes to the rating system.

[39] The effect of an LTP and AP is to provide a formal and public statement of the local authority's intentions.[15] Their adoption does not, in itself, constitute a decision.

[40] The LGA requires the local authority to run a sustainable and prudent budget. The local authority must balance its projected operating expenses with its projected operating revenue.[16]

[41] Each year, following the adoption of its annual budget or LTP, the local authority sets its rates for the relevant financial year in the accordance with the LTP and the FIS for that financial year.

Events leading to 2017/2018 annual budget

[42] In 2015 the Council adopted its LTP. This was for the 10-year period 2015-2025. Auckland's significant population growth was projected to continue for the next 30 years. This would place pressure on the city's infrastructure including roads, public transport, water, sewerage and public amenities such as parks and community centres. The LTP revealed an operating deficit in the order of $12 billion.

[43] The Council's Financial Strategy contained in the 2015 LTP set out the approach to achieve a balance between Auckland's aspirations and their affordability. Central to this approach was the importance of maintaining the Council's AA Standard & Poor's credit rating and thus its ability to access international credit markets at competitive rates.

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13 Section 95(1).
14 Section 95(2) and (2A).
15 Section 96(1).
16 Section 100(1).

[44] In November 2016 work began on preparing the annual budget for 2017/2018. After estimating the capital and operating expenditure, the revenue from rates (including a projected rate rise of between 2.5 and 3.5 per cent), closing borrowings and a group debt to revenue ratio of 256 to 257 per cent, it became clear that the Council had limited headroom, particularly given that operating expenditure was projected to increase by 1.1 per cent per annum.

"Pre-election Report" and an APTR

[45] Prior to the October 2016 Auckland local body election, the Council prepared and published a "Pre-Election Report" ("the Report"). This is required by the LGA.[17] Its purpose is to provide information to the electorate to inform and promote public discussion in the leadup to an election.

[46] The Report drew on the LTP. It referred, in some detail, to the continuing growth of the city and the population projections for the next 30 years. It pointed out that with growth of the magnitude predicted there would be increasing demands on the city's infrastructure. It noted that the Council's revenue was derived from a combination of rates, user charges, borrowings and central government subsidies. It acknowledged that ratepayers had expressed a preference for low debt and minimal rate increases but that the Council was reaching the limits of responsible borrowing. In order to maintain rates at an affordable level and keep borrowings at or below current levels, alternative funding sources needed to be identified. The Council's financial policy team began to examine what these might be. Amongst the options considered were fuel taxes, road tolls and targeted rates.

The Mayoral Office and the Mayor's Proposal

[47] Under the LGACA the role of the Mayor is to articulate and promote a vision for Auckland, to provide leadership for the purpose of achieving objectives to contribute to that vision, to lead the development of Council plans, policies and budgets (including the LTP and AP) and to ensure there is effective engagement between the Council and the people of Auckland.[18]

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17 Section 99A(1).
18 Section 9(1) and (2).

[48] The Mayor maintains a separate entity known as the Mayoral Office.[19] The Mayoral Office has its own budget.[20] Unlike Council officers whose role requires them to be politically neutral, staff in the Mayoral Office are appointed by the Mayor, through the Chief Executive. They have a political focus in assisting the Mayor to achieve his or her political objectives for the city.

[49] Each year the Mayoral Office, with Council officers, is required to present a Mayoral Proposal ("the Proposal"). It is published in or around November. The Proposal sets out the Mayor's priorities, strategies and significant budgetary and financial policy changes recommended for the draft annual budget or LTP. These may include increases in or changes to the way rates are levied.

[50] Once developed, the Proposal is considered by the FPC and the Governing Body. Depending on their particular significance, some proposals such as changes to rating processes require consultation. Following consultation the Proposal may be modified to reflect feedback. The Proposal will then be presented to the FPC which will make recommendations to the Governing Body before it makes the final decision.

How the concept of an APTR was introduced

[51] During the Hon Phil Goff's 2016 Mayoral campaign he made two particular pledges relevant to these proceedings. The first was to limit rate increases to 2.5 per cent. The second was to "investigate a fair level of user-pays where there are demonstrable private benefits generated from CCO operations".

[52] On 8 October 2016 he was elected the second Mayor of Auckland. Almost immediately he began to examine an APTR.

[53] On 26 October 2016 the Mayor and his staff were briefed by Council officers on the Council's capital programme. This included the multi-billion dollar infrastructure funding gap, the operating budget and the limited headroom to maintain revenue growth. Unsurprisingly, the need to consider alternative funding sources was discussed.

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19 Section 9(3)(e).
20 Section 9(4)(b).

[54] According to Mr Walker, the Mayor expressed a clear preference to maintain general rate increases below the 3.5 per cent forecast in the LTP. He asked how rating liability could be apportioned more fairly across the community. He promised to extract cost savings from inside the Council. In a Radio New Zealand interview he spoke of cutting the duplication of work done by the Council and its subsidiaries such as the "economic agency ATEED". He asked that targeted rates be explored. This initiative became part of the Proposal for the 2017/2018 Annual Budget.

[55] Mr Wood led the preparation for the Proposal. In this task he received assistance from Council staff.

[56] During his first month of office, the Mayor met with the CCOs, including ATEED. According to Mr Wood, ATEED advised him that the tourism and hospitality sector was backing away from any commitment to a voluntary or "opt-in" funding option to support ATEED's activities. This claim, however, is not accepted by the applicants. Mr Wood says the Mayor expressed an interest in pursuing a targeted rate and asked ATEED to provide data on its spending on attracting visitors and major events to Auckland. Early estimates indicated that $20 to $30 million of ATEED's spending could be funded through the imposition of a targeted rate on a "user-pays" basis.

The first Mayoral Proposal

[57] The Proposal for the 2017/2018 annual budget was first published on 28 November 2016 in the Council's monthly publication "Our Auckland".

[58] In its discussion on the targeted rate, the Proposal stated:

> "**Targeted Rates**
>
> 32. The use of targeted rates provide the Council with an opportunity to better align the sources of revenue with the beneficiaries of specific expenditure. A range of targeted rates are set out in the rating policy. Possible additional targeted rate initiatives are discussed below.
>
> *Visitor levy*
>
> 33. The number of commercial guest nights in Auckland rose from 6 million in the year ending July 2011 to 7.3 million in the year ending

July 2016. This growth is partly attributable to the visitor attraction and major events activities of [ATEED] and has placed additional demands on the city's infrastructure and services. In light of the benefits visitors derive from council activities, ATEED has been exploring with the commercial accommodation sector the available options for indirectly funding some or all of ATEED's visitor-related expenditure from visitors rather than Auckland ratepayers.

34. The council cannot set a bed tax, but may be able to achieve a similar outcome through a targeted rate on accommodation providers. We would expect, but not require, the financial impact of the targeted rate to be passed onto guests through an additional charge on their bills. The revenue captured through a levy is expected to be $20 million to $30 million per annum. Indicative council analysis suggests the levy would translate into a three to four per cent surcharge on a typical tariff for a four to five star hotel; in the order of $6 to $10 per night. Municipal charges of this nature are common practice in OECD countries.

35. Staff will engage with the tourism and accommodation sector on the design of the levy and include their perspectives in a report back to the Council in the New Year. In the event the levy is implemented, the tourism and accommodation sector will be invited to participate on a governance body that will advise ATEED on the allocation of levy revenues."

Council's adoption of the Proposal for consultation

[59] The first decision-making on releasing the Proposal for public consultation took place at the FPC's meeting on 30 November 2016. Attached to the agenda was a draft of the Proposal. The FPC recommended that the Governing Body endorse the 2017/18 annual budget consultation documents.

[60] On 15 December 2016, the Governing Body resolved to accept the FPC's recommendations. However, it should be noted these documents were already familiar to the Governing Body. They had come before the FPC as part of the proposed annual budget discussions and had been considered by the Governing Body. The resolution, adopting the FPC's recommendations is reproduced below:

"That the Governing Body:

(a) agree that the Annual Plan 2017/2018 public consultation document include the following items:

Rating policy changes

(i) that the general rates increase be capped at 2.5%;

….

(iv) introduction of a visitor levy (via a targeted rate) to fund visitor related expenditure of [ATEED]."

[61] Mr Wood says the term "visitor levy" was deliberately chosen for the purposes of public communication relative to the APTR. On this point he said:

> "The term "visitor levy" in the Mayoral Proposal was chosen as the best way to communicate to the wider public the intent of the targeted rate, rather than purporting to be a technical description of the revenue mechanism. This approach has a precedent. The Interim Transport Levy that was in place at the time was, in fact, a targeted rate. The Mayoral Proposal stated that Council could not set a bed tax, but may be able to achieve a similar outcome through a targeted rate on accommodation providers. …
>
> … the announcement, media and Mayoral Proposal all referred to the targeted rate on accommodation providers as a 'visitor levy'. By this we meant a rate to fund activities aimed at attracting visitors, that would be ultimately borne by visitors staying in hotels and the like."

APTR Steering Group

[62] The Council set up a Steering Group to provide pre-consultation engagement with the accommodation sector to advise on the contents of the consultation documents. In particular, its task was to provide industry feedback on the design of a possible APTR.

[63] The Steering Group was chaired by Cr Desley Simpson, the Deputy Chair of the FPC. Five representatives from the accommodation sector were invited to participate.[21]

[64] The Steering Group met three times before the Proposal was adopted by the Governing Body. Unsurprisingly, the sector appointees were described by Mr Wood as having a genuinely negative reaction to any proposed APTR. They claimed it was hurried and had been drafted without input from the industry. They expressed scepticism over the benefits of ATEED's spending and its focus. Alternative rating options were discussed, such as rating the CBD business sector or targeting the wider tourism sector. Options for differentiating by location or provider were also discussed.

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[21] Hospitality New Zealand, Sky City, Novotel Auckland Airport, Tourism Industry Aotearoa and Whangaparaoa Lodge.

[65] At the last meeting before the Governing Body's decision, the documents for public consultation were circulated and discussed.

[66] It was through the engagement of the Steering Group that a number of particular criticisms on an APTR were raised.

[67] Mr Wood is of the view that the sector engagement through the Steering Group was constructive. For example, it was through this vehicle that issues around forward bookings, strata titles and hotels where there is a contractual separation between the owners of the property and the operators of the business and the risk posed by the owners of unit titles within hotel pools leaving the pool to avoid commercial classification were identified. Other issues ventilated included the geographical concentration of the benefits derived from ATEED's visitor and events-related expenditure, whether there was a basis to apply a differential rating system based on the type of accommodation provider and their location and the need to differentiate between ATEED's visitor and events-related expenditure.

Other engagement

[68] According to Mr Wood there were other forms of industry engagement. For example, the Mayor met with a group of Auckland hoteliers on 24 January 2017 at the Crowne Plaza. Various issues were raised including the marginal profitability of the hotel sector in recent years, the "head winds" the rate might create for new hotel development, why the rate was being imposed on hotels and not on the informal accommodation sector and whether the rate could, in practice, be passed on. Other issues including those identified by the Steering Group were discussed.

[69] On 13 February 2017 Mr Wood and the Mayor attended a Hospitality New Zealand national board meeting to discuss the proposed APTR. Cr Newman organised a visit to the Crowne Plaza and Base Backpackers which was attended by a staff member from the Mayoral Office.

[70] Cr Newman also organised an informal meeting with members of the hotel industry on 15 March 2017. In April and May Mr Wood and the Mayor met individually with major providers such as the CP Group, Rydges, The Heritage and Fu

Wah. The Mayor met with the TIA. Other meetings occurred between interested and potentially affected parties in April and May, hosted by staff of the Mayoral Office, including Mr Hamilton. The meeting with Mr Hamilton apparently focused on the business models used within the sector and how those models might operate relative to an APTR.

The Consultation Documents

[71] These are the documents which the Governing Body resolved to adopt. They reflect the LGA's duty to publicly consult. In practice, and as occurred in the present case, this ordinarily means two documents are prepared; a consultation document and another, "the Supporting Document", containing the information supporting the first. It was these documents which the Steering Group commented on at its last meeting.

Consultation document

[72] The consultation document for the 2017/2018 annual budget ran to 34 pages. It commenced with a "Message from the Mayor" in which he said:

> "I want to keep rate increases low and reasonable. In this budget, I want to share the cost of growth more fairly across those who benefit from it. In my view rate rises should be no higher than 2.5%. I am working to broaden our revenue base through measures such as a targeted rate on accommodation providers …"

[73] Under Part Two was a section headed, "What we want your feedback on". Below this were listed six issues:

(a) rates increases;

(b) rating stability;

(c) paying for tourist promotion;

(d) paying for housing infrastructure;

(e) paying Council staff a living wage; and

(f) priorities in your local area for 2017/2018.

[74] The document then proceeded to discuss each issue. In the section headed "Rates Increases", it stated:

> "… We had previously projected that an average increase of 3.5% would be needed for 2017/2018 to deliver our planned investments and services. The latest review of our budgets has identified additional savings … that will allow us to deliver the same things for about $15m less. The $15m of savings could be used to reduce the rates increase for 2017/2018 from 3.5% to 2.5%. Any further revenue reductions would put our AA Standard & Poor's credit rating at risk …"

In the section headed "Rating Stability" it stated:

> "We consider that businesses should pay a greater share of rates than residential properties but that the present share is too high and should be reduced gradually over time. …"

In the section headed "Paying for Tourism Promotion" it stated:

> "The Council currently spends $20-$30m of general rates money each year on tourist promotion and major events which provide significant benefits to accommodation providers such as hotels and motels. To continue to support Auckland's rapid tourism growth while keeping rates fair and affordable, we need to consider new ways to pay for this spending."

[75] Then, two options were proffered:

(a) Option A was to maintain the status quo by continuing to fund ATEED's activities across the whole taxpayer base through general rates. This was said to be at a cost of $46.[22]

(b) Option B was to fund tourist promotion using a targeted rate on accommodation providers. Accommodation providers were described as hotels and motels which would pay a rate equating to approximately four per cent of their revenue. It was claimed that if charges were passed on to visitors the average hotel room rate would increase by about $6 to $10 per night. The Council would use the "freed up general

[22] Presumably per annum per ratepayer.

rates" to invest $250 to $300 million in transport infrastructure over the following 10 years.

[76] The consultation document went on to record:

> "Our preference is to fund tourism promotion costs from a targeted rate on accommodation providers as the connection between visitor attraction and their customer base is strongest. This would allow the rates currently collected for this purpose to be invested in urgently needed infrastructure for the city, such as transport improvements – benefiting residents and visitors alike. If this new approach is approved, we would create a new group including industry representatives to provide direction on how the money is spent."

[77] The background to the Council's preference was then explained in the following way:

> "We explored a range of other possible funders for the proposed rates. While businesses such as a restaurants, café and taxis also benefit from visitors, the majority of their revenue come from Auckland residents. A targeted rate on accommodation providers ensures that very little of the costs of visitor attraction falls on Auckland residents, as nearly all sectors revenue is from visitors. Discussion of all the options considered can be found in s 2.3 of the supporting information for this consultation document."

Supporting Document

[78] The Supporting Document was a good deal more substantial and detailed. It ran to just under 150 pages. It dealt with the same issues as the consultation document but in much greater depth. It included tables and appendices. It introduced the topic of an APTR by observing that through ATEED the Council had spent $27.8 million on visitor attraction and major events funded by general rates. This represented approximately two per cent of rates. The proposal was "to free up general rates" by funding visitor attraction and major events with a targeted rate on accommodation providers, allowing the $27.8 million to support capital expenditure of $180 million over five years extending to a total of $250 to $300 million over 10 years.

[79] The document said:

> "Funding visitor attraction and major events expenditure from a targeted rate on accommodation providers establishes a clear link between the sector that is the most immediate direct beneficiary of expenditure to raise visitor numbers and those who are paying. While other sectors benefit from visitor expenditure they also have a substantial local customer base. As the Council

> does not wish to add further costs to Auckland residents it considers a rate on accommodation providers to be the best funding option."

[80] And later:

> "A rate set to raise $27.8 million would represent around 4 per cent of the estimated commercial accommodation sector revenue for 2017 of $706 million. If they wish, the accommodation sector can pass through the costs of the rate by adding an Auckland Council accommodation sector targeted rate surcharge of around 4 per cent to guests' bills. Charges on the accommodation sector are widely used overseas to fund visitor attraction (most often as a bed night tax) ranging up to 17 per cent. At present the accommodation sector pays total rates of $18.5 million."

[81] After discussing the various options as to how and on what basis the APTR might be levied, the Council explained why it favoured capital value:

> "The Council considers that capital value is the most equitable rating tool to distribute the revenue requirement across accommodation providers. Capital value provides for factors that reflect the variations between providers in terms of both benefit received and affordability. Capital value differentiates between central city hotels, suburban motels and backpacker hostels. Capital value is also consistent with how other rates are applied to these and other properties in the CBD and elsewhere such as the general rate, City-Centre Targeted Rate and Half of the City BID Targeted Rate.
>
> The measures that are based on potential volume (bed numbers, room numbers and floor area) differentiate on potential but not actual volume and therefore revenue. They also do not distinguish between widely varying accommodation types. As a result they are less equitable in terms of distributing the rate burden in relation to the benefits received or relative affordability.
>
> Land value has no relationship to the number of visitors and does not distribute the rates burden equitably between providers in relation to the benefits received or relative affordability."

[82] The Supporting Document then turned to consider the options for differentiating between the various types of accommodation provider. It recognised that those offering premium properties have less price sensitive clientele. This would make it easier to pass on the costs of the proposed rate to visitors. However, motels, backpackers, camp grounds and less centrally-located providers were likely to have more cost sensitive clientele making it more difficult to pass on any additional costs.

[83] The report also observed that the Council could apply an APTR differentially based on the type of provider and location. This would have hotels and serviced apartments treated differently from motels and backpacker hostels.

Public consultation phase

[84] As noted, public consultation on the 2017/2018 budget and the Proposal (including the APTR) took place between 27 February 2017 and 27 March 2017.

[85] According to Mr Walker, the principal mechanisms for facilitating consultation were:

(a) a household summary of the proposals delivered to 540,000 Auckland letterboxes in the March edition of "OurAuckland*"*;

(b) advertisements appearing in local and regional newspapers, online banner advertisements, media releases and targeted stakeholder communications;

(c) the Council's website: "ShapeAuckland";

(d) the hosting of 70 public events, including 25 "Have your Say" meetings;

(e) offers by the Council to speak on particular issues on request; and

(f) engagement on social media.

Results and analysis of feedback

[86] As feedback was received it was analysed. Mr Walker said that as a consequence, Council officers reviewed and re-considered aspects of the consultation documents. In some cases, officers followed up on submitters, seeking further information. Council members engaged with staff seeking further information about the impact of an APTR on providers in their ward. He described the process as "iterative … between Council officers, the Mayor, his staff and elected members".

This was mostly through FPC workshops. FPC workshops were held in March, April and May 2017. Additionally, Local Boards communicated their views including at an FPC workshop on 9 May 2017.

Feedback analysis and the "Staff Report"

[87] The analysis of the submissions and feedback was contained in a detailed paper, known as the Staff Report.

[88] According to Mr Walker, the community engagement on the proposed APTR was "very high". 5,626 responses were received. Of these, 68 per cent supported the Proposal. A significant minority (21 per cent), apparently mostly from the commercial accommodation provider sector, did not. 11 per cent said they were not sure.

[89] The key reasons given by supporters of the APTR were:

(a) many international cities have a "similar tax";

(b) accommodation providers benefit from tourism and often increase room rates for major events; it is only fair they pay costs;

(c) residential ratepayers receive no benefit from tourism and events so should not be paying towards the promotion of these;

(d) general rates revenue should be spent on improving Auckland for the people who live here, rather than on encouraging visitors;

(e) user-pays is the fairest option;

(f) targeted rates should also include other accommodation providers such as Airbnb and Bookabach;

(g) the mode of recovery should not be a bed tax and should not apply to Auckland residents; and

(h) cruise ships and international students should also help fund the costs.

[90] Those opposed to an APTR submitted:

(a) it is inequitable to rate only accommodation providers when less than 10 per cent of the visitor spend is on accommodation and four other sectors receive a larger share;

(b) only 26 per cent of visitors stay in commercial accommodation;

(c) businesses already pay high rates;

(d) the proposed APTR is unaffordable;

(e) ATEED's spend is also on events that benefit Auckland residents;

(f) accommodation providers on the outskirts of Auckland have few overseas visitors;

(g) informal accommodation providers such as Airbnb should be included;

(h) the APTR will encourage many short-term accommodation providers to become long-term accommodation providers to avoid the extra rates charge which would increase accommodation costs, thus discouraging overseas visitors;

(i) many serviced apartments are owned by individual investors and leased to a hotel group for a fixed return; current contracts mean the owner would pay the targeted rate, not the hotel;

(j) an APTR will de-value existing businesses and investments; and

(k) an APTR will discourage much-needed new hotel developments.

[91] Unsurprisingly, in contrast to Mr Walker's comments on the level of community engagement, the applicants hold a very different view of the consultative process. Their evidence is highly critical of how the Council approached and managed this task. For example Cr Newman, a member of the Governing Body, made an affidavit in support of the applicants. His view was that the consultation process was wholly inadequate, particularly because it did not provide appropriate opportunities for the accommodation sector to present their views to the Governing Body as a whole. He said the closest the Council came to a hearing with the accommodation sector was on 20 March 2017 at the "Have your Say" meeting. However, that was not attended by all Council members, was open only to certain invited accommodation providers and took place before the written submissions were made. As a consequence, the ability of Councillors to meaningfully engage on the issues which particularly concerned commercial accommodation providers was limited. Cr Newman was also critical that the Mayor and many of the Councillors were unwilling to undertake the investigations necessary to understand the APTR or what it meant for the industry. He said that the Mayor was politically committed to the APTR and was not interested in discussing alternatives.

[92] The essence of the applicants' complaint is that the Council ought not to have proceeded with the APTR with such haste. Given its importance to accommodation providers the Council should have allowed more time for a more detailed analysis to be completed.

Council consideration of Staff Report

[93] On 17 May 2017, the FPC held a full-day workshop in anticipation of the Governing Body's decision on the APTR. Mr Walker provided an overview of the budget process. This was followed by an overview of the consultation feedback and a discussion about the key issues and options for responding to the feedback. This included reviewing the amount proposed to be funded by the targeted rate, options for differentiating categories of accommodation provider and geographic location, the possible use of a remissions policy for those who would incur the rate but could not pass on the cost and developing a solution to consider the informal accommodation

sector the following year. The option of a voluntary contributions scheme was also discussed.

FPC meeting on 1 June 2017

[94] On 1 June 2017, the FPC met to discuss the annual budget in light of the feedback received and to make decisions on the Proposal. At this meeting, the Mayor presented a report setting out his revised proposal for the budget following public consultation. It attached the Staff Report, the recommendations of which were accepted by and incorporated into the Mayor's report.

[95] In relation to the APTR, the Staff Report stated:

> "(e) That a targeted rate on commercial accommodation providers be established to fund a proportion of the visitor attraction and major events expenditure of ATEED as follows:
>
> (i) the amount of the targeted rate is set at a level materially less than the $27.8 million proposed by Council in the consultation material with the balance continuing to be funded by general rates.
>
> (ii) consideration be given to a differential to recognise different categories of commercial accommodation provider:
>
> Hotels and serviced apartments.
>
> Motels, lodges and motel-like accommodation in camp grounds.
>
> Other accommodation providers such as backpackers, camp grounds and hostels.
>
> (iii) consideration be given to a geographic differential to recognise feedback that there are variations in the distribution of benefits between properties in the CBD and airport precincts and other areas, with a differential recognising two categories:
>
> CBD and airport.
>
> Others.
>
> (iv) for the 2017/2018 year, the Council consider applications for remission under existing rates remission scheme (remission of rates for miscellaneous purposes), for example where the owner/ratepayer is separate from the accommodation operator and the nature of the relationship between the parties means the owner/ratepayer does not have the option of passing on the increased costs to the accommodation operator.

> (v) staff report back on the development of a more targeted scheme, along with the LTP 2018-2028.
>
> (vi) staff report back on a proposal for 2018/2019 for inclusion of informal accommodation providers currently being rated as residential properties.
>
> (vii) staff report back on a proposal for the introduction of alternative governance arrangements of ATEED, including a greater role for commercial accommodation providers appropriate to their level of funding of ATEED's activities.
>
> (viii) the Council's RFP be amended to provide four targeted rates to be used to fund visitor and external relations, destination and marketing and major events in the economic growth and visitor economic activity."

[96] The foundation for these recommendations was set out in considerable detail across the nine following pages. It then summarised the feedback before turning directly to the requirements of s 101(3) of the LGA. After setting out the statutory criteria, the Staff Report turned to consider each. These are set out in Appendix 1 to this judgment.

Mayor's report to the FPC and revised Proposal

[97] The Mayor's report covered the key issues identified in the consultation document.

[98] In respect of the APTR, the Mayor recorded that as a result of the feedback, he had decided to revise his Proposal in five ways ("the Revised Mayoral Proposal"):

(a) the APTR would fund only a part of the cost of ATEED's operation. A significant proportion of ATEED's visitor attraction and major events expenditure would continue to be funded from general rates. Instead, the $26.9 million would be split evenly between the APTR and general rates. As a consequence, the APTR would recover $13.45 million. This 50/50 apportionment, the Mayor said, represented a political judgement applying a "stand-back" evaluation of the factors set out in the Staff Report;

(b) the APTR would distinguish accommodation provider types and locations. This recognised the differences in the distribution of benefits and affordability within the commercial accommodation sector. It also recognised the geographical differences. Thus it was proposed that three geographical zones would be created, each with three provider types or tiers. The rate would differ depending on which category applied to the property. The zones generally reflected distance from the CBD with the exception of accommodation at or near the International Airport at Māngere:

(i) Zone A – Mt Eden, Devonport/Takapuna, Māngere/Ōtāhuhu, Maungakiekie/Tāmaki, Ōrākei and Waitematā;

(ii) Zone B – Henderson/Massey, Hibiscus and Bays, Howick, Kaipātiki, Manurewa, Ōtara/Papatoetoe, Puketāpapa, Upper Harbour, Waiheke, Whau; and

(iii) Zone C – Franklin, Great Barrier, Papakura, Rodney, Waitākere Ranges;

(c) the proposed provider types were:

(i) Tier 1 – hotels and serviced apartments;

(ii) Tier 2 – motels and lodges (including motel-like accommodation at camp grounds); and

(iii) Tier 3 – other (backpackers, camp grounds, hostels);

(d) a rates remission scheme would be applied to consider applications for the remission of rates where the ratepayer could not pass on the rate to the operator. Staff would develop and report back on proposals for a bespoke rate remissions scheme the following year; and

(e) Council staff should consider and report back on whether the informal accommodation sector should be included in the APTR from 2018/19. This was in direct response to submissions from the commercial sector.

[99] The Mayor's report also recommended that Council staff report back on alternative governance arrangements for ATEED, including greater participation by commercial accommodation providers.

[100] All the recommendations were carried by the FPC. The resolution was then passed by the Governing Body on 1 June 2017.

Rates remission for the APTR

[101] Before moving to consider how matters developed throughout the following year, and in particular the 2018/2019 APTR, it is convenient at this point to discuss more fully the issue of rates remissions.

[102] A local authority may adopt a rates remission policy ("RRP").[23] Before doing so, it must consult with the community.[24] Further, the RRP adopted must state:[25]

(a) the objective sought to be achieved by the remission of rates; and

(b) the conditions and criteria to be met in order for rates to be remitted.

[103] If an RRP is adopted, a local authority may remit all or part of the rates on a rating unit if it is satisfied that the conditions and criteria in the RRP are met.[26] It must also give notice to the ratepayer identifying the remitted rates.[27]

[104] As previously noted, the Council passed the FPC's recommendation that staff report back on the development of a more targeted remissions scheme as part of the LTP for 2018-2028.

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23 Local Government Act 2002, s 102(3)(a).
24 Section 102(4)(a).
25 Section 109(1).
26 Local Government (Rating) Act 2002, s 85(1).
27 Section 85(2)

[105] This directly reflected concerns which emerged from the consultation process. As previously discussed, two particular examples were identified:

(a) where the ratepayer was not the accommodation provider, but owned the property; and

(b) where the ratepayer was the accommodation provider with forward contracts fixing room tariffs.

[106] However, in the meantime, the Council considered how any unfairness might be mitigated by the existing Miscellaneous Remissions Scheme.

[107] Following the setting of the APTR for the 2017/2018 year the Council advertised the availability of the APTR remission on its website. This explained how to apply for remission and the need to meet the conditions and criteria. It gave examples of the circumstances which might attract eligibility:

> "For example:
>
> > Where you have a contract agreed before 1 June 2017 to use the rating unit as commercial accommodation, and you have no means of managing the cost of the rate. Some serviced apartment rating units may fall into this category:
> >
> > > Where you operate a commercial accommodation business, and can show that the substantial proportion of your capacity as at 1 June 2017 was contracted forward under business-to-business agreements.
> > >
> > > Where you have contracted some or all of your commercial accommodation capacity to Work and Income New Zealand (WINZ) to use as emergency housing."

[108] While each of these examples emerged from submissions received during the consultation phase the Council did not consult on the criteria nor adopt them as a new policy. This was because it did not need to. The Miscellaneous Remissions Scheme was already in place to deal with any unfairness or inequity suffered by ratepayers, general or targeted.

[109] The remission policy was conveyed by letter to all ratepayers identified as liable to pay the APTR. The letter, dated 11 July 2017, provided information not only on how much the APTR would be, but also how a remission of rates might be obtained.

The 2018/2019 APTR

[110] As previously noted, the Governing Body's resolution to impose an APTR required Council staff to report back on three matters:

(a) a more targeted remissions scheme;

(b) the inclusion of informal accommodation providers; and

(c) a proposal for the introduction of alternative governance arrangements for ATEED, including greater participation of commercial accommodation providers.

[111] I turn now to discuss the first two of these matters.

A more targeted remissions scheme

[112] On 27 September 2018 the FPC resolved to consult on an APTR-specific remission scheme. It was proposed that this would be available for rating units used as serviced apartments where the ratepayer owned no more than two rating units and had a contract with an accommodation provider which, amongst other conditions, did not allow the ratepayer to pass on the cost of the rate. The proposed scheme was graduated in the sense that the quantum of remission would decline to zero in equal steps over a 10-year period.

[113] During the consultation phase the Council had said that the granting of remissions would assist those owning one or two serviced apartments who are unable to pass on the cost of the APTR. Its stated rationale for not extending the scheme to large investors, that is those owning more than two units, was that it would represent a significant risk to APTR funding.

[114] On 31 May 2018 the Governing Body resolved to adopt the FPC's recommendation.

[115] Mr Walker described the remissions scheme as striking what he referred to as "an appropriate balance", recognising that some owners liable to pay the APTR were unable to pass on the cost of the rate and might, as a consequence, suffer financial hardship. He said that ownership of a serviced apartment was a choice; investors should bear the risk. The reason for limiting the remissions scheme to those with no more than two apartments recognised that those who owned large numbers of apartments were generally considered to be more capable of negotiating their lease arrangements and managing potential risks.

The inclusion of informal accommodation providers

[116] As for the second issue, in 2018/2019 the Council determined to assess properties used for informal accommodation using online platforms, such as Airbnb and Bookabach. The formula for calculating liability was linked to the property's level of occupancy for business purposes.

[117] This was an issue which had been identified during the 2017/2018 consultation phase. Submitters had pointed to the sharp increase in the popularity and number of informal or online accommodation providers. They pointed to the inequity and unfairness of an APTR which did not include such providers.

[118] The Council consulted on this issue as part of the LTP consultation process. It said:

> "Growth of the online accommodation sector such as Airbnb and Bookabach has been significant, with Airbnb properties alone exceeding 10% market share in the last year. There is an equity issue in terms of a rating classification of these properties, many of which are operating as businesses but are paying lower, residential rates and are not paying the APTR. Our proposals (explained below) seek to address this inequity and some providers may have significant rate increases as a result."

[119] The consultation document for the LTP proposed that the APTR would be applied to informal accommodation providers:

(a) within zones A and B (as created for the purpose of the APTR in 2017); and

(b) calculated by reference to occupancy rates classified as follows:

(i) residential (booked up to 28 days a year) – the APTR does not apply;

(ii) medium-occupancy online accommodation provider (booked for between 29 and 135 days a year) – 75 per cent residential and 25 per cent business (i.e. 25 per cent of the APTR applies); and

(iii) business (booked for more than 136 days a year) – 100 per cent of the APTR will apply.

[120] Having set out the background to how the APTR was set for 2017/2018 and 2018/2019 I now turn to consider the applicants' claim.

The application

[121] The applicants seek to review the Council's decision to impose the APTR for both periods on three grounds.

[122] First, they say that the decision to impose the APTR was unreasonable. That is because:

(a) the Council wrongly assumed that accommodation providers could pass-through the costs of the rate to their guests;

(b) the Council failed to inform itself of the contributions accommodation providers already make to promoting New Zealand as a tourist destination;

(c) the Council overstated the benefits ATEED's expenditure would provide accommodation providers;

(d) the imposition of the APTR resulted in significant horizontal inequity between ratepayers; and

(e) the Council did not consider a less discriminatory regime.

[123] Individually or in combination, these considerations mean the decision to impose the APTR was unreasonable.

[124] The second ground of review focuses on s 101(3) of the LGA. The applicants say the Council failed to comply with its obligations under this provision. It paid them only lip service. Specifically the applicants say the Council:

(a) failed to adequately consider the distribution of benefits between the community as a whole, any identifiable part of the community, and individuals. The Council did not properly inform itself of the extent to which ATEED's spending would benefit the accommodation sector; and

(b) failed to properly consider the costs and benefits, including consequences for transparency and accountability, of funding the activity distinctly from other activities. The Council proceeded on the incorrect pass-through assumption and did not take into account the extent to which accommodation funders already promote New Zealand as a tourist destination.

[125] In the third ground of review the applicants say the Council breached its statutory consulting obligations under s 82 of the LGA. They acknowledge that the Council undertook a consulting process. But they say that the Council did not seek

the views of affected ratepayers about two aspects of the APTR which only arose *after* the initial consulting process:

(a) that it would be geographically differentiated; and

(b) that it would be covered by the Miscellaneous Remissions Scheme.

[126] A fourth ground of review, alleging a failure by the Council to follow its LTP in breach of s 23 of the LGRA and s 93 of the LGA, was abandoned at the hearing before me.

[127] In terms of remedy, the applicants seek:

(a) a declaration that the decision to impose the APTR was invalid;

(b) an order that the decision to impose the APTR be quashed or set aside, such that it has no effect; and

(c) an order that the Council make restitution of any amounts paid pursuant to a demand for payment of the APTR.

Approach to review

[128] The first step in reviewing the exercise of local authority powers is to examine the scheme of the legislation and determine the nature and scope of the powers and the statutory processes governing their exercise.[28]

[129] Following that, I shall review the relevant facts, including the processes followed by the Council and the decisions in question, to determine whether it discharged its legal responsibilities. In this case, that exercise involves asking whether the Council acted reasonably in imposing the APTR. There is some disagreement between the parties as to what actually constitutes an "unreasonable" decision in this

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[28] *Wellington City Council v Woolworths New Zealand Ltd* [1996] 2 NZLR 537 (CA) at 540; see also *Waitakere City Council v Lovelock* [1997] 2 NZLR 385 (CA) at 390.

context. I am required to determine that issue. But first, it is helpful to set out in some detail the relevant legislation to the extent that it has not already been discussed.

The Local Government Act 2002

[130] The purpose of local government is to enable democratic local decision-making by communities and to meet their needs for good-quality infrastructure, public services and performance of regulatory functions in a way that is most cost-effective for households and businesses.[29] One of the roles of a local authority is to give effect to this purpose.[30]

[131] In performing this function, a local authority has full capacity to undertake any activity, business, act or transaction and has full rights, powers and privileges to do so.[31] It must also act in accordance with various principles.[32] Amongst others, a local authority is obliged to:

(a) conduct its business in an open, transparent and democratically accountable manner;

(b) give effect to its identified priorities and desired outcomes in an efficient and cost-effective manner;

(c) make itself aware of and have regard to the views of all its communities; and

(d) when making a decision, take account of the likely impact on the diversity and interests of its communities, both current and future.

Decision-making

[132] Section 77 of the LGA provides that a local authority must, in the course of its decision-making process:[33]

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29 Section 10(1).
30 Section 11(a).
31 Section 12(2).
32 Section 14.
33 Section 77(1)(a) and (b).

(a) seek to identify all reasonably practicable options for the achievement of the objective of a decision; and

(b) assess the options in terms of their advantages and disadvantages.

[133] Under s 78, it must also give consideration to the views and preferences of persons likely to be affected by or have an interest in the matter.[34] But that does not, in and of itself, generate an obligation to consult or adopt any particular consultation procedure.[35] Rather, it is the responsibility of a local authority to make, in its discretion, judgements about how to achieve compliance with ss 77 and 78 in a way which is "largely in proportion to the significance of the matters affected by the decision" as determined in accordance with its significance and engagement policy.[36] In particular, it is the Council's responsibility to make judgements about:[37]

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

(b) the degree to which benefits and costs are to be quantified;

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

(d) the extent and nature of any written record to be kept of the manner in which it has complied with ss 77 and 78.

[134] However, in making its judgements, a local authority must have regard to "the significance of all relevant matters" and to:[38]

(a) the principles relating to local authorities contained in s 14;

(b) the extent of its resources; and

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34 Section 78(1).
35 Section 78(3); see also *Wellington City Council v Minotaur Custodians Ltd* [2017] NZCA 302, [2017] 3 NZLR 464 at [36].
36 Section 79(1)(a).
37 Section 79(1)(b).
38 Section 79(2).

(c) the extent to which the nature of a decision, or the circumstances in which a decision is taken, allow the local authority scope and opportunity to consider a range of options or the views and preferences of other persons.

The Local Government (Rating) Act 2002

[135] The purposes of the LGRA are to promote the purpose of local government set out in the LGA by:[39]

(a) providing local authorities with flexible powers to set, assess and collect rates to fund local government;

(b) ensuring that rates are set in accordance with decisions made in a transparent and consultative manner; and

(c) providing for processes and information to enable ratepayers to identify and understand their liability for rates.

[136] Rates must be set by a resolution of the local authority.[40] They must relate to a financial year (or part thereof) and be set in accordance with the relevant provisions of the LTP and FIS for the applicable year.[41] The relevant FIS is therefore the one contained in the AP, not the LTP.

[137] The APTR is a targeted rate. The power of a local authority to set a targeted rate is set out in s 16 of the LGRA:

> "**16 Targeted rates**
>
> (1) A local authority may set a targeted rate for 1 or more activities or groups of activities if those activities or groups of activities are identified in its funding impact statement as the activities or groups of activities for which the targeted rate is to be set.
>
> …

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39 Section 3.
40 Section 23(1).
41 Section 23(2).

(3) A targeted rate may be set in relation to—

(a) all rateable land within the local authority's district; or

(b) 1 or more categories of rateable land under section 17.

(4) A targeted rate may be set—

(a) on a uniform basis for all rateable land in respect of which the rate is set; or

(b) differentially for different categories of rateable land under section 17."

[138] Section 17 of the LGRA states that a category of rateable land is one which is identified in the local authority's FIS and defined in terms of one or more of the matters listed in sch 2 of the LGRA. Those matters include the use to which the land is put and where the land is situated.

[139] When assessing a rate, the relevant rating unit, values or factors are those which have been corrected as at the end of the financial year immediately before the financial year for which the rates are set.[42] The rates are not affected by a change in the rateable value or factors of a rating unit during the financial year in which the rates are set.[43] Once a rate has been assessed, a local authority must then deliver a rates assessment to a ratepayer to give notice of their liability for rates on a rating unit.[44]

First ground of review: the standard of unreasonableness

General legal principles

[140] The starting point under this heading is the Court of Appeal's judgment in *Wellington City Council v Woolworths New Zealand Ltd (No 2)*.[45] This is a seminal decision in New Zealand administrative law. The facts require only brief rehearsal. A coalition of commercial ratepayers sought to challenge rates fixed by the Wellington City Council ("the WCC"). The previous year the differential of the rates as between commercial to residential was 68:32. The WCC then adjusted this to 67:33. The

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42 Section 43(2).
43 Section 43(3).
44 Section 44(1).
45 *Wellington City Council v Woolworths New Zealand Limited (No 2)* [1996] 2 NZLR 537.

essence of the ratepayers' challenge was that the WCC had breached its statutory duties in not making a larger alteration to the differential and in striking the rates. At first instance Ellis J agreed. The Court of Appeal did not. Importantly for present purposes, it framed the enquiry this way:[46]

> "…[J]udicial review of the exercise of local authority power, in essence, is a question of statutory interpretation. The local authority must act within the powers conferred on it by Parliament and its rate fixing decisions are amenable to review on the familiar *Wednesbury* grounds. Rating authorities must observe the purposes and criteria specified in the legislation. So they must call their attention to matters they are bound by the statute to consider and they must exclude considerations which on the same test are extraneous. They act outside the scope of the power if their decision is made for a purpose not contemplated by the legislation. And discretion is not absolute or unfettered. It is to be exercised to promote the policy and objectives of the statute. Even though the decision maker has seemingly considered all relevant factors and closed its mind to the irrelevant, if the outcome of the exercise of discretion is irrational or such that no reasonable body of persons could have arrived at the decision, the only proper inference is that the power itself has been misused."

[141] Echoing the now familiar words of Lorde Greene MR in *Wednesbury*, the Court went on to say that proving a case of that kind required "something overwhelming".[47] It then listed various articulations of that standard. These included:

(a) "A decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question could have arrived at it";[48]

(b) a conclusion "so absurd that [the decision-maker] must have taken leave of his senses" and engaged in "a pattern of perversity";[49] and

(c) a decision which is "outside the limits of reason".[50]

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46 At 545.

47 At 545; *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 (EWCA) at 230.

48 *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (HL) at 410 per Lord Diplock.

49 *Nottinghamshire County Council v Secretary of State for Environment* [1986] AC 240 (HL) at 240 and 247-248 per Lord Scarman.

50 *Webster v Auckland Harbour Board* [1987] 2 NZLR 129 (CA) at 131 per Cooke P.

[142] Whatever the formulation, the Court of Appeal labelled the test "a stringent one".[51]

The applicants' position

[143] For the applicants, Mr Galbraith QC invites the Court to adopt a less rigorous standard of review than the traditional notion of *Wednesbury* unreasonableness. He recognises that, in the years prior to the Court of Appeal's decision in *Woolworths*, a number of successful challenges to rating decisions were mounted off the back of *Wednesbury*.[52] But he says the landscape of administrative law has changed. The standard of review to be applied is more contextual and nuanced than the "narrow" *Wednesbury* approach; the level of scrutiny will depend on the decision.

[144] In support, he cites the comments of Wild J in *Wolf v Minister of Immigration*:[53]

> "[47] I consider the time has come to state – or really to clarify - that the tests as laid down in *GCHQ* and *Woolworths* respectively are not, or should no longer be, the invariable or universal tests of "unreasonableness" applied in New Zealand public law. Whether a reviewing Court considers a decision reasonable and therefore lawful, or unreasonable and therefore unlawful and invalid, depends on the nature of the decision: upon who made it; by what process; what the decision involves (i.e. its subject matter and the level of policy content in it) and the importance of the decision to those affected by it, in terms of its potential impact upon, or consequences for, them. This is a rather long-winded way of saying, as Lord Steyn so succinctly did in *Daly*:
>
> > 'In administrative law context is everything.'"
>
> (Citations omitted)

[145] These comments were recently endorsed by the Court of Appeal in *Quake Outcasts v Minister of Canterbury Earthquake Recovery*.[54] There the Court noted that "the standard of review for unreasonableness may vary with context".[55]

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51 At 545.

52 Mr Galbraith cites *Mackenzie District Council v Electricity Corporation of New Zealand* [1992] 2 NZLR 41 (CA); *Electricity Corporation of New Zealand Ltd v Waimate District Council* HC Christchurch CP47/90, 27 March 1992; *South Waikato District Council v Electricity Corporation of New Zealand* HC Wellington CP16/93, 18 August 1994.

53 *Wolf v Minister of Immigration* [2004] NZAR 414 (HC).

54 *Quake Outcasts v Minister of Canterbury Earthquake Recovery* [2017] NZCA 332, [2017] 3 NZLR 486 at [73].

55 Ibid.

[146] Similarly, in *Watson v Chief Executive of the Department of Corrections* Dunningham J said:[56]

> "[25] …[A]s Professor Philip Joseph notes on this subject, "unreasonableness is the most problematic of the grounds of review". While earlier cases followed the stringent standard of irrationality, set in …*Wednesbury Corp*, it is clear that this test has been modified in subsequent decisions. The Courts now adopt a "somewhat lower standard of unreasonableness than 'irrationality' in the strict sense".
>
> [26] The correctness of a decision can be challenged where it is unreasonable in an administrative law sense. Examples of what constitute unreasonableness in the context of judicial review include the case where a decision-maker had more than one option, but the decision reached was unsupported by a reasoned justification. It may also include where the decision was so disproportionate in its weighing of competing factors, that the outcome was unreasonable…"
>
> (Citations omitted)

[147] Mr Galbraith also points to Palmer J's discussion of unreasonableness in *Hu v Immigration and Protection Tribunal*.[57] It is lengthy, but instructive:

> "[26] …[*Wednesbury* unreasonableness] has often been criticised by academic commentators and by courts. This may be particularly because the concept could be deployed to allow a court to overturn a decision with which it simply disagrees. That is not often seen as a legitimate judicial function on judicial review in New Zealand….
>
> [27] Defining unreasonableness with reference to unreasonableness is surely tautological. Lord Greene's intention appears simply to have been to preserve the rare possibility of successful challenge where the substance of a public decision is egregiously unreasonable. But, as Lord Cooke suggested it would in *R (Daly) v Secretary of State for the Home Department*, I agree the day has come that it is more widely recognised that *Wednesbury* was "an unfortunately retrogressive decision in English administrative law, in so far as it suggested that there are degrees of unreasonableness and that only a very extreme degree can bring an administrative decision within the legitimate scope of judicial invalidation". The problem is that little progress has been made in unpacking what unreasonableness means.
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> [28] The nature, rarity and high threshold for the success of unreasonableness as a ground of judicial review is reminiscent of, and conceptually related to, the nature, rarity and high threshold for the success of a factual determination constituting an error of law. In *Edwards v Bairstow*, a few years after *Wednesbury,* Lord Radcliffe identified three rare states of

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56 *Watson v Chief Executive of the Department of Corrections* [2015] NZHC 1227, [2015] NZAR 1049.

57 *Hu v Immigration and Protection Tribunal* [2017] NZHC 41, [2017] NZAR 508. See also the discussion of Venning J in *Jiang v Immigration Advisers Complaints and Disciplinary Tribunal* [2018] NZHC 3152, [2019] NZAR 363 at [54]-[59].

> affairs which would constitute errors of law: where "there is no evidence to support the determination" or "the evidence is inconsistent with and contradictory of the determination" or "the true and only reasonable conclusion contradicts the determination"…
>
> [29] …I consider the Supreme Court's reformulation of *Edwards v Bairstow* offers a better account of unreasonableness constituting illegality in judicial review than the circular words used in *Wednesbury*. Where a decision is so insupportable or untenable that proper application of the law requires a different answer, it is unlawful because it is unreasonable.
>
> [30] A decision may be unreasonable if it is not supported by any evidence, or if the evidence is inconsistent with or contradictory of it, or if the only reasonable conclusion contradicts the determination. The first two of these involve the adequacy of the evidential foundation of the decision. The last involves the chain of logical reasoning in the application of the law to the facts: if there is a material disconnect in the chain of logic from a fact or a legal proposition to a conclusion, a decision may be unreasonable and therefore unlawful."
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> (Citations omitted)

[148] Mr Galbraith marshals further judicial comment which suggests that unreasonableness bleeds into, if not mimics, an error of law enquiry:

(a) "Where inadequate weight is given to a relevant consideration which, in the context of the statute and the facts, is clearly entitled to great weight, then there will be an error of law which shades into grounds of unreasonableness";[58]

(b) "Where the facts cannot support a decision, judicial review is available on the partially overlapping grounds of error of law (on the basis that it must be inferred that the decision maker has misconceived the law) or unreasonableness";[59] and

(c) "[Unreasonableness] arises where there is no factual basis for the conclusion reached. It is closely aligned with the error of law identified in *Edwards v Bairstow*".[60]

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58 *CMP v Director General of Social Welfare* [1997] NZFLR 1 (HC) at 38 per Elias J (as she then was).

59 *Lewis v Wilson & Horton* [2000] 3 NZLR 546 (CA) at [63] per Elias CJ.

60 *Bell v Victoria University of Wellington* HC Wellington CIV-2009-485-2634, 8 December 2010 per Clifford J.

[149] Mr Galbraith encourages the Court to adopt Palmer J's formulation of unreasonableness and discard the traditional *Wednesbury* criteria. He accepts the Court must not substitute its own decision for that of the decision-maker. But he says his broader and contextual approach to unreasonableness does not infringe that principle. Instead, he articulates the Court's task in this way: to assess whether the Council has proceeded in accordance with any statutory criteria which apply and on a basis that can "properly be said to be within reason".

[150] Part of this enquiry is to ask whether the decisions in question resulted in ratepayers "being treated unreasonably inconsistently". Mr Galbraith points to the general principle that treating like cases alike and unlike cases differently is axiomatic of rational behaviour.[61] In *Manukau Urban Maori Authority Inc v Treaty of Waitangi Fisheries Commission* McGechan J put the issue this way:[62]

> "[50] It has been recognised, unsurprisingly, that a decision can be so discriminatory as between one person and another as to be unreasonable in the required sense. Inconsistency can be regarded as an element which may give rise to irrationality in result…"

[151] Mr Galbraith says this principle has "particular purchase" in tax cases[63] and, by extension, rating decisions. He also refers to the Privy Council's decision in *Waikato Regional Airport Ltd v Attorney-General*.[64] There the Ministry of Agriculture and Forestry ("the Ministry") decided to recover the cost of providing border control services at regional airports. At the same time, border control services were being provided free at metropolitan airports through a parliamentary appropriation for border biosecurity services. The regional airports objected to the differential charging scheme. The Privy Council held that the Ministry took into account an irrelevant consideration, noting that the scheme "may have been convenient and economical but

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61 Harry Woolf and others *De Smith's Judicial Review* (8th ed, Sweet & Maxwell, London, 2018) at [11-062].

62 *Manukau Urban Maori Authority Inc v Treaty of Waitangi Fisheries Commission* HC Auckland CP122/95, 28 November 2003.

63 Mr Galbraith cites the comments of the Court of Appeal in *Reckitt & Colman (New Zealand) Ltd v Taxation Board of Review* [1966] NZLR 1032 (CA) at 1042: "It is of the highest public importance that in the administration of such statutes every taxpayer shall be treated exactly alike, no concession being made to one to which another is not equally entitled".

64 *Waikato Regional Airport Ltd v Attorney-General* [2004] 3 NZLR 1 (PC).

it was not equitable".[65] Their Lordships concluded that it did not accord like treatment to parties "which were essentially in the same situation".[66]

[152] The Ministry's decision making power in that case was governed by a statutory provision which explicitly required it to recover its administrative costs by any method it believed on "reasonable grounds to be the most suitable and equitable in the circumstances".[67] Mr Galbraith recognises that neither the LGA nor LGRA contains a similar equity mandate. But he says that treating like cases alike is nevertheless fundamental to reasonable decision-making.

[153] In summary, he says the Council was under an obligation to act in such a manner as it considered to be appropriate "on reasonable grounds", taking into account the matters listed in s 101(3) of the LGA. Further it was required to take these principles into account on a substantive and logical basis, not just paying lip service. Mr Galbraith accepts that rating decisions do involve a discretionary and policy element. But he says the reasonableness of the rate should be measured in terms of cost and benefit and that the Council owes fiduciary and proportionality obligations in the exercise of its powers.

[154] In this context, Mr Galbraith says the Court should find that the Council acted unreasonably if its decision was "unsupported by evidence or logic such that [the] proper application of the law requires a different answer". He says the merits of the decision are relevant to this enquiry. In this way, the following circumstances may amount to unreasonable decision-making:

(a) where the decision-maker has more than one option but reaches a decision unsupported by a reasoned justification or evidence;

(b) where evidence supporting the decision is inconsistent with it;

(c) where the only reasonable conclusion contradicts the determination;

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65 At [74].
66 Ibid.
67 Biosecurity Act 1993, s 135.

(d) where the decision is so disproportionate in its weighing of the competing factors that the outcome is unreasonable;

(e) where the decision fails to treat like cases alike; or

(f) where, standing back and reviewed in context, the decision is not one open to a decision-maker acting reasonably.

Council's position

[155] Unsurprisingly, Mr Farmer QC, for the Council, takes a different view. He says the Court should adopt a strict *Wednesbury* standard when approaching the question of unreasonableness. Key to this, Mr Farmer says, is the principle of judicial restraint. That is a principle which assumes particular prominence in the review of local government rating decisions. As was said by the Court of Appeal in *Woolworths*:[68]

> "…[T]here are constitutional and democratic constraints on judicial involvement in wide public policy issues. There comes a point where public policies are so significant and appropriate for weighing by those elected by the community for that purpose that the Courts should defer to their decision except in clear and extreme cases. The larger the policy content and the more the decision making is within the customary sphere of those entrusted with the decision, the less well equipped the Courts are to reweigh considerations involved and the less inclined they must be to intervene."

[156] Applying these principles to the specific context of rating decisions, the Court went on to say:[69]

> "Rating is essentially a matter for decision by elected representatives following the statutory process and exercising the choices available to them. The breadth and generality of the empowering provisions applying to territorial authorities and affecting the general rate and differential… make it clear that rating was not intended to be a calculation of benefits and allocation of the incidence of rates by reference to the outcome. The very complexity and inherent subjectivity of any benefit allocation for these specified outputs points away from using relative benefit as a definitive criterion. The relative interdependence of the commercial and residential sectors suggests a degree of artificiality in any such exercise…
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> …

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68 At 546.
69 At 552-553.

> Rating requires the exercise of political judgment by the elected representatives of the community. The economic, social and political assessments involved are complex. The legislature has chosen not to specify the substantive criteria but rather to leave the overall judgment to be made in the round by the elected representatives."

Analysis

[157] *Woolworths* was decided against the background of the Local Government Act 1974 and the Rating Powers Act 1988: the forerunner legislation to the LGA and LGRA. But I consider the force of the Court's comments remains apt.

[158] Collins J recently reached a similar conclusion in *Meridian Energy Company v Wellington City Council*.[70] Discussing the legislation's predecessor, the Court in *Woolworths* noted:[71]

> "...[T]he provisions for making and reviewing rates are to enable the local authority to carry out its statutory functions and to perform the activities which it undertakes for the benefit of its community...
>
> The legislation proceeds on the premise that the wider substantive judgments [concerning the setting of, inter alia, differential rates] are made by the popularly elected representatives exercising a broad political assessment..."

[159] Collins J held that these comments "apply with equal force to the [LGRA]".[72]

[160] I agree. The comments cited from *Woolworths* above at [155]-[156] must still carry great weight. As I read the Court of Appeal's decision, it cautions against eager judicial intervention in local government decision-making. That conservatism is born out of the traditional and understandable reluctance of the Court to interfere with the decisions of democratically elected officials which, by necessity, involve the weighing and compromising of political considerations. By their nature, such decisions must be given greater scope and latitude. Thomas J explained this principle in *Waitakere City Council v Lovelock*:[73]

> "In some circumstances a departure from strict logic may be permissible on the part of an administrator without it being able to be said that the ensuing decision is unreasonable. Especially in a political context it may at times make

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70 *Meridian Energy Company v Wellington City Council* [2017] NZHC 48.
71 At 544-545.
72 At [69].
73 At 405.

> sense to permit the decision maker to compromise, defer, equivocate, hedge or circumvent an issue."

[161] This is a statement of general principle which sits outside the mechanics of the LGA and LGRA. Judicial reluctance to interfere in rating decisions, as articulated in *Woolworths*, must logically survive changes in the legislative scheme. This was recently affirmed by the Court of Appeal:[74]

> "Courts will not usually intervene in rating decisions on reasonableness grounds, but they respond readily to challenges for illegality."
>
> (Citations omitted)

[162] Further, in *Lovelock* Thomas J identified six factors which he considered underpin the Courts' recognition of the latitude to be given to local government decision-making.[75] I attempt to summarise them below.

(a) Local bodies exercise a constitutional role in the structure of the country's governance, exercising wide powers devolved from central government. In the exercise of those powers they have considerable capacity to choose between different courses of action and, as elected bodies, respond to the wishes of their constituency.

(b) A local body is representative and accountable to its electorate. It should be given as much latitude as is reasonably possible to perform its functions as it sees fit and in a manner which will meet both the needs and approval of those to whom it is politically responsible.

(c) The extent of administrative control imposed by statute often obliges local bodies to follow procedures designed to ensure consultation with persons affected by decisions and, following notice, with the public at large.

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74 *Mangawhai Ratepayers and Residents Association Inc v Kaipara District Council* [2015] NZCA 612, [2016] 2 NZLR 437 at [101].

75 At 413-415.

(d) There is genuine scope for differing views on almost every issue confronting a local authority. The issues are often complex and difficult. The means of obtaining economic efficiency and the achievement of policy or strategic goals in the most cost-efficient way are particular areas of local government activity where the Courts must be hesitant in assuming, much less asserting, authority to judge.

(e) Overly indulgent judicial intervention risks inhibiting administrators' efficiency in the performance of their statutory duties. The constant threat of judicial review will make them overcautious, conservative and reluctant to act. Judicial caution is required.

(f) The more remote the subject-matter from ordinary judicial experience, the more hesitant the Court should be in finding a decision irrational. This is based on common sense and an appreciation of the proper roles of government.

[163] For these reasons Mr Farmer argues the reasoning in *Woolworths* continues to apply. He says that none of the cases cited by Mr Galbraith as "lowering" the *Wednesbury* standard of unreasonableness was decided in the context of the review of rating decisions. It follows each is distinguishable on that basis. While I accept that submission as far as it goes, I do think it is neither helpful nor necessary to apply a strict *Wednesbury* formulation of unreasonableness. The practicality of enforcing that standard in the modern administrative law environment has properly been questioned. Indeed, more than 20 years ago Thomas J in *Lovelock* described the standard as inadequate and lacking coherence.[76] What constitutes unreasonable decision-making must necessarily be more flexible and context-dependent. Framing the enquiry in the language of *Wednesbury* will not, in my view, assist in undertaking a balanced review of the Council's decision-making relative to the APTR.

[164] That does not mean, however, I accept the essence of Mr Galbraith's submission insofar as it promotes a test for unreasonableness significantly lower than the *Wednesbury* threshold. Nor do I accept that the authority cited by Mr Galbraith

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[76] See *Waitakere City Council v Lovelock*, above n [28] at 402-408.

permits such a course. In this way, it seems to me that the applicants' argument is something like the ouroboros; that is the mystical symbol of the serpent consuming its own tail. Mr Galbraith urges the Court to discard the traditional *Wednesbury* formula for unreasonableness. He encourages focus on the context in which the decisions were made. I agree that context is the theatre within which reasonableness assessments should be made. But where that context involves local body decision making, especially where the decisions relate to the setting of rates, a higher threshold is called for. Judges must hesitate before interfering with the discretion of councils to set and impose rates. Put simply, it is not the task of Judges to engage in what is effectively political decision-making except in the most obvious of cases.

[165] This point was well illustrated by McGechan J in *Manukau Urban Maori Authority* where he said:

> "[48] The intensity of review by the courts when determining such "unreasonableness" varies somewhat according to the character of the subject matter involved. Where the decision under attack has been made by taking into account such matters as broad policy considerations or political considerations or the need to compromise differences or involves particular experience or instincts or like matters, there are practical difficulties for a court in itself weighing up such matters and deciding whether the decision concerned is or is not "unreasonable" in this sense. Broad intangibles and their outcomes do not lend themselves to close measurement by courts. At worst, the courts categorise the matter involved as "not justiciable" and decline involvement. At a lower but still broad-issue extreme, courts do not attempt the difficult and highly debatable task of close scrutiny, making only a broad appraisal usually favourable to the decision…"

[166] McGechan J went on to cite *Woolworths* as an example of such judicial reticence. Similar comment may be found in *Lovelock* where Thomas J said:[77]

> "…[T]he appropriate formulation [of unreasonableness] should be directly related to the duty in issue. A public authority is under a duty to act fairly and reasonably in the performance of its statutory function and powers… Parliament cannot be thought to have contemplated less in vesting the statutory power in the authority. It follows, therefore, that a public authority is in breach of its basic obligation whenever it acts unfairly or unreasonably. It must be emphasised at once, however, that this does not mean the Courts must or should intervene every time a decision might appear to be unreasonable. The latitude required for a public authority in carrying out its statutory function and demanded by a consideration of the factors discussed below remains critical. The challenged decision must still be one which is beyond the limits of reasonableness."

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77 At 412.

[167] More concisely, the Judge asked whether a reasonable council in the position of the particular council acting in fidelity to its statutory function could have reached the decision which that council reached.[78] Blanchard J considered that this was the precise enquiry undertaken by the Court of Appeal in *Woolworths*.[79] I consider it is appropriate to adopt this as the framework for my own assessment. Further, for the reasons outlined above, I agree with Blanchard J that rate-fixing is a particularly inappropriate area for Judges to be involved:[80]

> "The restricted test of what is unreasonable adopted [in *Woolworths* and *Lovelock*] serves to emphasise the inappropriateness of judicial intervention in the rate striking process of a local authority save where it is obvious that the council's process and its outcome is indefensible."

[168] It is with these principles in mind that I turn to consider the decisions in question. However, before doing so, I make one final point. That is to recognise the instinctive nature of judicial review. Referred to sometimes as "the inarticulate premise", Joseph poses the question in this way:[81]

> "The judge instinctively asks: *Has something gone wrong* that calls for judicial intervention and correction? If "yes", the judge must translate the instinctual impulse into "legal" language that can explain and justify the court's intervention."

[169] In an exchange between bench and bar Tipping J simply stated that "the Court must interfere where it must".[82] More candidly he said:[83]

> "You either feel driven to interfere or you don't, and that will depend on what sort of right it is and what the whole shebang is."

[170] All of this is simply to say, as Lord Steyn famously did, in administrative law context is everything.[84]

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78 At 419.
79 At 419.
80 At 419-420.
81 Philip A Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Brookers, Wellington, 2014) at [22.4.1].
82 *Ye v Minister of Immigration* Transcript SC53/2008, 21 April 2009 at [182]. See D Knight "Mapping the Rainbow of Review: Recognising Variable Intensity" [2010] NZ L Rev 393 at 400-401 for the transcript of the exchange.
83 Ibid.
84 *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532 (HL) at [28].

[171] I now proceed to address the various grounds of review advanced by the applicants in this case.

[172] As indicated, the applicants say the decision to impose the APTR was unreasonable based on five interlinked considerations. I proceed to address each in turn.

(a) First consideration – pass-through

[173] The applicants divide this argument on pass-through into two. First they say that, economically speaking, the APTR could not be passed through to customers. Secondly, they say that the Council's decision to impose the APTR was premised on the false assumption that it could.

(i) Economic viability

[174] In terms of the first point, the applicants place reliance on the evidence of Dr Small.[85] Broadly, he says that accommodation providers are unable to pass-through the APTR because it is a fixed cost. He draws a distinction with the traditional concept of a bed-tax; where, for example, all visitors sleeping overnight in commercial accommodation are charged a levy. This is a variable cost. It is incurred only when a room is rented out. If the room is not occupied the levy is not incurred. A night in a hotel room is a commodity which is lost once it is gone. In that sense, as Mr Galbraith observed in oral submissions it is unlike, say, aluminium, which retains its value. In pure economic terms, the imposition of a bed tax would push the supply curve upwards. The price equilibrium would also climb, but not as high. This reflects the fact that a portion of the tax would be borne by the accommodation provider and the balance passed through to the guest. The ratio depends on the sensitivity of demand; the steeper the demand curve, the more tax the provider has to absorb.

[175] But the APTR is fundamentally different from a bed tax. As a fixed cost it remains uniform regardless of how many rooms are rented. According to Dr Small, this means it cannot be passed through. He described it in this way:

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[85] Dr Small is an economic consultant specialising in competition and regulatory policy. He has particular experience in taxation economics.

> "35. … Changes in fixed costs do not affect the slope of the supply curve so they do not change the terms on which firms compete, which determine market prices.
>
> 36. Fixed costs affect shut-down and investment decisions because they affect the overall financial viability of a business: firms cannot remain in business if they persistently fail to cover their costs. While fixed costs affect how many firms can survive in an industry, they otherwise have no bearing on the market price, provided the market price is higher than the average cost. In this way, on a day-to-day basis, businesses will happily sell at prices just above their variable costs, whatever those variable costs are at a given time. Since the Targeted Rate does not affect variable costs, unless it drives some providers out of business it will not alter the retail pricing of accommodation. The full burden of the Targeted Rate will fall on those paying the Targeted Rate, rather than on visitors to Auckland."

[176] In his second affidavit, Dr Small accepts that there might be some pass-through of the APTR "in the long run". As firms targeted by the APTR become unprofitable and go out of business, room rates will rise. However, this would not be a desirable outcome or an efficient way to achieve pass-through, he says.

[177] Dr Small expresses the issue in another way. He says that "hotels are already maximising their revenues". Competition in the industry is intense. Rival suppliers offer similar products. Any comparative advantage (location or quality) is already priced into existing room rates. At any one time, a hotel will set its price as high as possible to maximise revenue. If it were commercially feasible for accommodation providers to increase rates in order to cushion the impact of the APTR, they would have done so already.

[178] Mr Hamilton explains it this way:

> "30. … Factors that influence the market price are the standard of accommodation including the individual guest room and general standard of the accommodation property, the level of guest services provided, the range of guest amenities provided, and the convenience of the location of the accommodation from the guests' perspective. The accommodation price charged is also strongly impacted by the pricing of direct and indirect competitors in the market, the level of overall demand for accommodation in the market, and the rate of increase in new supply of accommodation. The price of accommodation is not determined by the cost of operating or owning the accommodation assets. However, those operating and ownership costs determine the profitability of the accommodation assets after taking into account the costs of management of the business."

[179] In this context, Mr Hamilton describes the pricing of hotel rooms as "dynamic". It varies day to day and hour to hour. There are several factors in play:

(a) the extent of casual versus contracted guests;

(b) the level of sophistication of the technology or know-how of the operator; and

(c) the level of "compression" in the market (the general availability of rooms).

[180] Increasingly, accommodation providers employ software and revenue managers in an attempt to corral these factors and maximise revenue. This is known as "yield management". By way of example, effective yield management can see higher prices being charged for last-minute bookings on busy nights.

[181] Thus, the setting of the price for a hotel room is a complicated, nuanced and delicate process. Numerous factors influence the maximisation of revenue. The room price cannot simply be adjusted to include the APTR so that it is the customer who carries the additional cost. The applicants claim they have tried to but failed. They say that is because they are already maximising their room rates. In some cases, they have no control over the setting of room rates due to various contractual arrangements. They say the Council's remission scheme has been inadequate in addressing this. Further, the suggestion that accommodation providers can simply lift their rates on the night of major events is unworkable. Such events are few and far between and the gains made on those nights are already offset by slow business during the off-season.

(ii) The relevance of pass-through to the Council's decision

[182] The importance of all this, the applicants say, is that the Council's decision was premised on the assumption that accommodation providers could (and would if they wished) pass-through the cost of the APTR to customers. The applicants say it was an assumption which pervaded the Council's decision-making from the outset. Mr Galbraith refers to the following excerpts from the Supporting Document:

> "For most sectors of the economy benefitting from visitor spending the majority of revenue still comes from Auckland residents. If costs are passed on they will impact Auckland residents."

[183] And:

> "Costs can be managed by passing them on to guests, as occurs with bed night taxes in most other international cities. If the costs are passed on they will have nearly no impact on Auckland residents."

[184] Various comments attributed to the Mayor and other Councillors make it clear that the APTR, in its early stages at least, was promoted on the basis that it would be "effectively paid" for by visitors. Further, the justification for the targeting of accommodation providers was that, compared to other sectors, the lion's share of their revenue is drawn from visitors; some 99 per cent by the Council's estimate. This statistic was emphasised throughout the process. The applicants say it shows the extent to which the pass-through assumption underpinned the whole of the Council's analysis. As Mr Walker said:

> "It made sense to target accommodation providers because the connection between visitor attraction and their customer base is strongest."

[185] But, the applicants submit, accommodation providers are in fact unable to pass-through the APTR to their customer base. They say that when that fact is understood, the entire rationale behind the APTR collapses. The Council simply did not inform itself of the economic realities when deciding to impose the rate. Indeed, there is little suggestion they undertook any type of analysis on the pass-through issue before implementing the APTR. The applicants say this must be unreasonable.

[186] In response Mr Farmer points out that none of the applicants has suggested that they are unable to remain solvent while paying the APTR. Indeed, they confirmed this was not part of their case. The argument advanced on the pass-through issue can thus be summarised in the following way; that it is unreasonable to levy a new rate on the owner of a hotel because, depending on market conditions, that may lead to reductions in profitability in the short-term. Mr Farmer says that on that basis, it would never be open to a taxing authority to increase an existing tax.

[187] Further, he says the APTR was fundamentally premised on the fact that 99 per cent of revenue earned by accommodation providers is derived from visitors, who are to a considerable extent induced to visit through the efforts of ATEED. Prolonged and fine-tuned analysis of the economic viability of pass-through is a distraction. As Mr Mellsop said:[86]

> "39. … When considering the affordability of the APTR, it is important to recognise that destination marketing is an investment, the aim being to stimulate visitor numbers… APs are direct and material beneficiaries of this investment. Of course the APs would be better off if the destination marketing expenditure was socialised across all ratepayers, but the Council made the judgment this is not appropriate. In other words, we can view the introduction of the APTR as a mechanism to reallocate funding of destination marketing to those who receive the greatest and most measurable return on the investment…"

[188] This was the true basis of the APTR. The Council says it was not required to undertake the sort of sophisticated economic analysis on pass-through advocated by the applicants. It is also pointed out that these issues were not brought to its attention during consultation. Here the comments of Richardson P in *Woolworths* resonate:[87]

> "…[C]alculating benefits received from services is a complex task and developing the appropriate methodology to determine the level of benefits received by different groups is extremely difficult… [M]any services provided by governments give rise to both private and externality benefits and there is no uniform technical answer as to how particular services should be funded: it is the role of Councils to make appropriate expenditure and tax decisions which reflect the policy goals of the communities they serve…"

[189] Further, direct issue is taken with both aspects of the applicants' argument. Mr Farmer describes Dr Small's analysis as simplistic. His view of pass-through is short-term and direct. It entails an "immediate and across-the-board translation into increased room prices". Little regard is had to the possibility of adopting greater efficiency measures and reductions of cost. Many businesses faced with market constraints turn the other way in order to maintain profit. They reduce costs and increase efficiency. Dr Small does not address this possibility. Nor does he properly engage with Mr Mellsop's evidence that fixed costs are passed through over time and this is particularly true of industry-wide costs.

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86 James Mellsop is a consultant economist whose practice, NERA Economic Consulting, is involved in the application of economic analysis to competition and regulatory issues in the law.

87 At 551; endorsing the evidence of Professor Claudia Scott, a "recognised expert in the field of local government finance".

[190] More generally, Mr Farmer criticises Dr Small's approach as overly-theoretical and lacking in flexibility. The suggestion that the APTR cannot be passed on exists in a microeconomic vacuum. In reality, many firms engage in the "full price" method of price-setting, incorporating both fixed and variable costs when setting prices. Approaching the matter on a "real world" basis, Mr Farmer submits that the ability of an accommodation provider to pass-through new fixed costs cannot be dismissed so easily by Dr Small's single market price mode. As Mr Farmer puts it:

> "Just as there are times of diminished demand which may require an accommodation provider to reduce price until market conditions improve, so too an accommodation provider may need to absorb the cost of the APTR for a period and either reduce service or accept a drop in profitability until market conditions enable it to restore previous levels of price, service and profitability."

[191] He also disputes that the Council assumed the APTR would be passed on to guests. Despite the early language of its proposals suggesting that it "expected" visitors to bear the burden of the rate, the Council asserts that the possibility of this not happening was always appreciated. The APTR was considered and ultimately imposed irrespective of whether it could be passed on. Further, by the time the consultation document was issued, the Council's thinking had clarified. The consultation documents refer only to "if" the charges were passed on.

[192] Similarly, the Revised Mayoral Proposal recorded that the reduction of the APTR to funding only 50 per cent of ATEED was premised, in part, on "the relative affordability of the rate on different accommodation provider types, including the providers' ability to pass it on to their customers, if they decide to do so". Further, the Staff Report stated that "whether or not [commercial accommodation providers] choose to pass on the increased cost, and how, is entirely up to each… to decide individually".

[193] Taking all this into account, Mr Farmer says it is incorrect to assert that the Council set the APTR on the assumption that the accommodation sector would not bear the rate's economic impact. It considered that how or if the rate might be passed through to customers was entirely up to the providers.

(iii) Discussion

[194] I do not consider that any issue relating to the pass-through of the APTR renders the Council's decision unreasonable.

[195] I start with the economic viability of pass-through. It is far from clear to me that pass-through of the APTR is impossible. The utility of Dr Small's evidence, in my view, is limited. It may be based on sound microeconomic theory. But I agree with Mr Farmer that its applicability to real-world situations is fraught. Dr Small's opinion is based on the core proposition that, as a matter of economic principle, an increase in fixed costs will not affect the price of a supplied service or product. That may be so in an economic vacuum, but there is merit in the Council's submission that in the "real world" firms will adjust price to incorporate both fixed and variable costs. That approach appeals to both common sense and a robust view of commercial reality.

[196] Of course, that does not mean that the burden of the APTR may simply be passed on to the customer as some of the Mayor's and Council's early communications suggested. The early use of the "bed tax" analogy was both unfortunate and misleading. This was, to some extent corrected, when the consultation documents explained why a bed tax was not an available option. But the language of the Council's communications evolved so that by the time the consultation documents were published the language was a good deal more permissive and conditional. This included expressions such as, "if charges were passed on", "… if they wish, the accommodation sector can pass on …", "… if accommodation providers decide to pass on the costs [of the APTR] …". There are other examples.

[197] The pricing of accommodation is a delicate and refined process. As a significant increase in fixed cost, the APTR was always going to be commercially jarring. It is inevitable that providers experienced an initial drop in profitability. The collective experience of the applicants struggling to incorporate the APTR cost into their room rates is reflective of this. But in the longer term, I can see no reason, economic or otherwise, why its burden will not be incorporated into price and gradually passed through to the consumer, at least in part. Compensatory strategies to maximise revenue will need to be implemented, adjusted and refined. Some

providers with particularly tight trading margins may fail. But in time, a new equilibrium will be set. That is the reality of imposing any fixed cost, including a new rate.

[198] In any case, I do not think it is either appropriate or useful to engage in economic crystal-ball gazing, as the Court is essentially being asked to do. The imposition of rates on a targeted sector of the community is within the mandate of local government. Councils must be permitted sufficient latitude to identify appropriate funding sources for their activities. As was said by the Court in *Woolworths*:[88]

> "Rating requires the exercise of political judgment by the elected representatives of the community. The economic, social and political assessments are complex. The legislature has chosen not to specify the substantive criteria but rather to leave the overall judgment to be made in the round by the elected representatives."

[199] The political rationale behind the APTR has always been made clear. The accommodation sector enjoys the benefit of increased visitor spend. It receives the overwhelming majority of its revenue from visitors. Thus, even if the APTR is something of an imposte on that sector, that alone does not, in my view, render the rate unreasonable.

[200] I also agree with Mr Farmer that the APTR was never premised on pass-through being a certainty. As discussed it is true that the theme of its initial marketing and promotion was that the APTR would effectively be paid by visitors to Auckland. But that was never an immutable assumption. Indeed, the detailed description of the Council's decision-making processes, set out above, reveals the fluidity and evolution of the thinking behind the APTR. As it became clear to the Council that the burden of the APTR would not necessarily be passed on to the customer as a matter of course, it reconsidered aspects of the original proposal. Importantly, it reduced the rate by half. It also chose to mitigate any obvious or apparent unfairness in particular cases through the remissions scheme. The applicant's criticisms of that scheme are addressed in more detail later. For now it suffices to say that I reject the claim that the introduction of a remissions scheme was somehow an admission that the APTR was unreasonable.

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88 At 553.

If anything, the practical application of the scheme demonstrates that the Council was sympathetic to appropriate claims that the APTR caused financial hardship in some cases.

[201] Thus in summary, while some of the Council's communications, particularly at the early stages, were overly simplistic and carried the potential to mislead, it is plain that by the time of public consultation the Council understood that pass-through was not an inevitable or automatic consequence of imposing the APTR. Instead, it was up to the provider whether to absorb the cost or not.

[202] It is not the Court's task to interfere with the political assessments of local government provided the resulting decisions are within reason. That some accommodation providers may struggle, at least initially, to pass on the economic burden does not make the APTR itself unreasonable.

(b) Second consideration – contributions by accommodation providers to tourism

[203] The second complaint relates to the voluntary contribution which accommodation providers already make to fund the same activities ostensibly funded by the APTR. They say the Council failed to consider the reasonableness of the contribution the rate requires the provider to make to the funded activity. Large hotels, in particular, which pay a significant proportion of the APTR, already make substantial contributions to tourist promotion in Auckland.

[204] By way of example, the applicants point to the evidence of Mr Luxon. He described the efforts the second plaintiff, MCK, makes in promoting New Zealand, particularly Auckland, as a tourist destination. In summary:

(a) MCK operates a "centralised sales and marketing operation" out of its corporate office in Auckland, with satellite offices in Wellington, Christchurch and Sydney. Within that operation are teams specialising in targeting certain industries and geographic market sectors;

(b) Asian markets are particularly important to MCK. They accounted for one third of total room revenue in 2017. MCK sends sales

representatives to China twice a year for several weeks to meet with businesses, travel agents and tour promoters. MCK undertakes this marketing independently and at its own cost;

(c) MCK attends numerous international events and tradeshows to promote New Zealand as a destination. Some, but not all, are also attended by other organisations such as Tourism New Zealand, Air New Zealand, Destination Queenstown and ATEED;

(d) MCK often collaborates with event organisers. Typically, organisers approach MCK to ask them to provide rooms for staff on a discounted basis in exchange for promotional benefits. Examples include New Zealand Fashion Week, the New Zealand Cheese Awards and the Banksy Exhibition at the Aotea Centre; and

(e) within the wider tourism industry, MCK often supports "familiarisation" visits. These involve people visiting New Zealand to investigate hosting conferences or events here. MCK organises these visits, sometimes with the support of Tourism New Zealand or Air New Zealand and provides accommodation and meals.

[205] Similarly, Mr Ronfeldt explains that NZ Waldorf spends approximately three per cent of its revenue on marketing. Much of this expenditure funds international sales agents and attendances at tradeshows. Mr Fisher for the CP Group reports spending some $4 to 5 million on marketing. Similar examples are given in the evidence of Messrs Pollock[89] and Roberts[90].

[206] The applicants acknowledge that these accommodation providers engage in this form of marketing and promotional strategy for perceived commercial benefit. The primary goal, which benefits the whole sector, is to attract visitors to New Zealand. As Mr Luxon said:

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89 Area General Manager of IHG Hotels (New Zealand) Ltd which in Auckland operates the Crowne Plaza Hotel and Holiday Inn Auckland Airport.

90 Chief Executive of TIA.

> "The first step is to attract the visitors; only then can we hope to have them in our hotel."

[207] The relevance of this evidence, according to the applicants, is that the accommodation sector, particularly large hotels, already makes a significant contribution to tourism promotion. Often this is in relation to specific events which ATEED is involved with. The applicants' investment generates the same benefits ATEED's spending is intended to generate. Furthermore, accommodation providers like these invest in this way to a much greater extent than other sectors, such as retail, which supposedly also benefits from ATEED's spending.

[208] And so it is that the applicants say this was something which the Council failed to take into account when imposing the APTR. They say that any reasonable local authority in the Council's position would have made an attempt to inform itself of the value of the accommodation industry's existing contribution to tourism promotion and destination marketing, before looking to impose a rate intended to achieve the same purpose.

[209] Mr Farmer submits that the accommodation providers' own contribution to tourism promotion and major events was not something the Council was obliged to consider. The issue for the Council was how to fund a specific area of expenditure. It is not relevant to the Council's decision making that certain ratepayers may carry out similar activities for similar purposes. As Mr Armitage[91] of ATEED commented:

> "I do not agree with the assumption… that this is a zero-sum game where efforts made by the accommodation sector mean that those undertaken by ATEED are unnecessary or have no effect. While ATEED acknowledges that some commercial accommodation providers undertake their own tourism promotion activity, this is often directed at attracting guests to their accommodation once they have chosen to visit Auckland. On the other hand, ATEED's activity in terms of growing the visitor economy is essential to market Auckland as a whole and to generate demand for the tourism sector as a whole. This demand can in turn be leveraged by individual commercial accommodation providers…"

[210] Thus the Council says that the applicants' focus on tourist promotion is different in nature to ATEED's. It is not a duplication of effort. ATEED is not being funded twice for the same purpose. In any event that some commercial

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[91] General Manager, ATEED.

accommodation providers also carry out promotional activities does not remove the need to fund ATEED. If anything, it supports the Council's case that commercial accommodation providers are specific and identifiable beneficiaries of visitor promotion activities.

Discussion

[211] It is apparent that many accommodation providers allocate a proportion of their marketing budget on attending tradeshows and otherwise promoting themselves to overseas visitors. On the applicants' evidence I accept there are clear and obvious commercial imperatives for them to do so. I accept that the examples cited by the applicants are not isolated. I also accept that there is no evidence that the Council consciously turned its mind to this issue when deciding to impose the APTR. But it does not necessarily follow that the Council acted unreasonably.

[212] The applicants say that their tourist promotion expenditure is primarily aimed at attracting visitors to New Zealand rather than promoting their particular accommodation services. They claim there is a duplication with ATEED's spending because that is also ATEED's focus and purpose. In my view this is a distinction without a difference. The accommodation sector must necessarily attract visitors to New Zealand before it can market its services to them. It is unlikely that someone planning on coming to New Zealand would do so in the first instance because they were attracted by a particular hotel rather than the various tourist attractions available throughout the country.

[213] The underlying point is that on any commercial analysis it would make no sense for individual providers to market their product, say a hotel, without first marketing New Zealand as a destination. Tourists have to get here first. Heightened demand for New Zealand as a destination will necessarily increase the number of visitors seeking accommodation in Auckland. For that reason I consider the claims of "duplication" of spending and effort are largely illusory. ATEED's marketing successes will benefit local providers. This success will supplement individual marketing strategies. Promoting New Zealand as a tourist destination is not a zero-sum game.

[214] There is also another way to view ATEED's activities. If they are successful in attracting visitors to Auckland the accommodation sector will benefit. If there really is a duplication of effort in the sense of ATEED undertaking the same marketing strategies as the providers, one might have thought this would relieve the pressure on providers to market their product.

[215] So while I accept that the Council did not explicitly consider the accommodation sector's spending on promoting New Zealand as a tourist destination, for the reasons set out above I have concluded this did not render the decision unreasonable. Put simply, the existing contributions voluntarily made by the sector were neither relevant nor significant to the making of the decision.

(c) Third consideration – benefits provided by ATEED

[216] The stated purpose of the APTR is to fund 50 per cent of ATEED's tourism promotion and major events spending. But the applicants say the Council failed to inform itself of the "actual and measurable benefits" this spending would generate for the ratepayers. Relatedly, they claim that in any event such benefits are limited. They do not say ATEED serves no useful purpose. But they do say it is limited and the Council made insufficient efforts to quantify that benefit.

[217] In regards to the first point, the applicants point to the Staff Report. There the Council noted that the activities which ATEED undertakes in the visitor attraction area strongly support the outcomes listed in the LTP:

(a) promoting Auckland as a business and leisure visitor destination and attracting visitors to attend events that are unique to Auckland;

(b) providing opportunities to showcase Auckland's unique arts and culture through support for and delivery of a portfolio of major events;

(c) growing Auckland's visitor economy through the promotion of and support for a range of culturally focussed visitor products; and

(d) celebrating and showcasing Māori culture and identity through major sporting and business events.

[218] The Staff Report then went on to state:

> "Some of these outcomes relate to the overall prosperity and cultural richness of the city, and suggest a general rate mechanism may be appropriate. Others are more focussed on the economy and support the concept of a targeted funding mechanism.
>
> The intent of the proposal is to make an appropriate shift of the burden of paying for visitor attraction and major events from the general ratepayer. Commercial accommodation providers receive direct benefit from the expenditure and they can decide whether to absorb the increased cost or pass it on to their customers…"

[219] The Staff Report then claimed that data collected by ATEED supported the proposition that its activities attract visitors to Auckland. It used the year 2015/16 as an example. During this period the Auckland Convention Bureau generated an estimated 107,195 visitor nights. Major events led to 282,150 additional visitor nights. $43.7 million additional gross domestic product was received from visitor expenditure. But the applicants say these figures are unsubstantiated. The Staff Report does not explain how they were calculated. There is no accompanying explanation or analysis.

[220] Mr Armitage gave some detail in his evidence. He said that the relevant reports were prepared by Fresh Info Ltd in relation to annual evaluations of ATEED's events portfolio and specific evaluations of some major events.

[221] But the applicants, referring to Mr Hamilton's evidence, challenge this. They make the following criticisms:

(a) the reports are at a high level and in summary form; only a few specific examples were provided;

(b) the reports were not prepared for the purpose of the APTR; and

(c) the reported impacts were measured against the counterfactual of the event not occurring; they measure the impact of the event itself rather than ATEED's spending on the event.

[222] Thus the applicants say that the Staff Report, while providing a significant volume of material, makes no attempt to undertake any meaningful analysis of the extent to which ATEED's spending generates any increase in room nights. Instead, the Council has proceeded on the assumption that there is a strong relationship between ATEED's spending and the potential benefits to accommodation providers. The applicants say this assumption was misplaced. Mr Galbraith described the approach as "a crude and unsophisticated analysis".

[223] That is because ATEED was established for the benefit of Aucklanders generally, rather than any particular commercial tourist sector. Indeed ATEED itself recognises that major events contribute to the regional economy and may be a catalyst for building infrastructure and social change. Such objectives are broad and deliver benefits across all of Auckland.

[224] Further, some of ATEED's activity is said to be focussed directly on Auckland residents. Examples include the Auckland Lantern Festival, the Pop-up Globe, New Zealand Fashion Week, Diwali, Splore Music & Arts Festival and Waiheke's Headland Sculpture on the Gulf. These are not events which materially increase visitor numbers. ATEED also seeks to attract international students, another activity which provides no benefit to accommodation providers. Conversely, there are some major events which do attract visitors but in respect of which ATEED can take no credit. They would have taken place anyway. Examples include international sports matches and large concerts.

[225] In a similar vein, the applicants point out that Fresh Info Ltd's reports reveal that the return on regional investment for ATEED's 2015/16 portfolio was 78 per cent; for 2016/17 it was 96 per cent. This means that the ratio between the contribution to regional GDP and regional investment into the relevant events was negative. As Mr Hamilton observed, that must mean the rationale for such events is that they benefit Aucklanders generally rather than just the tourism sector.

[226] In any case, much of the focus on ATEED's spending is on increasing room nights. But the applicants argue that such an increase, even if attributable to the activities of ATEED, may not necessarily benefit them. For example major events may displace visitors who would otherwise have visited but are reluctant to do so when the city is full. Further, to the extent that ATEED does attract a major event, this will often mean that it is not held elsewhere in the country. Most major commercial providers such as hotel groups have accommodation businesses in other main centres. They gain nothing when an event is moved from one centre to another.

[227] Further statistics are advanced by the applicants:

(a) in 2016 five of the highest 10 revenue per nights were recorded in traditionally busy months with no special events;

(b) the accommodation sector receives only 8 to 8.5 per cent of the total visitor spend; and

(c) only 25 per cent of total guest nights spent in Auckland are spent in commercial accommodation.

[228] In summary the applicants say that while CCOs such as ATEED may have a beneficial effect, the Council failed to undertake a meaningful assessment of ATEED's spending and the benefits derived by accommodation providers. Instead it relied on reports prepared for other purposes which led it to make false assumptions. This cannot provide a reasonable basis for imposing the APTR.

[229] In response Mr Farmer makes the point that the applicants' claim is founded on a false premise: namely that there must be a proportionate relationship between the burden of the rate and the benefit received by the ratepayer. But the nature of a rate is akin to a tax. It is not a payment for services.

[230] Mr Farmer submits that, in any case, it is difficult to undertake a "benefits analysis" with any degree of precision. It would have been all but impossible for the Council to have identified and quantified the distribution of actual and measurable

benefits across all its activities as the applicants contend. And even if that was theoretically possible, it would be highly impractical in the context of statutory financial planning processes and deadlines.

[231] Furthermore, Mr Farmer points out that the Council's decision to impose the APTR should not be set aside as unreasonable simply because it failed to inform itself of the actual and measurable benefits to accommodation providers. Such a threshold is too high. The requirement on the Council is that contained in s 101(3)(a)(ii) of the LGA; consideration of the "distribution of benefits between the community as a whole, any identifiable part of the community, and individuals". The Council took into account these requirements as is evident from the conclusions in the Staff Report. These were conclusions plainly open to the Council to make, says Mr Farmer.

[232] In addition, Mr Armitage claims that various events would never have been held in Auckland were it not for ATEED's investment. These include the World Masters Games 2017, the NRL Auckland Nines, multiple Volvo Ocean Race stopovers, the third test during the DHL Auckland Lions Series 2017, the New Zealand Women's Open, the NRL Double Header 2018, the Tonga v Australia rugby league match in 2018 and the Rugby League World Cup 2017. Each of these generated numerous visitor nights. As well, ATEED often uses its influence to schedule events in the shoulder season so as to minimise the displacement of visitors and the overlap of events.

[233] In summary, Mr Farmer says that, where appropriate, the Council looked to ATEED's past performance as a guide to where the likely benefits of future funding would lie. The accommodation sector's own investment in visitor promotion reveals there must be a benefit. But the APTR was never intended to be a payment for past or future services provided by ATEED requiring quantification with any sort of precision. The Council's assessment of where the benefits of ATEED's efforts lay was set out in the Staff Report. The conclusion was that ATEED's activities, designed to increase visitor numbers, would especially benefit accommodation providers on the basis that many visitors stay in commercial accommodation. That cannot be an unreasonable conclusion Mr Farmer says.

Discussion

[234] To place this aspect of challenge in perspective I preface the discussion with the following comments from *Woolworths*:[92]

> "[The] approach [to determining rates] does not require a close correlation between benefits provided to the particular sector and rates levied on that sector. Given the nature of the imponderables involved it does not call for an elusive search for a direct relationship between services and benefits."

[235] I agree with Mr Farmer that this aspect of the unreasonableness challenge involves the weighing of imponderables. Calculating the direct economic benefits of a targeted rate is inherently difficult. It is next to impossible to assess the benefits with anything approaching precision. In these circumstances, the Council's failure to do so cannot be regarded as unreasonable. Any attempt would have been both onerous and necessarily imprecise. Furthermore, the nature of the benefit provided by the APTR will always differ from ratepayer to ratepayer, making any attempt to compare and assess the distribution inherently arbitrary. Further, overlap between private and public benefit will be inevitable. These factors operate to make any assessment of benefit necessarily broad and high level.

[236] Where empirical data is reasonably available, such as the additional visitor nights generated by major events, the Council referred to it. But it never claimed a direct cause and effect. It always acknowledged it was difficult to quantity the benefit generated by ATEED's spending or to isolate that investment from the voluntary marketing initiatives of other providers. As such, the Council was entitled to assess ATEED's activities in a more global fashion; the outcomes which it was supporting or contributing to and to make an appropriate judgement as to where it believed the benefits lay.

[237] It is also of relevance that, despite criticising the Council for not properly calculating the benefit, the applicants have not suggested a mechanism by which this could be achieved.

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92 At 546.

[238] I accept that the Council proceeded on something of an assumption when imposing the APTR. It assumed that its spending benefited accommodation providers by attracting more visitors. But it was an assumption informed by past experience and logic. While I accept the Fresh Info Ltd reports may not have provided hard data proving ATEED's spending generated additional visitor nights, it clearly indicated that major events did. Given one of ATEED's primary functions is to promote Auckland as a host venue for major events, it is not difficult to see the positive implications for accommodation providers brought about by its spending. It follows I do not agree that the assumption upon which the Council proceeded was "false".

[239] In any event, the Council's evidence pointed to the positive impact ATEED's activities have had on attracting additional visitors to Auckland. Two particular areas of expenditure, both discussed in the Staff Report, are highlighted. These are tourism and major events.

[240] As for tourism, the Staff Report made reference to specific advertising campaigns in Australia with partners such as Tourism New Zealand and Flight Centre. During the year to date, leisure visitors from Australia increased by 7.8 per cent. Over the four-year partnership with Flight Centre the bookings increased by more than 50 per cent over the growth in underlying visitor numbers. Mention was also made of growing relationships in the United States and China. A marketing and sales partnership with Virtuoso saw a growth in spend from their clients in Auckland of 36 per cent over three years. During the same period ATEED attracted more than 10 business delegations and investor groups from China.

[241] As for the major events, I agree with Mr Farmer's submission that the Staff Report did not seek to attribute the additional visitor nights solely to ATEED. ATEED's activities, including building and delivering a portfolio of world class major events, would have been a contributing factor. But given the nature of visitor promotion, ATEED's expenditure would not have been the only contributor.

[242] Similarly, much of ATEED's spending would benefit both the accommodation sector and the regional economy. But any overlap of benefit does not operate to reduce the benefit to local accommodation providers. Nor is it helpful to argue otherwise

without embarking on a detailed analysis of trickle-down economics. While other sectors may benefit from the accommodation providers' payment of the APTR, that is justified on the basis that accommodation providers benefit considerably more from visitor spend than other industries. In any case, the extent to which ATEED's spending benefits the local economy in general is now reflected in the fact that it is still funded, in half, by the general ratepayer. That may not have been the basis upon which the APTR was originally formulated, but it is how it operates now.

[243] It is apparent that ATEED's spending, as might be expected, is a positive factor operating to attract visitors to Auckland. It is neither necessary nor helpful to go further. That is not only due to the economic and practical difficulties in calculating the benefit with any degree of precision, but also, any attempt to do so risks misdirecting the enquiry towards the utility of ATEED itself. That is beyond the scope of this judicial review. Such an approach risks extending the enquiry into how the Council operates and structures its internal arrangements.

[244] In conclusion, I consider that this aspect of challenge is also without foundation. There is no requirement to demonstrate a proportionate relationship between a ratepayer's liability and the benefit they receive from the rate itself. In the present case, accommodation providers were targeted by the APTR to partly fund ATEED on the assumption that they would benefit from ATEED's spending more than any other sector. That assumption was neither inherently illogical nor factually flawed. While it is correct that the Council did not undertake a fine-tuned or precise cost benefits analysis that was because to do so would have been fraught and all but impossible. It was not unreasonable for the Council to conclude there was a connection between ATEED's spending and a future, albeit incalculable, benefit to the commercial accommodation sector.

(d) Fourth consideration – horizontal inequity

[245] The APTR is a form of tax. The applicants claim that one of the core economic principles applicable to taxation is horizontal equity. As Dr Small observed, "parties in similar positions should pay similar taxes".

[246] The applicants' position is that like cases should be treated alike. They claim the APTR does not achieve this equity. That is said to be due to a lack of meaningful analysis undertaken by the Council before imposing the APTR. The inequitable result has manifested itself in the following:

(a) different parts of the tourism industry are treated differently;

(b) informal accommodation providers were excluded from the APTR in 2017/2018 and then treated differently in 2018/2019;

(c) basing the APTR on capital value creates significant arbitrary differences, particularly in respect of strata units;

(d) backpacker accommodation is excluded; and

(e) all of the above are exacerbated by the operation of the remissions scheme.

[247] The applicants' first objection under this head is that the APTR applies only to accommodation providers. This is particularly unfair given the proportion of tourism revenue received by the sector. The Council estimates this at 10 per cent. Mr Hamilton puts the figure at around eight per cent.

[248] In either case, the APTR requires accommodation providers to fund 50 per cent of ATEED's spending. This is despite the fact that they already invest millions of dollars in attracting visitors to Auckland.

[249] The applicants acknowledge that accommodation providers earn a high proportion of their revenue from tourism when compared to other sectors. But they say this does not justify imposing the burden of the APTR on them.

[250] The applicants also contend that the APTR creates inequity within the accommodation sector. For example, despite deriving a benefit from ATEED's spending, informal accommodation providers were excluded from the first iteration of the APTR. This compounded a pre-existing inequity because many properties used

for informal accommodation are rated residential rather than commercial. Furthermore, being excluded from the APTR gave informal accommodation providers an unfair competitive edge.

[251] And yet, despite acknowledging this inequity, Mr Galbraith says, the Council went on to impose the rate anyway.

[252] He maintains that the amended regime introduced for 2018/2019 is insufficient to address this inequity for three principal reasons. First, he says the decision was inadequately informed. The Council faced difficulties in terms of identifying properties used by the informal accommodation sector. Secondly, the grading of informal accommodation providers based on their occupancy is inherently unfair. Other accommodation providers are rated flatly, regardless of their levels of occupancy. Thirdly, the scheme adopted by the Council also creates "odd incentives". The creation of tiered categories refined by usage allows, if not incentivises, informal providers to adjust their usage to maximise revenue in a way other commercial operators cannot. This will likely result in informal providers electing to enter the market at times of peak demand when competition between all commercial providers is at its greatest.

[253] A further inequity arises, Mr Galbraith says, in relation to properties divided into strata titles. The APTR is assessed by reference to a property's capital value. But the value of the sum of individual strata titles is typically higher than a hotel property owned in-one-line. That is intuitive; strata titles may be sold separately. The result is that a hotel divided into strata titles is rated significantly higher under the APTR than a comparable hotel which is not. The applicants predict that many owners will withdraw their strata units from hotel pools due to the reduction in profitability. In turn, this will increase the remaining owners' share of the pool's common costs, including the APTR, further reducing profitability. This is a business risk which the Council did not take into account when assessing the rate by reference to capital value. More generally, a property's capital value does not convert to room nights, which the APTR is intended to target. In essence, the Council has imposed a rate on direct competitors which varies significantly between them in a way they could not have predicted or planned for.

[254] There is another related, but somewhat discrete, objection. Backpackers are excluded from the APTR despite competing directly with other accommodation providers.

[255] Mr Galbraith also draws attention to the fact that the APTR applies to property regardless of who owns or operates the accommodation business associated with the property. This is said to result in two "obvious injustices":

(a) first, owners who have leased their property to a third party or hired accommodation managers may be required to pay the APTR despite having nothing to do with the accommodation business; and

(b) secondly, owners who have committed significant amounts of their capacity at fixed prices may have to bear the APTR as a dead weight cost.

[256] The Council acknowledges these are unfair outcomes. It has attempted to address any unfairness through the remissions scheme. In 2017/2018 some 35 per cent of all properties subject to the APTR were granted a remission. But the applicants say this statistic is a telling illustration of the scale of the problem. Further, they say in many cases the remissions scheme does not operate to remedy the unfairness. Anecdotal evidence was produced in support. In several cases, hotel owners who lease out their premises to third parties and are not involved in the operation of the business, have apparently unsuccessfully applied for remissions. In such instances, the Council has responded as follows:

> "The introduction of the APTR is expected to have an inflationary effect on hotel prices. While the operators of [the hotel] are not liable for the rate, it is to be presumed that they will consider the change in market conditions when setting their revenue expectations. In addition, as noted above, you as the landlord have the ability to object to the revenue expectations set by the operator."

[257] Emphasis is also placed on the commercial competence and experience of the parties. By way of illustration, the Council rejected an application for a remission in part because:

> "… both parties to the agreement are experienced commercial parties in this industry. It is therefore reasonable to expect they would have received appropriate advice regarding the allocation of risk. If no clauses were included to allow the owner to share the risk of increased costs with the hotel operator, the council does not consider it appropriate to require general ratepayers to subsidise these commercial decisions through a remission."

[258] Mr Galbraith says this approach is inconsistent with how the Council has explained eligibility for rates remission in its published materials. Moreover, the examples cited reveal a problem with the APTR as a whole. The remissions policy was represented as an attempt to address unfairnesses inherent in the rate. But the policy itself was opaque, discretionary, not consulted on and ineffective. Worse still, he says, the policy adopted for the 2018/2019 year was later narrowed. A remission is now available only to those accommodation providers who own two units or fewer. Furthermore, it phases out over 10 years. The policy thus continues to fail to meet its stated objective.

[259] In response, Mr Farmer's broad position is that the Council decided the APTR would not apply to some accommodation providers for rational and clearly articulated reasons. This was an explicit policy choice. The underlying reasons were set out in the Staff Report.

[260] He challenges the applicants' submission that informal accommodation providers are in a "like" situation to hotels and motels and should be rated in the same way. Their different treatment under the APTR reflects an obvious difference. Properties in the informal accommodation sector are commonly rented out for only part of the year (often during the holiday period). Otherwise they revert to normal residential use. It would be inappropriate to treat them as full-time professional operators.

[261] As for the claim that the APTR applies to the owner of the property regardless of who controls or profits from the accommodation business, Mr Farmer points out

that the Council's hands were tied. The LGRA defines who the ratepayer is.[93] The various peculiarities, personal circumstances and contractual relationships which lie behind the ownership and operation of the properties in the accommodation sector could not have been taken into account when setting or assessing the APTR. He says it cannot have acted unreasonably in failing to set a rate which it was not legally able to set.

[262] The applicants are said to be well aware of the difficulty this poses. For that reason, they attempt to impugn the Council's remission policies on the basis that they were an integral part of the APTR mechanism. But Mr Farmer takes a different view. The Council acknowledged that financial hardship in paying rates could be addressed through rates remission in certain circumstances. But, logically, that is a separate and subsequent step in the process. Given the applicants do not challenge the formation of the remission policy itself, it is all but irrelevant to any assessment of the reasonableness of the APTR.

[263] When setting the APTR, the Council indicated it would consider applications for remissions under the Miscellaneous Scheme. It said nothing about the implementation of that Scheme, the circumstances under which a remission would be available nor that the APTR was predicated on such a possibility. Put simply, the decision to set the APTR was not conditional on remissions being available in any particular situation, or at all.

[264] Remission of the APTR has been granted in circumstances where the Council considers it appropriate. Initially that was under the Miscellaneous Scheme. But that was always intended to be a temporary measure. Now that the issue has been reviewed and formalised, the availability of remissions has been narrowed. That too was an informed policy decision open to the Council. In the absence of direct challenges to these policies, legally they stand. Any complaint by the applicants that they fail to address the "unfairness" of the APTR are thus irrelevant.

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93 Sections 10, 11 and 12.

Discussion

[265] Again, for reasons of context, I start with the following comments from *Woolworths*:[94]

> "… [I]t is implicit in the scheme of the legislation that a rating system in its diversity remains primarily a taxation system and not a system inherently based on a principle of user-pays… [T]he authority to adopt a differential system for its general rate assumes the entitlement to discriminate as between types of groups or properties. *The very concept of differential rates involves casting a heavier burden than justified solely by relative values on one sector rather than another*… The legislation permits a territorial authority in making those choices which impact on the incidence of rates to make its own judgment as to what is appropriate and equitable."
>
> (Emphasis added)

[266] This statement of principle is equally applicable under the current statutory scheme.

[267] I have already rejected the applicants' claim that it was unreasonable for the Council to require the accommodation sector to carry the burden of the APTR with little or no corresponding benefit. To a considerable extent, that finding addresses the criticism that the APTR led to inequity as between that sector and others said to benefit from visitor spending. The comments of the Court of Appeal reinforce that finding. Put simply, it was entirely open to the Council, in principle, to impose a targeted rate on accommodation providers. Its reasons for doing so, and the processes it undertook in that regard, have already been covered in this judgment.

[268] That leaves the issue of horizontal inequity. Before discussing that question, the comments of the Court in *Woolworths* that the Council is entitled to "make those choices which impact on the incidence of rates to make its own judgment as to what is appropriate and equitable" are apt.[95] I accept that, if the effect of the APTR was blatantly iniquitous or resulted in wholly unprincipled differential treatment of parties in similar positions, this might be an indicator of unreasonableness. But it does not stand to reason that, just because there is some horizontal inequity, the underlying decision to impose the rate must have been unreasonable. That would be to subvert

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94 At 544-545.
95 At 545.

the powers granted to the Council under the legislation. Something more is required than simply apparent unfairness.

[269] In this regard, I do not think the differential treatment of informal accommodation providers under the APTR can be impugned as unreasonable. I agree with Mr Farmer that the way in which informal accommodation was eventually captured within the APTR demonstrates the Council was responding to the consultation process as it should.

[270] The principled basis for differential treatment was set out in the Supporting Document during the consultation process. At that time the Council's position was that such "mixed-use" properties should not be subject to the APTR. When a significant proportion of the submissions challenged this, the Council modified its view. It responded to the complaints. It amended the APTR for 2018/2019. From that point informal accommodation providers were rated as "business" depending on commercial use. I agree with Mr Farmer that this change in approach demonstrates the Council's willingness to adapt in response to the consultation process.

[271] It is apparent that initially the Council did not have sufficient information to include informal accommodation providers. But the Council might rightly have been criticised for being hasty, premature and potentially imprudent had it included this group without further analysis. Nor do I think it can be said that, given the need to defer including informal accommodation, it was unreasonable to "plough on ahead" and impose the APTR for 2017/2018 solely on formal accommodation providers. It is clear that the decision to impose the APTR was an evolving process. The version of the rate imposed for 2017/2018 was never intended to be the finished product. There must be a certain practical fluidity and flexibility in local government decision-making. This is reflected in the power to amend rates. To require the Council to delay imposing the APTR on accommodation providers while it undertook more detailed research and analysis on the informal sector would risk eroding that principle.

[272] I also agree with Mr Farmer that the way the informal accommodation was eventually assessed under the rate (for 2018/2019) was a justified exercise of its judgement as to the appropriate incidence of liability. The decision to categorise

informal accommodation providers depending on how many nights a year their properties are occupied was both rational and principled. There are clear differences between these providers and others, such as hotels. One group has a residential use. The other does not.

[273] Much of the applicants' submissions on this topic focussed on the claimed competitive advantage given to the informal accommodation sector through its supposedly more lenient treatment under the APTR. These complaints are not well founded. Any competitive edge exists regardless. The APTR merely reflects the status quo as between the sectors. Those who rent their property on Airbnb or Bookabach will be able to operate with more agility and lower costs than hotels and motels. Further, they are able to exploit periods of high demand. Logically, informal accommodation providers will attract a broad cohort of clients; local and international visitors.

[274] The APTR did not create these commercial advantages. They existed before the APTR was set. Imposing a graduated version of the APTR on informal accommodation was plainly necessary given the commercial reality of the sector. Rating informal accommodation providers on the same basis as commercial operators would have been unfair given the extent to which they also have a residential use. It is not helpful to speculate that those in the informal accommodation sector will manage their bookings to maximise their returns at the upper limits of the accommodation grades. And even if that was the case it would serve to limit the supply of informal accommodation, thereby increasing demand in other sectors including those in which the applicants operate.

[275] That the Council has experienced some difficulties in identifying those in the informal accommodation sector is also of little moment. The process of identification was always going to be a continuing and evolving process. In any event, difficulties of that sort do not mean the decision to impose the APTR on informal providers was unreasonable.

[276] In a similar vein, I do not accept the decision to exclude backpackers from the APTR may be impugned as unreasonable. There was a clear, logical commercial basis

for this decision. Backpackers generally attract "low budget" clients who tend to be more price sensitive. While the Council's weighing of economic factors might be questioned, its decision cannot be impugned as unreasonable. The decision reflects a balancing of obvious competing commercial imperatives, well within the exercise of its discretion as a local body.

[277] It follows I have reached the view that none of the inequities claimed to result from the APTR renders the Council's decision unreasonable. But it does not follow I agree with Mr Farmer that the issue of remissions should be excluded from my analysis. The availability of remissions under the remissions policy clearly formed part of the Council's decision-making process. It was anticipated that ratepayers under the APTR would make claims for remissions. Initially the Council relied upon the availability of the Miscellaneous Scheme to address aspects of the APTR which led to unfairness; specifically property owners who were locked into leases or were not involved in the accommodation business operating within their premises. After that it intended to replace the Miscellaneous Scheme with a more tailored and focused remissions scheme for the APTR.

[278] It follows there is a certain artificiality to claim that the availability of the various remissions policies was not an operative factor when the Council chose to adopt the APTR. It is something which goes to the reasonableness of the decision. If the relevant remissions policies were patently not fit for purpose, and this was something known to the Council, that would suggest that the decision to impose the APTR was unreasonable given the potential for the rate to impose an unfair burden on property owners unconnected to the accommodation sector.

[279] But that is not the case here. I am not satisfied that the various APTR remissions policies adopted by the Council were generally deficient nor fit for purpose. It is difficult to place much weight on the applicants' anecdotal evidence. They are isolated cases. What is unknown is the proportion of claims accepted. The fact that 35 per cent of ratepayers were granted APTR remissions in 2017/2018 suggests that the Council did not adopt an unduly conservative or restrictive approach when considering applications. But I am reluctant to examine the detail of particular cases. Not only would that exercise encourage a certain narrowness of approach, but

it would also focus on whether particular remissions should have been granted in individual cases. That would risk engaging in the detail of local government decision-making. As Mr Farmer pointed out, the remissions policies themselves are not subject to review. They are relevant only so far as their availability to mitigate any unfairness on adversely affected ratepayers bears on the reasonableness of the decision to impose the APTR.

[280] Furthermore, as I have already observed, I do not accept that the number of remissions granted by the Council demonstrates that APTR itself was unreasonable. How can it be said that the number of remissions reveals the unfairness of the APTR when those same remissions were implemented to cure the unfairness complained of? And as the rate continued to evolve, the policy was tailored appropriately. Additionally, it cannot be overlooked that with time the burden of the APTR will ease. Accommodation providers will adapt their business models, adjust their contractual relationships and learn to operate within the new APTR paradigm. Any perceived unfairness, in that sense, might properly be viewed as the sort of inevitable teething problems often experienced with regulatory initiatives which carry a cost burden.

(e) Fifth consideration – a less discriminatory regime

[281] Mr Galbraith says that the Council should have considered a less discriminatory rating regime before imposing the APTR. Specifically, he refers to a sector wide, voluntary funding option. According to Mr Armitage and Mr Roberts, ATEED was considering such a model before Mr Goff was elected. As earlier noted there was some consultation with the sector in September and October 2016. But once Mr Goff was elected, the applicants say any consultation ended. The prospect of a voluntary model was abandoned by the Council.

[282] Under a voluntary model, the applicants say they would have paid a "fraction" of what they now pay under the APTR. Had the Council been willing to engage in a genuinely consultative and collaborative process with accommodation providers, it would have been possible to reach a more workable and acceptable solution. The Council's failure to explore this possibility is therefore said to be unreasonable.

[283] Mr Farmer disputes that the Council was obliged to consider an opt-in funding model for ATEED. The rating powers of local authorities have obvious advantages. Almost always, raising revenue through rates will be the preferable funding option. Mr Farmer repeats his submission that the decision to set a rate is quintessentially political. At the relevant time, voluntary funding from the tourism sector was never a realistic option to fund ATEED for 2017/2018 and beyond. The urgency in addressing ATEED's financial situation was emphasised in the Mayoral Proposal. The Council was entitled to pursue a rating option and was not required to consider options which were clearly less likely to succeed in raising revenue to the levels considered necessary.

Discussion

[284] This point may be disposed of briefly. I agree with Mr Farmer. The LGRA provides local authorities with specific rating powers. These necessarily impose a degree of financial hardship on every ratepayer. Exercising these powers cannot be unreasonable simply because there may have been a less onerous funding option. Taken to its extreme the imposition of every rate might be attacked for unreasonableness on this ground. There will always be alternative options. While pursuing an opt-in funding model would have had less of an economic imposte on accommodation providers, it would also necessarily have led to a shortfall in funding ATEED. ATEED would have been forced to pull back its investment in attracting visitors or the general ratepayer would have picked up the shortfall. For the reasons I have outlined, the Council was entitled to pursue a targeted rate to avoid either of these results.

[285] Furthermore, the evidence is that the voluntary "opt-in" model was not widely supported across all elements of the sector. The APTR has the effect of capturing virtually all commercial accommodation providers. In that sense it is necessarily more equitable.

Concluding remarks on unreasonableness

[286] In summary, I have concluded that:

(a) The APTR was not premised on the assumption that accommodation providers could immediately pass on its economic burden to customers. There will likely be a degree of financial hardship for the sector; but in time this will fade as accommodation providers adjust their business models.

(b) The fact that accommodation providers already contribute to destination marketing was not taken into account by the Council, but it did not need to be.

(c) The Council did not engage in a precise analysis of the benefits caused by ATEED's spending because this is all but impossible. It is sufficient that it proceeded on a logical assumption that ATEED's investment provided a benefit to accommodation providers.

(d) It is inevitable that the APTR leads to a degree of horizontal inequity, but none of the inequities complained of is so gross as to render it unreasonable. The starkest unfairness was addressed by the remissions schemes.

(e) The Council did not need to devote resources to considering an opt-in funding scheme for ATEED.

[287] It follows I do not think the decision to impose the APTR was unreasonable. I turn now to the next, related ground of review.

Second ground of review: failure to comply with s 101(3) of the LGA

[288] The applicants say that the Council breached its obligations under s 101(3) of the LGA. This ground of review is closely linked to the first.

Legal principles

[289] Section 101 contains the Council's overarching financial management obligation:

> "**101 Financial management**
>
> (1) A local authority must manage its revenues, expenses, assets, liabilities, investments, and general financial dealings prudently and in a manner that promotes the current and future interests of the community.
>
> (2) A local authority must make adequate and effective provision in its long-term plan and in its annual plan (where applicable) to meet the expenditure needs of the local authority identified in that long-term plan and annual plan.
>
> (3) The funding needs of the local authority must be met from those sources that the local authority determines to be appropriate, following consideration of,—
>
> (a) in relation to each activity to be funded,—
>
> (i) the community outcomes to which the activity primarily contributes; and
>
> (ii) the distribution of benefits between the community as a whole, any identifiable part of the community, and individuals; and
>
> (iii) the period in or over which those benefits are expected to occur; and
>
> (iv) the extent to which the actions or inaction of particular individuals or a group contribute to the need to undertake the activity; and
>
> (v) the costs and benefits, including consequences for transparency and accountability, of funding the activity distinctly from other activities; and
>
> (b) the overall impact of any allocation of liability for revenue needs on the community."

[290] Section 101(3) is concerned with ensuring there is a thorough process by which the local authority identifies and uses sources of funding to meet local authority needs.[96] It is the "critical filter" by which funding sources in respect of each activity are to be considered and determined.[97] The factors contained in s 101(3)(a) are to be

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[96] *Paekakariki Informed Community Inc v Kapiti Coast District Council* HC Wellington CIV-2003-485-2760, 29 September 2004 at [51].

[97] *Neil Construction Ltd v North Shore City Council* [2008] NZRMA 275 (HC) at [214].

considered on an activity-by-activity basis.[98] All must be considered; they are clearly stated to be cumulative, not alternatives or options for consideration.[99] Having done so, s 101(3)(b) requires a local authority to "stand back" after a proposed allocation of liability for revenue and consider its impact on a range of community factors.[100]

[291] Mr Galbraith submits:

(a) the Council failed to adequately consider the distribution of benefits between the community as a whole, any identifiable part of the community, and individuals;

(b) the Council did not properly inform itself of the extent to which ATEED's spending would benefit the accommodation sector; and

(c) the Council failed to properly consider the costs and benefits, including consequences for transparency and accountability, of funding the activity distinctly from other activities. It proceeded on the incorrect pass-through assumption and did not take into account the extent to which accommodation funders already promote New Zealand as a tourist destination.

[292] Mr Galbraith says that as a result, the Council failed to consider the factors under s 101(3)(a)(ii) and (v), that is, the distribution of benefits within the community and the costs and benefits of funding the activity. In support of these propositions the applicants largely repeat the arguments advanced in respect of the first, second and third considerations under the first cause of action.

[293] I have already addressed those arguments in some detail.[101] It is unnecessary to repeat my findings save to say that I have found that the Council's decision-making was not flawed in any of the ways complained of. This conclusion necessarily makes the second ground of review more of an obstacle for the applicants. The treatment of

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98 *Paekakariki Informed Community Inc v Kapiti Coast District Council* at [52].
99 *Neil Construction Ltd v North Shore City Council*, above n 97 at [212].
100 *Paekakariki Informed Community Inc v Kapiti Coast District Council*, above n 96 at [52].
101 See above at [194]-[202], [211]-[215] and [234]-[244].

s 101(3) occupied six pages in the Staff Report. These are reproduced in full in Appendix 1 to this judgment.

[294] Mr Galbraith submits that more than mere lip service is required in respect of each mandatory consideration.[102]

[295] It is plain to me that the Council's engagement with each of the factors listed in s 101(3) was entirely sufficient. Furthermore, given the factual findings I have already made I do not accept that the Council either did not consider any of the relevant factors or should have done so more rigorously. This was not a "lip service" analysis. It was comprehensive, detailed and, where relevant and available, supported by statistical evidence. As can be seen, each of the factors listed in s 101(3) is assessed in a measured and even-handed way.

[296] It is also evident that, taking into account the rest of the Staff Report, the Council did in fact "stand back" and consider the impact of the APTR. Overall, and as I have already commented, I do not think the imposition of the rate can be impugned for want of analysis. The decision-making process was considered. Further, it was fluid and responded readily to valid criticisms, as can be seen in the detailed background I have set out above. The most glaring criticisms of the Council's decision-making expressed by the applicants, such as the failure to consider pass-through sufficiently or engage in a detailed cost benefits analysis of ATEED's spending, were simply not workable in the circumstances for reasons which I have already given. Put simply, I do not think, taking into account the practicalities and relative urgency of local body decision-making, the Council could have done more to comply with its statutory obligations under s 101(3).

[297] It follows that this ground of review fails.

Third ground of review: breach of s 82 of the LGA; failure to consult

[298] The applicants say that the Council failed to comply with s 82 of the LGA by not specifically consulting on two matters:

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[102] *South Waikato District Council v Electricity Corporation of New Zealand* HC Wellington CP16-93, 18 August 1994 at [35].

(a) its decision to geographically differentiate the APTR; and

(b) its decision to make the APTR subject to the Miscellaneous Remissions Scheme.

[299] Again, I have already discussed these issues under the first ground of review. As a consequence the treatment of this ground will necessarily be brief.

Legal principles

[300] The LGA does not impose a general duty to consult. But if a local authority does choose to consult (or is required to do so by the LGA in relation to a specific matter), the relevant principles are to be found in s 82:

> "**82 Principles of consultation**
>
> (1) Consultation that a local authority undertakes in relation to any decision or other matter must be undertaken, subject to subsections (3) to (5), in accordance with the following principles:
>
> (a) that persons who will or may be affected by, or have an interest in, the decision or matter should be provided by the local authority with reasonable access to relevant information in a manner and format that is appropriate to the preferences and needs of those persons:
>
> (b) that persons who will or may be affected by, or have an interest in, the decision or matter should be encouraged by the local authority to present their views to the local authority:
>
> (c) that persons who are invited or encouraged to present their views to the local authority should be given clear information by the local authority concerning the purpose of the consultation and the scope of the decisions to be taken following the consideration of views presented:
>
> (d) that persons who wish to have their views on the decision or matter considered by the local authority should be provided by the local authority with a reasonable opportunity to present those views to the local authority in a manner and format that is appropriate to the preferences and needs of those persons:
>
> (e) that the views presented to the local authority should be received by the local authority with an open mind and should be given by the local authority, in making a decision, due consideration:

(f) that persons who present views to the local authority should have access to a clear record or description of relevant decisions made by the local authority and explanatory material relating to the decisions, which may include, for example, reports relating to the matter that were considered before the decisions were made.

…

(3) The principles set out in subsection (1) are, subject to subsections (4) and (5), to be observed by a local authority in such manner as the local authority considers, in its discretion, to be appropriate in any particular instance.

(4) A local authority must, in exercising its discretion under subsection (3), have regard to—

(a) the requirements of section 78; and

(b) the extent to which the current views and preferences of persons who will or may be affected by, or have an interest in, the decision or matter are known to the local authority; and

(c) the nature and significance of the decision or matter, including its likely impact from the perspective of the persons who will or may be affected by, or have an interest in, the decision or matter; and

(d) the provisions of Part 1 of the Local Government Official Information and Meetings Act 1987 (which Part, among other things, sets out the circumstances in which there is good reason for withholding local authority information); and

(e) the costs and benefits of any consultation process or procedure."

[301] The operation of s 82 was helpfully summarised by the Court of Appeal in *Wellington City Council v Minotaur Custodians Ltd*:[103]

"[38] The effect of this provision is that, when a council does choose to consult, certain "principles" apply to the particular forms of consultation the council adopts: most relevantly, those affected should have access to relevant information in an appropriate format and be encouraged to present their views having been given clear information as to both the purpose of the consultation and the scope of any likely decision. Further, a council must ensure that interested or affected parties have a reasonable opportunity to present their views, and that those views are received by council with an open mind.

[39] In substance, these principles are really basic performance standards. Subsection (3) is the counterweight. This restates… that the "how" of compliance with these guidelines is a matter for the local authority. That

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103 *Wellington City Council v Minotaur Custodians Ltd*, above n 35.

proposition is subject to the following further considerations which the local authority must (relevantly) bear in mind:

> (a) the terms of s 78 including, presumably, the fact that it is subject to the reservation to the local authority of the decision of how to implement;
>
> (b) whether the views of those affected are already known to the local authority;
>
> (c) the significance of the issue in question for those affected; and
>
> (d) the costs and benefits of consultation."

(Citations omitted)

[302] The Court went on:

> "[42] In summary, pt 6 of the LGA carefully and repeatedly rejects the idea that there is to be found in its provisions any duty to consult with affected or interested parties. Instead, local authorities are given a deliberately broad discretion as to whether to consult, and, if so, how. That does not mean, however, that there are no limits on a council's discretion. Like all statutory decisions, consultation decisions must be rational and consistent with the objects of the LGA and the particular controlling provisions…"

[303] Mr Galbraith submits that the applicants should have been consulted on the differential application of the APTR based on location. In the Supporting Document, differentiating the APTR on this basis was described as "not justified". But that position changed following consultation. According to the applicants, geographic differentiation was raised for the first time at the FPC workshop on 17 May 2017. Thereafter, the Revised Mayoral Proposal recommended categorising the accommodation providers paying the APTR into three zones based on their location.[104] This was later incorporated into the APTR.

[304] Mr Galbraith says this was a "very significant change in approach". It introduced significant horizontal inequity into the APTR, creating "arbitrary" distinctions between different areas of the city and imposing a greater burden on hotels in the CBD. Ratepayers were not provided with clear information on the decisions around this issue and were thus denied an opportunity to present their views. Had they been, they could have explained the potential problems. Mr Galbraith says the Council should have consulted on the proposal to differentiate geographically at the outset or,

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[104] See above at [98](b).

given its change of view in May 2017, as a supplementary consultative process. He says it was not permissible for the Council to consult on one concept but not on the later, materially different, variant.

[305] A similar point is made in relation to the use of the Miscellaneous Remissions Scheme. This was first raised after the consultation process. That was because, after consultation, the Council learned from submitters that the APTR could operate unfairly against some ratepayers. The issue was first raised at the FPC workshop on 17 May 2017. It was then included in the Revised Mayoral Proposal. Guidance on how the policy would operate in practice was not published until June 2017 after the APTR was in place.

[306] Mr Galbraith repeats his submission that this constituted an "unusual" and uneven use of the remissions scheme. Having undertaken consultation on the APTR, the Council ought to have consulted on the possibility the rate it might apply differentially.

[307] Mr Farmer replies as follows:

(a) options for differential application of the rate (both in terms of accommodation provider and location) were included as part of the formal consultation documents, discussed with industry representatives and briefed to the media;

(b) the Miscellaneous Remissions Scheme was already in existence. No new policy was introduced as part of the decision to impose the APTR;

(c) both aspects of the APTR challenged under this ground were refinements to the proposal made in response to feedback received by the Council during consultation; and

(d) it is implicit in any consultation process that what is adopted may differ from that originally proposed. This is an artefact of any effective consultation process. Proposals evolve in response to feedback.

Discussion

[308] I do not consider the Council breached its obligations under s 82 of the LGA. As Mr Farmer notes, the options of differentiating the APTR based on location were expressly referred to in the Supporting Information. Given the stage of the decision-making process and the degree of latitude afforded by s 82, the Council included an appropriate level of information on the matter.

[309] Further discussions on differentiation took place at the second and third sector steering meeting and revisions to the proposal were given to the media in May 2017. It follows I agree with Mr Farmer that geographical differentiation was "on the table" during the consultation process. The relevant information could have been reviewed and submitted on by anyone so inclined.

[310] Indeed, as a result of the feedback received, the Council decided to refine its proposal for the APTR and differentiate the rate on a geographical basis. Rather than revealing any shortcoming in the consultation process, I consider this response by the Council reveals the process worked as it should. Further, the adjustment made was not outside the bounds of what was consulted on. It did not require an additional round of consultation. As noted by the Court of Appeal in *Minotaur*, the "how" of compliance with s 82 is a matter for the local authority.[105] In this situation, requiring the Council to have undertaken additional consultation processes on what could be regarded as tinkering with the existing proposal (which itself was prompted by the initial consultation) would be overly burdensome and would read into s 82 an obligation which simply is not required.

[311] The same applies to the application of the existing remissions policy. There was no need to consult prospective ratepayers on this. The remissions policy was already in place. Further, the decision to apply it to APTR ratepayers was designed to soften certain unfair aspects of the APTR. Again, this was an issue brought to the Council's attention during the consultation process. Requiring further consultation would be circular.

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105 At [39].

[312] I also agree with Mr Farmer that it would be non-sensical to require re-consultation on an existing remissions policy whenever a new rate is formulated which might qualify under that policy. In any case, the miscellaneous remissions policy was only ever intended as a temporary measure to soften any hardship. Notably, there is no challenge to the subsequent decision to implement the more tailored remissions scheme.

[313] It follows, I am satisfied the Council did not breach s 82. On the contrary, both matters complained of demonstrate the Council's consultation process worked as intended. This ground of review must also fail.

Conclusion

[314] I have concluded that:

(a) the decision to impose the APTR was not unreasonable;

(b) the Council did not breach s 101(3) of the LGA; and

(c) the Council did not breach s 82 of the LGA.

[315] It follows the application for judicial review is declined.

[316] The Council being the successful party, it would normally be entitled to costs. If the parties are unable to agree as to costs, they should file memoranda not exceeding five pages within 25 working days of the date of this judgment.

Moore J

Solicitors:
Mr Galbraith QC, Auckland
Bell Gully, Auckland
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Simpson Grierson, Auckland

Appendix 1

Consideration of statutory criteria

65. When deciding from what sources to meet its funding needs, council must consider the matters set out in section 101(3) of the Local Government Act 2002.

66. For the proposed targeted rate to fund expenditure on visitor attraction and major events, council must consider, in relation to this activity:

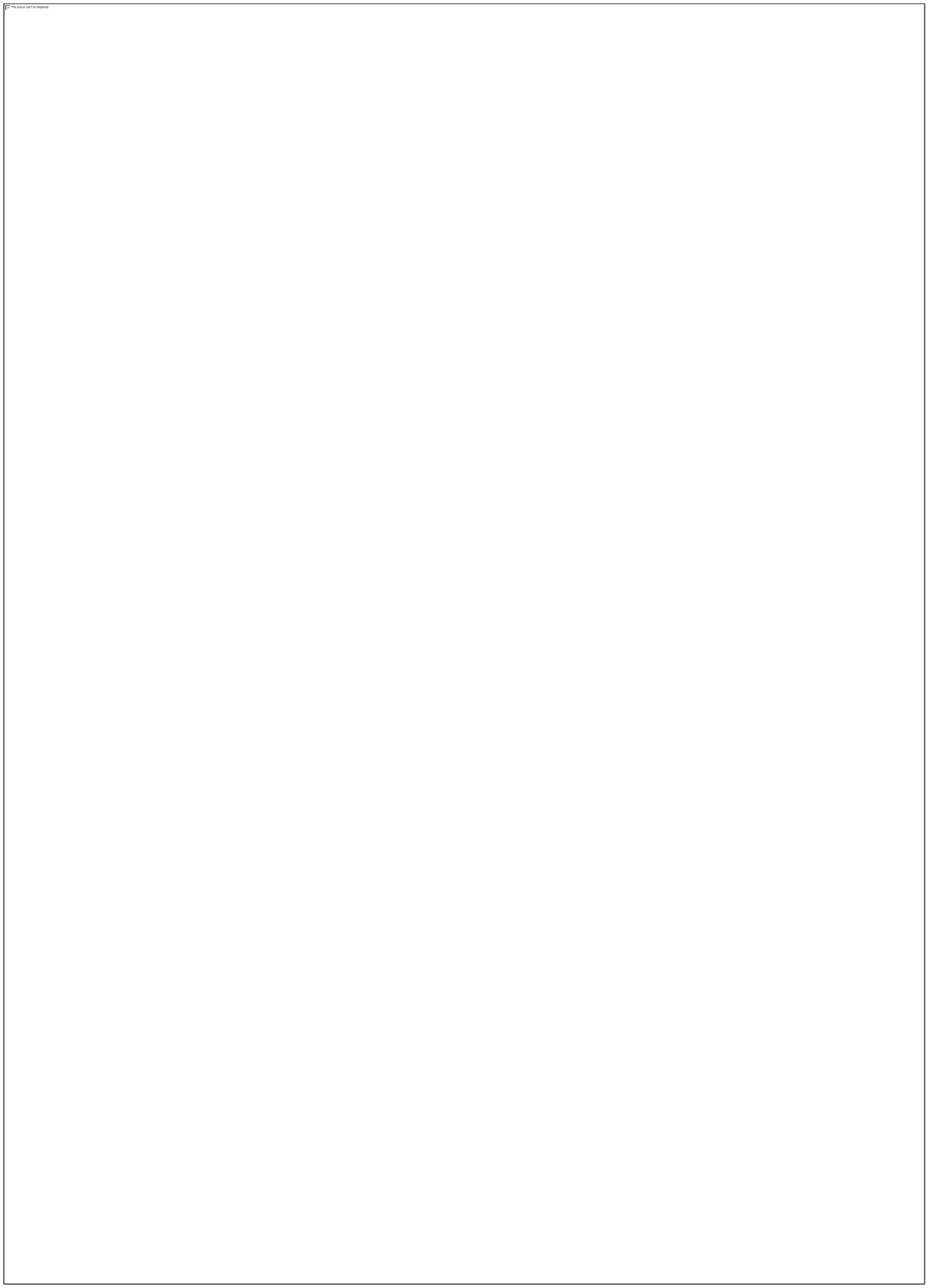
- the community outcomes to which the activity primarily contributes
- the distribution of benefits between the community as a whole; any identifiable part of the community; and individuals
- the period over which the benefits are expected to occur
- the extent to which individuals or a group contribute to the need to undertake the activity
- the costs and benefits (including consequences for transparency and accountability) of funding the activity distinctly from other activities.

67. Having considered these matters, the council must stand back and consider the overall impact of any allocation of liability for revenue needs on the community. This involves elected members exercising their political judgement and considering the proposal in the context of council's funding decisions as a whole.

The community outcomes to which the activity primarily contributes

68. The community outcomes to which the activity (visitor attraction) primarily contributes is set out in the LTP 2015-2015 as:

1. An Auckland of prosperity and opportunity
   - through promoting Auckland as a business and leisure visitor destination and attracting visitors to attend events that are unique to Auckland
2. A culturally rich and creative Auckland
   - providing opportunities to showcase Auckland's unique arts and culture through support for and delivery of a portfolio of major events including the annual Auckland Diwali, Lantern and Pasifika Festivals
   - growing Auckland's visitor economy through promotion of and support for a range of culturally focussed visitor products
3. Te hau o te whenua, te hau o te tangata
   celebrating and showcasing Māori culture and identity through major sporting and business events including a Māori Signature Festival for Auckland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- Auckland Convention Bureau 2015/2016 – estimated 107,195 visitor nights generated
- Major Events 2015/2016 – estimated 282,150 visitor nights generated.

77. Figures quoted by Tourism Industry Aotearoa show that more than 87 per cent of accommodation provider revenue is from visitors to Auckland (over 90 per cent when campgrounds are excluded).

78. One of the issues raised in feedback is that national statistics show that only 10 per cent of visitor spending is on accommodation. This feedback referred to the following statistics (which were included in the consultation materials)[1]:

Industry category	Auckland visitor expenditure (int. and domestic) $m	Share of Auckland visitor expenditure
Accommodation	$724	10%
Cultural, recreation and gambling	$133	2%
Food and beverage	$1,206	16%
Other passenger transport	$1,229	17%
Other tourism	$981	13%
Retail	$3,148	42%
Total	**$7,420**	**100%**

79. However, these statistics include visits for all reasons - business, holidays, education and visiting friends and relatives. Business and leisure travellers are the primary targets of ATEED's visitor attraction and major events expenditure. Historical data on overnight domestic visitors to Auckland for the year ending December 2012 shows the proportion of visitor spending on accommodation for these visitors is higher at around 22 per cent[2]

Expenditure category	Reason for visit					
	All	Business	Education	Holiday	Other	Visiting Friends or Relatives
Accommodation	18.9%	21.9%	28.2%	22.4%	23.8%	10.9%
Alcohol	5.3%	3.8%	5.3%	5.8%	5.0%	6.5%
Food and Beverages	18.8%	13.9%	15.5%	20.9%	20.6%	22.0%
Gambling	0.5%	0.3%	0.2%	0.5%	0.7%	0.6%
Gifts	2.5%	1.5%	1.8%	2.6%	3.2%	3.4%
Other	11.9%	8.3%	7.7%	12.8%	13.4%	15.0%
Recreation	5.8%	3.5%	4.0%	6.1%	8.1%	7.9%
Transport	36.4%	46.8%	37.4%	28.9%	25.2%	33.7%

80. The feedback highlights that there are significant direct benefits to other businesses that operate tourism based activities. There are also indirect benefits to other businesses and the community as whole from the increased economic activity.

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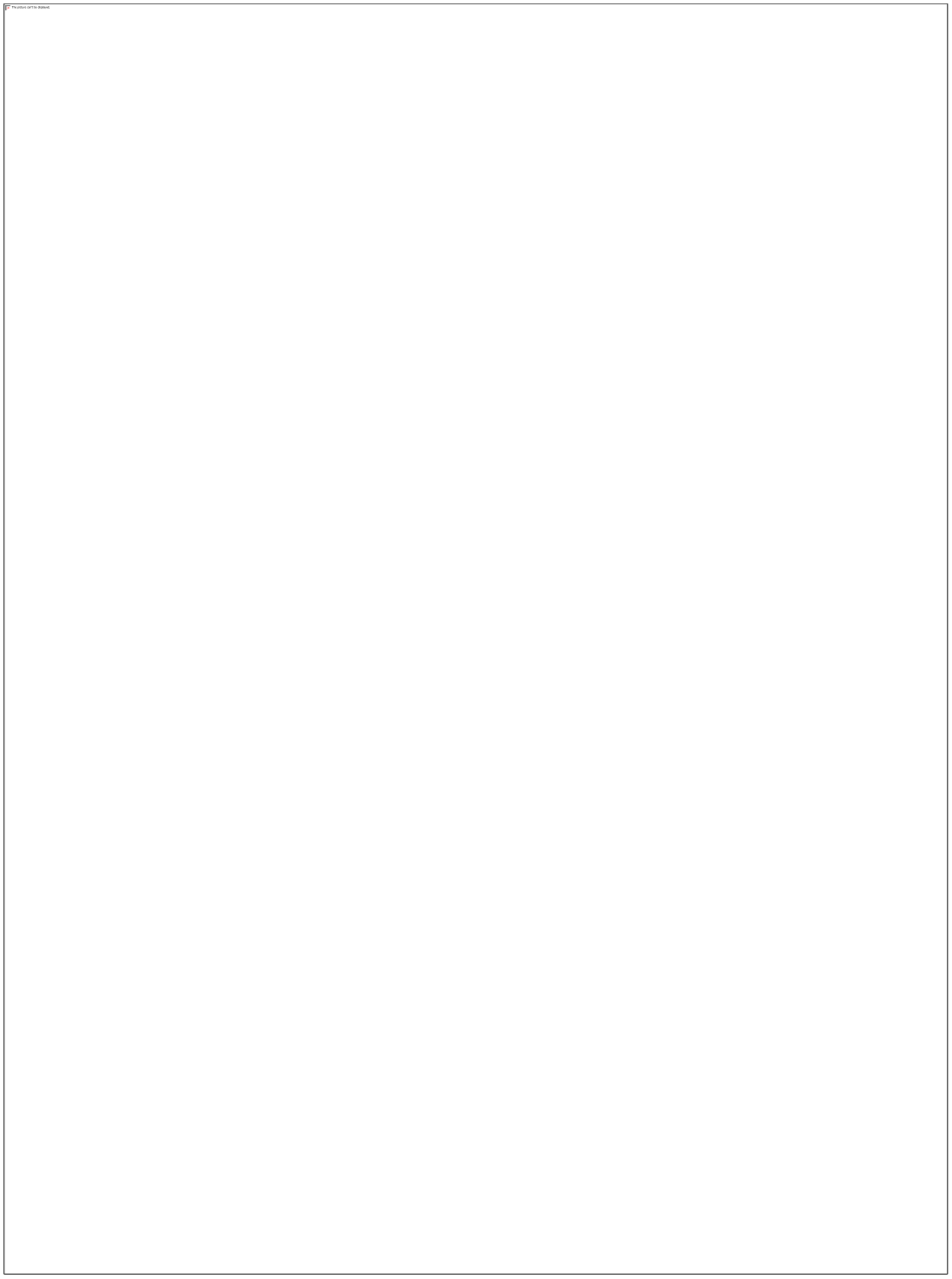
[1] Figures drawn from the Monthly Regional Tourism Estimates prepared by Ministry of Business Innovation and Employment for 2016.

[2] Statistics New Zealand, Domestic Travel Survey, 2012. Note this data is not strictly comparable to the preceding table from Statistics New Zealand as the data source and categorisation of expenditure are different.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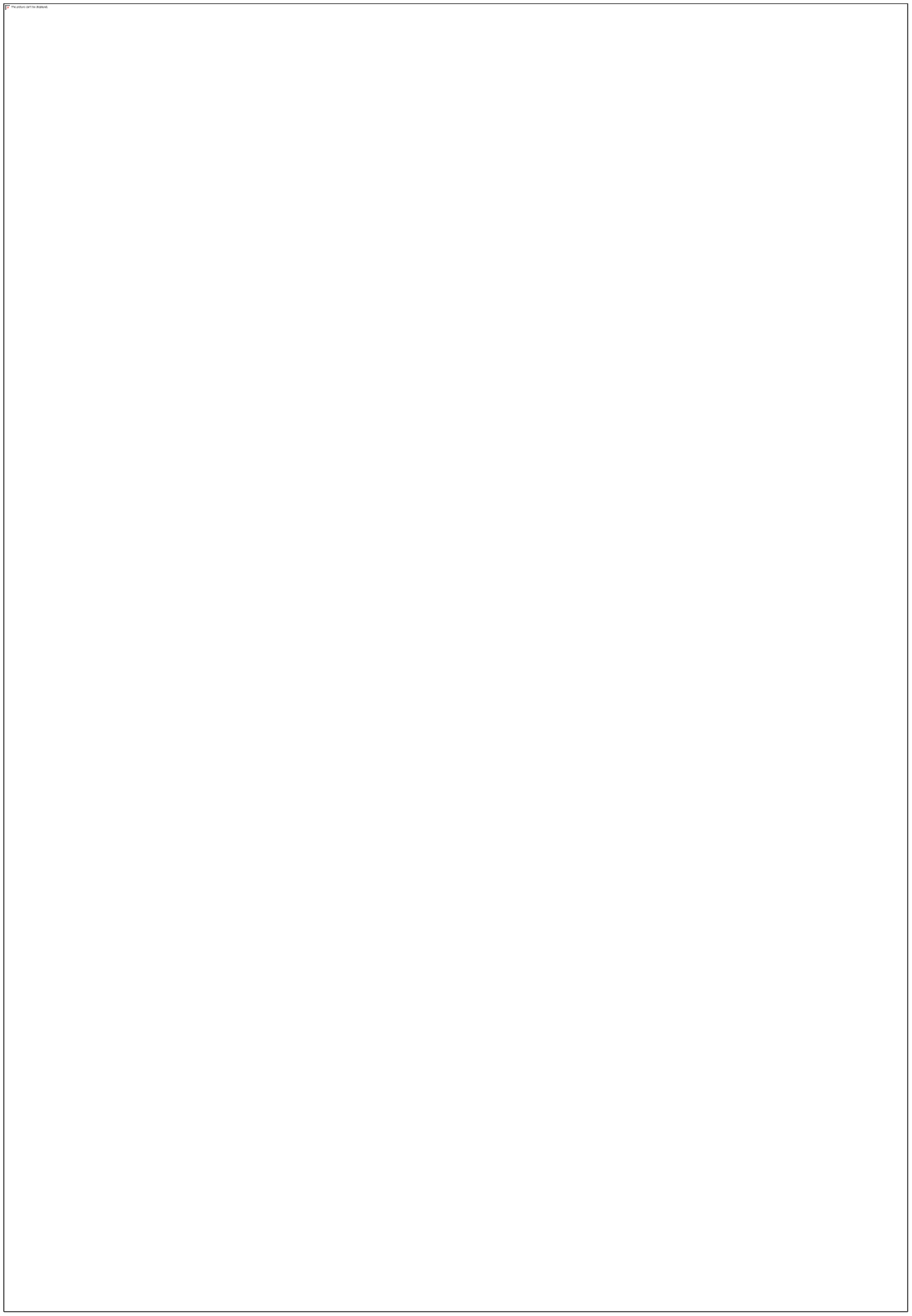
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The consultation material was prepared on the understanding that individual accommodation providers would have the option of passing on the increased cost from a targeted rate without any significant impact on demand. However, feedback through the submission process has raised concern that the ability to pass on costs may differ for some categories of provider.

Motels generally offer services in a similar price band to budget hotels, and submitters considered they benefited less from visitor attraction and major events expenditure. The average occupancy rate for motels is also lower than for hotels. As a result, the demand for motel services will be less price inelastic than hotels.

Backpackers and campgrounds are targeted at the more budget conscious traveller. Demand for their services will be much more price-sensitive than hotel or motel accommodation.

A differential could be applied to these categories of providers to reduce the impact of the targeted rate.

c) Recognition that the geographic location of some accommodation providers mean that they do not benefit to the same degree from the visitor attraction activities.

Feedback from providers in more suburban locations, particularly those further from the CBD, indicated that they felt that they did not receive significant benefit from activities that were often centred in the city. While capital values (on which the rate would be applied) do to some extent reflect the distance from the city centre, consideration could be given to a differential based on geographic location.

d) Recognition of the inability of some accommodation providers to pass on the cost due to contractual commitments.

Feedback highlighted that one of the key operating models for the provision of commercial accommodation is serviced apartments owned by investors who are liable for rates. They are made available for short term accommodation through a variety of contractual arrangements. The nature of these arrangements varies widely, varying from profit sharing to fixed returns, and lease terms from three months to 30 years. Staff estimate that there may be between 600 and 800 properties, out of 2800, with long term leases. Only some of these will have long-term restrictive leases with no ability to leave the hotel pool or pass on the rate.

Staff recommend that for the 2017/2018 year, the council consider applications for remission under its existing rate remission scheme (Remission of rates for miscellaneous purposes), for example where the owner/ratepayer is separate from the accommodation operator and the nature of the relationship between the parties means the owner/ratepayer does not have the option of passing on the increased costs to the accommodation operator and ultimately the visitor. A more targeted remission scheme should be developed along with the LTP 2018-2028.

e) Applying the targeted rate to informal providers

Another consistent theme from feedback was the perceived unfairness of informal providers of accommodation being excluded in the application of the rate. The proposal was clear that the targeted rate would apply only to those properties identified as businesses for rating purposes. Staff agree that inclusion of the informal sector not currently rated as business should be addressed from 2018/2019 for other properties (staff will report back on the process for this as part of the Long-term Plan 2018-2028).

Governance

93. The proposal made provision for the introduction of a revised governance mechanism with greater involvement of commercial accommodation providers. Only a few submissions made reference to this element of the proposal. They all supported much greater involvement by providers in decision-making.