**IN THE SUPREME COURT OF NEW ZEALAND**

**I TE KŌTI MANA NUI O AOTEAROA**

**SC 158/2021**
**[2023] NZSC 53**

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| BETWEEN | AUCKLAND COUNCIL<br>Appellant |
| AND | C P GROUP LIMITED<br>First Respondent |
| | MILLENNIUM & COPTHORNE HOTELS NEW ZEALAND LIMITED<br>Second Respondent |
| | MLC SCENIC LIMITED<br>Third Respondent |
| | KATALYMA HOTELS & HOSPITALITY LIMITED (FORMERLY KNOWN AS T & T CLARRY'S HOLDINGS LIMITED)<br>Fourth Respondent |

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|---|---|
| Hearing: | 20 and 21 July 2022 |
| Court: | Winkelmann CJ, Glazebrook, O'Regan, Ellen France and Williams JJ |
| Counsel: | J E Hodder KC, J W S Baigent, G D Palmer and O J V D Maassen for Appellant<br>J B M Smith KC, M C Smith and R A D'Silva for First and Third Respondents<br>A R Galbraith KC, T B Fitzgerald and S R Hiebendaal for Second and Fourth Respondents<br>T D Smith and G K Rippingale for New Zealand Local Government Association Inc as Intervener |
| Judgment: | 12 May 2023 |

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## JUDGMENT OF THE COURT

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**A The appeal is allowed. The decision of the Court of Appeal is set aside. The decision of the High Court dismissing the respondents' application for judicial review is reinstated.**

**B** **The respondents must pay the appellant one set of costs of $35,000 plus usual disbursements. We allow for second counsel.**

**C** **The award of costs and disbursements made in favour of the respondents in the Court of Appeal is quashed. That Court should redetermine costs in light of this Court's judgment allowing the appeal.**

**D** **Costs in the High Court are to be determined by that Court in the light of this Court's judgment allowing the appeal.**

**E** **Leave is reserved to the parties to apply for consequential orders if required.**

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**REASONS**
(Given by Ellen France J)

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## The appeal

[1] The appeal concerns the lawfulness of the decision of the appellant, Auckland Council, to impose a targeted rate in the 2017/2018 and 2018/2019 rating years on commercial accommodation providers to help fund expenditure on visitor attraction and major events by Auckland Tourism, Events and Economic Development (ATEED). ATEED was a council-controlled organisation with the purpose of promoting Auckland.[1]

[2] The decision to impose the targeted rate was challenged in the High Court in judicial review proceedings brought by the respondents, all of whom are ratepayers subject to the targeted rate.[2] Four causes of action were advanced but only two are relevant now. The first of these grounds was that the Council's decision did not comply with the requirements of s 101(3) of the Local Government Act 2002 (LGA 2002). That section provides that the local authority's funding needs must be met from the sources the local authority decides are appropriate following consideration, in relation to each activity to be funded, of the listed factors. In this case in terms of ATEED's expenditure (the activity being funded), it is alleged that the Council failed to adequately consider "the distribution of benefits" as required by s 101(3)(a)(ii). The other relevant ground of challenge was that the decision to impose a targeted rate was unreasonable.

[3] In the High Court, Moore J dismissed the claim.[3] The Judge considered the decision was not unreasonable and the statutory requirements were met.

[4] The Court of Appeal reversed the decision of the High Court, finding the Council had not adequately considered the distribution of benefits in s 101(3)(a)(ii).[4] Instead, the Court said the analysis of that factor had been "corrupted" by the Council's

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1 See Local Government Act 2002 [LGA 2002], s 6. ATEED subsequently merged with Regional Facilities Auckland Ltd, another council-controlled organisation, to form Tātaki Auckland Unlimited Ltd.

2 The targeted rate was suspended in 2020 because of COVID-19 and the impact on accommodation providers of the associated closure of New Zealand's borders to international tourists.

3 *CP Group Ltd v Auckland Council* [2020] NZHC 89 [HC judgment].

4 *C P Group Ltd v Auckland Council* [2021] NZCA 587 (Kós P, Gilbert and Courtney JJ) [CA judgment]. The Court agreed with the High Court that the Council had turned its mind correctly to s 101(3)(a)(v).

erroneous and irrelevant belief that the accommodation providers could pass through the costs of the targeted rate to visitors to their accommodation.[5] The Court also said that if it had been necessary to address the unreasonableness ground, a finding the decision was unreasonable would inevitably follow given both the inadequate consideration of the distribution of benefits and the disproportionate burden on the targeted group. The decision to introduce the rate in each of the rating years was set aside and the Court of Appeal made a declaration that those decisions were invalid.

[5] Leave to appeal was granted on the question of whether the Court of Appeal was correct to allow the appeal.[6] Leave to intervene was subsequently granted to New Zealand Local Government Association Inc (referred to as Local Government New Zealand) as intervener on the legal issues before the Court.

*The issues on the appeal*

[6] In determining whether the Court of Appeal was correct to allow the appeal, we first need to consider the nature and extent of the consideration required by s 101(3) and whether the assessment undertaken by the Council met those requirements. Second, it will be necessary to address the approach to be taken to questions of unreasonableness in judicial review in the rating context and, in particular, whether the Court of Appeal was right to not apply the approach to the review of rating decisions adopted in *Wellington City Council v Woolworths New Zealand Ltd (No 2)*.[7]

[7] In response to a direction from the Court, the respondents split the argument on the two issues, error of law and unreasonableness, between them, with the first and third respondents dealing primarily with compliance with s 101 and the second and fourth respondents primarily with unreasonableness. Both sets of respondents adopted each other's submissions. For convenience, we will refer to the "respondents" collectively in this judgment. We add that there is considerable overlap between the issues arising under the error of law ground and that relating to unreasonableness. The High Court dealt with the latter argument first so that the issues were largely addressed

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5 At [111].
6 *Auckland Council v C P Group Ltd* [2022] NZSC 31.
7 *Wellington City Council v Woolworths New Zealand Ltd (No 2)* [1996] 2 NZLR 537 (CA).

as questions of reasonableness. The Court of Appeal focused on the question of compliance with s 101 and we do the same.

[8] To put the questions on the appeal in context we first say a little about the factual background before reviewing the statutory framework.

**Background**

[9] The facts are set out in some detail in the judgments below.[8] At this point we need only briefly sketch out the process leading to the imposition of the targeted rate in the 2017/2018 and 2018/2019 years.

[10] The decision to impose a targeted rate on commercial accommodation providers had its genesis in the Council's exploratory work on alternative funding sources and then later in commitments made during the Hon Phil Goff's 2016 Mayoral campaign. In particular, he pledged to limit rate increases to 2.5 per cent and to "[i]nvestigate adopting a fair level of user-pays where there are demonstrable private benefits generated from" the operations of council-controlled organisations such as ATEED. Mr Goff was elected and took office in November 2016 and the consideration of a targeted rate by the Council proceeded.

[11] The Mayoral Proposal for the 2017/2018 annual budget was published in late November 2016. The proposal canvassed the idea of a "visitor levy" as a means of better aligning sources of revenue with the beneficiaries of ATEED's expenditure. It noted that the Council could not set a bed tax but that a similar outcome may be achieved through a targeted rate on accommodation providers. The proposal said that Council staff would engage with the tourism and accommodation sector on the design of the levy and then report back to Council in the new year.

[12] The Council set up a steering group with members of the accommodation sector represented. They had discussions about the proposal in the course of which various criticisms were raised by representatives of the accommodation sector. There

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8 HC judgment, above n 3, at [4]–[120]; and CA judgment, above n 4, at [15]–[79].

were also other meetings, formal and informal, with hoteliers and other industry participants.

[13] The proposal went out for public consultation along with a Supporting Document. The consultation documents sought feedback on a number of issues including rates increases and the question of paying for tourist promotion. Two options were put forward in the proposal. The High Court summarised the options in this way:[9]

> (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 [presumably per annum per ratepayer].
>
> (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 rates" to invest $250 to $300 million in transport infrastructure over the following 10 years.

[14] The Supporting Document contained a much more detailed discussion of the proposal including reasons for preferring the option of a targeted rate.

[15] An extensive public consultation process followed over a one-month period from 27 February 2017. The stern opposition to the proposal emerging from that process from commercial accommodation providers was discussed in a detailed summary of feedback document prepared in late April 2017. As we will discuss, the "Annual Budget 2017/2018 — Key Budget and Rating issues", dated 1 June 2017, drew together the issues arising after the public consultation round. This report is referred to as "the staff report".

[16] The staff report assessed the proposal for a targeted rate which would be based on the capital value of the relevant rateable land. The report discussed the proposal under each of the various headings in s 101(3) and recommended modifications to the

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9 HC judgment, above n 3, at [75] (footnote omitted).

targeted rate in response to the criticism received from accommodation providers. Four broad categories of changes were recommended.

[17] First, the original proposal was for a targeted rate which would recover all of ATEED's anticipated expenditure of close to $26.9 million for the 2017/2018 year.[10] Instead, the staff report recommended that the targeted rate be set "at a level materially less than" the figure originally proposed.

[18] Second, it suggested that consideration be given to a differential based on categories of commercial accommodation and location. Broadly speaking, the differences were intended to recognise some providers were less able to pass on cost increases and received lesser benefit from ATEED's activities.

[19] Third, the report recommended that the existing rates remission scheme should apply to ratepayers paying the targeted rate in 2017 and that a bespoke remissions scheme be developed for 2018 onwards. Again, in very general terms, this change was to address the situation where the ratepayer (for example, an investor in a serviced apartment) was liable for the rate but had restricted ability to increase prices to cover the increase in rates.

[20] Finally, the staff report proposed that consideration be given to extending the targeted rate so that it also applied to informal providers (such as Airbnb and Bookabach) in 2018/2019. This was to meet the feedback about the perceived unfairness of these providers being excluded in the application of the rate.

[21] Changes were made in accordance with the recommendations in the report and these were incorporated in the "Final Annual Budget 2017/2018 — Mayoral Proposal" which was put to the Council. In particular, the revised Mayoral Proposal set the amount of the targeted rate at 50 per cent of ATEED's budgeted expenditure on visitor attraction and major events. A differential was created for three provider types: Tier 1 — hotels and serviced apartments; Tier 2 — motels and lodges, including motel-like accommodation at campgrounds; and Tier 3 — other (encompassing

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[10] By the time the revised Mayoral Proposal was drafted, the anticipated expenditure had fallen from $27.8 million to $26.9 million.

backpackers, campgrounds and hostels). There would also be three geographical zones, A, B and C. As the High Court said, these zones "generally reflected distance from the [central business district] with the exception of accommodation at or near the International Airport at Māngere".[11] Accommodation providers in Tier 3 would not be liable for the targeted rate and nor would any accommodation provider in Zone C (generally, those locations most distant from the central business district). The revised proposal also adopted the suggestions to consider changes to the remissions scheme and to assess the future inclusion of the informal accommodation provider sector.

[22] The table below illustrates the differential ratios and the rate in the dollar of capital value thereby imposed.[12]

| Category | Differential ratio | Rate in the dollar of capital value |
|---|---|---|
| Tier 1/Zone A | 1.0 | 0.00811379 |
| Tier 2/Zone A | 0.6 | 0.00486827 |
| Tier 1/Zone B | 0.5 | 0.00405690 |
| Tier 2/Zone B | 0.3 | 0.00243414 |

[23] Turning then to the decision made in the following rating year, that is, the 2018/2019 year, the Council amended the scheme for this rating year to address three issues that had been identified in the context of the previous (2017/2018) rating year. The three issues were the extension of the targeted rate to informal accommodation providers; a tailored rates remission scheme; and a proposal to amend ATEED's governance arrangements so that there would be greater participation by commercial accommodation providers. Under this (2018/2019) version of the rate, provider types (hotels, motels and so on) were grouped into seven tiers. Six of those tiers would be liable for the rate. The three geographical zones were retained and, as before, only

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11 HC judgment, above n 3, at [98(b)]. Zone A encompassed commercial accommodation providers in the central business district.

12 The capital value to which the targeted rate applies excludes the portion of value not attributable to the provision of commercial accommodation.

two of the three zones would attract the rate. The modified targeted rate was approved as part of the 2018–2028 Long-Term Plan at the Council's meeting on 31 May 2018.

[24] As finally implemented, the rate applied to owners of rating units at 236 sites, comprising 2,921 rating units. To put those figures in context, there were approximately 550,000 rating units in Auckland at the time.

**The statutory scheme**

[25] The purpose of the LGA 2002[13] "is to provide for democratic and effective local government that recognises the diversity of New Zealand communities".[14] The democratic mandate afforded to local authorities under the LGA 2002 is reinforced by s 11(a) which states that one of the roles of a local authority, such as the Council, is to give effect to the purpose of local government as set out in s 10(1). At the relevant time, s 10(1) provided that the purpose was two-fold as follows:

> (a) to enable democratic local decision-making and action by, and on behalf of, communities; and
>
> (b) to meet the current and future needs of communities for good-quality[15] local infrastructure, local public services, and performance of regulatory functions in a way that is most cost-effective for households and businesses.

[26] The other point to note about s 10(1) is that it envisages that a local authority will be providing services to its community. As we have indicated, s 101(3), the provision directly in issue in this case, provides that the funding needs of the local authority to pay for those services "must be met from those sources that the local authority determines to be appropriate", following consideration of the listed matters in relation to each of the funded activities.

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13 All references are to the statute as it was at the time of the decision to impose a targeted rate on commercial accommodation providers.

14 LGA 2002, s 3.

15 "Good-quality" relevantly means infrastructure, services, and performance that are efficient, effective and "appropriate to present and anticipated future circumstances": s 10(2).

[27] Section 12 of the LGA 2002 provides general powers of competence for local authorities.[16] Under s 12(2), a local authority has "full capacity" to "undertake any activity or business, do any act, or enter into any transaction". For these purposes, the authority has "full rights, powers and privileges".[17]

[28] In conducting its business, the local authority must act in accordance with the principles set out in s 14. Those principles include operating "in an open, transparent, and democratically accountable manner" and giving "effect to its identified priorities and desired outcomes in an efficient and effective manner".[18] The local authority is also to "make itself aware of, and should have regard to, the views of all of its communities" and, when making a decision, take account of the likely impact on the diversity and interests of its communities both present and future.[19] This emphasis on proper processes is a consistent thread running through the relevant provisions. It also reflects the establishment of what is intended, as the Council submits, to be a "participatory democracy". These themes are apparent also in other sections of the LGA 2002 which impose requirements on an authority's decision-making process[20] and in the requirement for the preparation of annual and triennial planning documents (the annual plan and the long-term plan).[21]

[29] Local authorities are generally required to balance their budgets.[22] Their obligations in terms of financial management are fleshed out in s 101, the critical section for the appeal. Section 101 provides as follows:

> **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.

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16 *New Health New Zealand Inc v South Taranaki District Council* [2018] NZSC 59, [2018] 1 NZLR 948 at [22] per O'Regan and Ellen France JJ and [148]–[149] per Glazebrook J; and see *Moncrief-Spittle v Regional Facilities Auckland Ltd* [2022] NZSC 138, [2022] 1 NZLR 459 at [56].

17 LGA 2002, s 12(2)(b).

18 Section 14(1)(a).

19 Section 14(1)(b) and (c).

20 Sections 77–79. See also s 82 as to the principles of consultation to be applied by a local authority.

21 See, in particular, ss 93 and 95.

22 Section 100. A local authority's projected operating revenues must be "set at a level sufficient to meet that year's projected operating expenses".

(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.

[30] Under s 102, a local authority must adopt various funding and financial policies including a revenue and financing policy.[23]

[31] Rating powers are set out in the Local Government (Rating) Act 2002 (the Rating Act).[24] As with the LGA 2002, there is an emphasis on the processes to be followed by a local authority whilst giving the authority flexibility in relation to the exercise of its rating powers. Hence, s 3 of the Rating Act makes it clear that the purpose of the Act is to promote the purpose of local government as expressed in the LGA 2002 by:

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

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23 Section 102(2)(a).

24 References are to the statute as it was at the time of the decision to impose a targeted rate on commercial accommodation providers.

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

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

[32] The power to set a general rate is found in s 13 of the Rating Act. The power of a local authority to set a targeted rate like that in issue here is provided for in s 16. The power is to set a targeted rate for an activity or for groups of activities.[25] The full text of the relevant parts of the section reads as follows:

(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.

…

(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.

[33] Section 17 provides that for the purposes of s 16, categories of rateable land are categories identified in the funding impact statement of the local authority as categories for setting the targeted rate and defined in terms of one or more of the matters listed in sch 2. The statutory scheme for targeted rating therefore allows a local authority to define categories of rateable land for targeted rating using a broad range of matters such as the use to which the land is put, the area of land within each rating unit, location, and any of the annual, capital or land values.[26] Further, the calculation of liability for a targeted rate must utilise both the factors identified in the

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25 For the purposes of the LGA 2002, s 5(1) of that Act defines "activity" as "a good or service provided by, or on behalf of" the local authority or a council-controlled organisation. It includes, providing facilities and amenities; making a grant; and "the performance of regulatory and other governmental functions".

26 Local Government (Rating) Act 2002 [the Rating Act], sch 2.

authority's funding impact statement as matters to be used to calculate the liability and those listed in sch 3.[27] Again, the flexibility afforded to the local authority is apparent from the factors in sch 3. These factors include the annual, capital, or land values of the rating unit; its area of land; and the area of floor space of buildings within the rating unit.

[34] Under s 23(1), rates are to be set by resolution of the local authority. They must relate to a full or partial financial year and "be set in accordance with the relevant provisions of the local authority's long-term plan and funding impact statement for that financial year".[28]

**Error of law**

[35] The Council says the Court of Appeal was wrong to conclude that the Council erred as a matter of law in its consideration of s 101(3)(a)(ii). The respondents support the reasoning and conclusion of the Court of Appeal. It is helpful then to begin with an outline of the approach taken by the Court of Appeal.

*The Court of Appeal judgment on compliance with s 101(3)(a)(ii)*

[36] The Court found that the targeted rate had not been formulated on the basis of the statutory criteria. That was because the "true target" was the visitor, not the ratepayer.[29] The assumption that commercial accommodation providers would simply pass on the cost of the rate to those using their accommodation (the pass through assumption) was critical to the design of the rate. Although the language of "pass through" softened as the Council realised that pass through might not be possible in all cases, that rationale remained central to the scheme. The Court found that the pass through assumption was both irrelevant and wrong. Further, the Court said that to view commercial accommodation providers as receiving a benefit "directly" was relevant only if pass through was available.[30] The consequence of the Council's incorrect approach to pass through was that there was no proper assessment of the distribution of benefits and any analysis was corrupted.

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27 Section 18(1).
28 Section 23(2).
29 CA judgment, above n 4, at [100].
30 At [102].

[37] The second, and inter-related, criticism of the Council's approach in terms of compliance with s 101(3)(a)(ii) was that the benefit to commercial accommodation providers from ATEED's activities in terms of visitor numbers was not sufficiently significant. That was particularly so where other sectors benefited more than the accommodation providers from ATEED's activities. Without pass through, the justification for targeting this small sector of ratepayers was absent. Further, given the burden imposed on the commercial accommodation providers:[31]

> … more analysis was required to assess the benefit to that group, and to others. In our view, it was not enough simply to show there was "a connection" between the spending and a "benefit" to this small group and leave it there because any benefit was "incalculable". It cannot be enough to show there would be *some* benefit.

[38] In the 2018/2019 year, the same, inadequate assessment was relied on. Although the amendment removed the inequity of excluding informal accommodation providers, there was no change to the essential rationale for targeting this group.

[39] In the key passage from the judgment, the Court of Appeal said this:

> [123] In summary, we conclude that Council did not adequately consider the benefit of the funded activity to the targeted group, nor the distribution of the benefits across the community including other identifiable groups. Fundamentally, this was because the assessment was carried out at the end of the process to reverse engineer a justification for a scheme that had been formulated without regard to these criteria in an attempt to achieve an outcome that was beyond the proper scope of a rating mechanism, namely to obtain an additional source of revenue from non-ratepayers, being visitors to Auckland.

[40] In assessing the correctness of the approach of the Court of Appeal, we first make a brief comment about the relevance of the ratepayers' ability to pass on costs. We then address the extent to which the Council was tied to the pass through assumption and the adequacy of the Council's assessment of the extent to which costs could be passed on. We then turn to the particular issues identified by the Court about the way in which the Council assessed the benefits to commercial accommodation providers from ATEED's activities.

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[31] At [114] (emphasis original).

*The pass through assumption*

Relevance

[41] Differing from the Court of Appeal, we consider that whether the providers subject to the proposed rate would be able to pass on the costs of the rate by increasing prices was relevant in considering s 101(3)(a)(ii) in this case. It may be that the ability, or not, to pass through the cost of the targeted rate will generally be relevant to the exercise required by s 101. We do not have to decide that.

Was the Council tied to the pass through assumption?

[42] We use the language of the Court of Appeal and refer to the pass through assumption but it is apparent that what is encompassed by the use of that term in the judgment and by the parties varies. The term is not used precisely. The principal use of the phrase by the Court of Appeal is largely directed to what the Court saw as the flawed assumption that the costs would be passed on automatically to guests as a surcharge or by way of increased room rates with the result that the rate would in fact be costless to the ratepayers. As will be apparent, the Council's ultimate position was to recognise there were some situations where pass through was simply not practicable because of structural impediments such as split ownership but that otherwise costs could be passed on albeit with some drop in demand which, in turn, would be addressed by the projected increase in tourism numbers.

[43] It is the case that, as the High Court observed, some of the initial language both in public discussion or in the initial Council documentation, which drew analogies with a bed tax and/or described the proposed rate as a "visitor levy" or "bed tax", was "unfortunate and misleading".[32] It may have been seen to be politically advantageous to market the proposal in this way but it is apparent that the Council's approach evolved, particularly in response to the feedback on the proposals. While the Court of Appeal acknowledged the shift in language, its approach was to fix the Council with its earlier description and this had the effect of ignoring the evolution in thinking. It follows from the fact that the position did evolve that there is nothing in the respondents' submission that the Council's position was an attempt to get around

[32] HC judgment, above n 3, at [196].

Parliament's intention that s 16 of the Rating Act could not be used to impose a bed tax.[33]

[44] The evolution in approach is apparent from the examples we now briefly discuss. We note first that in slides prepared by Andrew Duncan (the Manager Financial Policy at the Council) for a presentation on 6 December 2016 to the Finance and Performance Committee on the Mayoral Proposal, the message was that the commercial accommodation sector would be "encouraged" to pass through costs and that the Council would explore the practicalities of passing through with the sector.

[45] By the time of the Finance and Performance Committee's meeting on 13 December 2016, the Mayoral Proposal referred to an expectation that costs would be passed through but was clear the Council could not require that. Certainly, as the Court of Appeal had noted, at the time of public consultation in February 2017, the language of visitor levy had been discarded along with "the expressed expectation of pass through to the visitor".[34] The consultation material also accepted there would be a small reduction in demand should providers decide to pass the cost through to customers but that this would be more than compensated for by the projected increase in tourism.

[46] Importantly, by the end of the exercise, the Council's position is apparent from this passage on affordability in the staff report:

> … council proposed the rate on the basis that individual accommodation providers could decide whether to absorb the increased cost or pass it on to their customers (without any significant impact on demand). Whether or not they choose to pass on the increase cost, and how, is entirely up to each accommodation provider to decide individually.

[47] The report then went on to discuss various aspects of demand, to which we turn shortly, and to discuss the need for modifications to the rate to reflect structural

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[33] When the Rating Act was before the Local Government and Environment Committee, the Committee recommended that the "number of visitor stay units within the rating unit" be added as a factor that could be used in calculating liability for targeted rates: Local Government (Rating) Bill (149-2) (select committee report) at 11 and 93. The Government rejected that recommendation, because it could have "negative consequences for the continuing development of the tourism industry" ((26 February 2002) 598 NZPD 14627).

[34] CA judgment, above n 4, at [107]. An item on the 25 January 2017 steering group meeting included, as an action item, to remove "visitor levy" from the terms of reference.

issues that restricted the ability to pass on costs. On the latter point, the staff report observed:

> Accordingly, as a general proposition, the relatively small price increases required to recover the cost of the proposed rate are unlikely to have a significant effect on demand. However, the submissions made it clear that some categories of accommodation providers do not have the same flexibility as others. Demand for motels is likely to be less price inelastic than hotels; and backpackers and campgrounds would be less inelastic again. In addition, some particular accommodation providers may not have the option of passing on the increased cost because of contractual commitments. These complexities are addressed in "Modification and proposed option based on feedback".

[48] It is clear from the staff report that it was recognised the proposal would impose a cost on the targeted ratepayers. That is also apparent from other documentation prepared as part of the process leading to the decision to impose the rate, which addressed matters such as the rates impact of the various funding options, the impact on tourism revenues, on demand, and such like. Whatever the correct characterisation of the Council's initial position, it is clear that the Council did not adhere to an assumption that costs would always be passed on with no effect at all on demand. Rather, the Council's position is accurately reflected in the passage from the staff report set out at [47], above, along with the subsequent modifications made to the rate. Accordingly, to the extent the Court of Appeal suggested that, because of the pass through assumption, there was no consideration of the cost of imposing the rate on the targeted ratepayers, any such concern was based on a misapprehension of the Council's position.

Did the Council err in its approach to pass through?

[49] The respondents challenge the adequacy of the Council's consideration of the distribution of benefits, in part on the basis that there was inadequate consideration of how the commercial accommodation market works and a failure to address various structural issues. The respondents say that evidence of the Council's failure to properly address the distribution of benefits can be found in its failure to proceed upon the basis of clear evidence that the cost of the targeted rate could not be passed through

to guests. The end point of the submissions on this aspect is that the Court of Appeal was correct to conclude the pass through assumption was a fallacy.[35]

[50] In developing these submissions the respondents say that, as a fixed and not a variable cost, the targeted rate cannot be passed through. There was evidence that pricing by commercial accommodation providers is particularly sophisticated, using software and revenue managers. As the High Court explained, this is referred to as "yield management".[36] Using these means, it is said that the respondents already maximise their rates which compromises their ability to increase prices. In terms of structural issues, the respondents argue that the Council did not properly address the effect of long-term contracts. For example, a hotel may have a long-term contract with an airline to provide accommodation, the terms of which do not allow adjustment of prices. Nor did the Council address structural arrangements in which ownership is split between the ratepayer and the person running the hotel or other provider. The split means those incurring the rate have no control over room pricing, making pass through impossible.

[51] These criticisms can be shortly despatched. First, to a large extent the criticisms of the consideration given to these matters by the Council, and the respondents' evidence, is directed to the view the Council proceeded on the basis the rate would be costless. That point largely falls away because it is based on a misapprehension of the Council's position; as we have said, the Council acknowledged there would be a drop, albeit small, in demand. There may be room for debate about the parameters of the resultant drop but it cannot be said the Council did not turn its attention to the issues.

[52] It is sufficient to briefly refer to the consideration given in the staff report to price elasticity. That part of the report shows that the staff did have material before them which supported their conclusion that the room rate was relatively price inelastic. As noted in the Sapere report, a study referred to in the staff report, price elasticity measures the responsiveness of demand to changes in price. For example, inelastic

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35 The respondents' arguments make plain how close this ground of review is to the argument that the decision is unreasonable. See below at [100].

36 HC judgment, above n 3, at [180].

demand means that when the price rises by one per cent, the quantity demanded falls by less than one per cent and vice versa.[37] All things being equal, the more elastic the demand, the smaller the extent of pass through.

[53] The consideration in the staff report of price elasticity took place in the context of considering the overall impact on the community, as required by s 101(3)(b) of the LGA 2002 and, in particular, affordability of the proposed rate. The report referred to the Council's review of several studies that measured the elasticity of demand for hotel rooms and travel to New Zealand. The conclusion drawn in the report was that the commercial accommodation market was "relatively price inelastic".

[54] Of the studies referred to by the Council, that undertaken by Canina and Carvell in 2005 appears most on point because it drew conclusions about price elasticities using property level data from 1989 to 2000 for urban hotel properties located in major metropolitan markets across the United States.[38] Broadly speaking, the report supports the proposition that this market was relatively price inelastic. Dr Small, the economist who gave evidence on behalf of the respondents, is critical of the focus in the study on the demand side rather than the supply side but that criticism is not further elaborated.

[55] We do not see it as an error of law for the Council to have placed some weight on this study. There may well be differing views about how far it takes matters but the Council did have some basis for its views about the interrelationship between demand and price.

[56] It is also apparent that the Council had a more optimistic view, based on what were then current statistics and future forecasts, about the prospects of strong growth in visitor numbers, occupancy rates and revenue. Strong growth would lessen

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37 Vhari McWha and Kieran Murray *Effects of an increase in travel ticket price on New Zealand tourism* (Sapere Research Group, 9 September 2015).

38 Linda Canina and Steven A Carvell "Lodging Demand for Urban Hotels in Major Metropolitan Markets" (2005) 29 Journal of Hospitality & Tourism Research 291.

concerns that an increase in room rates would adversely affect demand. In discussing the impact on investment in accommodation, the staff report noted:[39]

> The market for accommodation is strong, as evidenced by recent actual and projected growth in visitor numbers and occupancy. Future demand is likely to exceed supply even taking into account planned investments. Given the relative inelasticity of accommodation it is expected that investment in accommodation will continue to prove attractive. Bed night taxes are common in overseas cities, as discussed in the Supporting Information, and hotel investment has continued in those cities.

[57] The second related point is that the Council recommended modifications to the scheme specifically because of the concerns raised. For instance, the staff report noted that there may be impediments to passing on the rate because some providers may have entered into long-term contracts and because of different ownership/operational structures. The report also acknowledged that some categories of providers have different price elasticities. The proposed modifications in the form of differentials and the remissions scheme were recommended to address these concerns.

[58] Finally, there was evidence to support the view that some pass through was possible. Dr Small argued that, as a fixed cost, the cost of paying the rate could not be passed on in the short term. A bed tax, for example, shifts the supply curve, altering market prices, because it is a variable cost to the hotel. The economist who gave evidence for the Council, Mr Mellsop, agreed that was the theoretical position in the short term. But, he argued that in practice "over time, changes in fixed costs will be passed through" even if there is not a demand stimulation effect.[40] This is because "in the long run supply would exit the market". He also notes that the "literature on pass-through finds that industry-wide costs will be passed through to a greater extent than firm-specific cost changes". Finally, he says that at the practical rather than theoretical level, the issue of pass through is "more complex". Quoting from a paper

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39 Footnote omitted. In the consultation material, the Council noted that annual stay nights were growing at around 3.5 per cent a year in the last year and that this was projected to continue for the next several years.

40 The demand stimulation effect refers to how the spending by ATEED increases demand, resulting in higher prices and in this way effectively achieving pass through of costs to some extent. However, Mr Mellsop acknowledged that ATEED demand stimulation was occurring before the targeted rate.

by Dr Russell Pittman, he suggests that firms do not simply set prices at true marginal cost. Those that do so are not going to remain solvent.[41]

[59] In conclusion, against this background, there was no error of law in the Council's approach to the availability and effect of pass through, particularly in light of the Council's acknowledgement of the issues and the modifications to the rate. Instead, there was evidence supporting the view of the High Court that in the "real world", firms will alter price to "incorporate both fixed and variable costs".[42] There was no error in seeing the extent of pass through, other than in the types of situations addressed by the modifications, as largely a matter of choice on the part of the ratepayer. Similarly, as the Judge said, there is "no reason, economic or otherwise" why the burden of the rate would "not be incorporated into price and gradually passed through to the consumer, at least in part".[43] Given that it was not an error to proceed as the Council did, there was no error in the reference to the respondents receiving a "direct" benefit from ATEED's activities, contrary to the Court of Appeal's finding.

*Assessment of benefits*

[60] The Council says that the Court of Appeal was wrong to essentially require, in order to comply with s 101(3)(a)(ii), a calculation of the extent of benefit to a particular ratepayer group and then a comparison against the rates which they will pay. The broad assessment undertaken by the Council met the statutory requirements. The Council submits that underlying the Court of Appeal judgment is "the unarticulated premise" that the Court would have undertaken a different assessment even though the weight to be given to any particular consideration and to the overall weighing of the various considerations is a matter for the Council.

[61] In supporting the conclusions of the Court of Appeal that the Council's analysis of the benefits received by commercial accommodation providers from ATEED's activities was inadequate, the respondents say that what was required was, among other things, a meaningful analysis of the actual benefit to accommodation providers

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41 Russell Pittman *Who Are You Calling Irrational? Marginal Costs, Variable Costs, and the Pricing Practices of Firms* (Economic Analysis Group discussion paper, July 2009).

42 HC judgment, above n 3, at [195].

43 At [197].

in contrast to the benefit to others; an assessment of the utility of ATEED's activities and whether they met its objectives; and an assessment of the accommodation providers' own destination marketing activities.

The approach required

[62] We agree with the Council that the analysis to be undertaken under s 101(3)(a)(ii) does not require a close correlation between the activity and the benefits received by the proposed target of the rate nor the application of the type of calculus envisaged by the respondents. In criticising the Council's consideration of the distribution of benefits, the respondents' submission that a "meaningful assessment" was required on these facts is effectively to require some closer analysis of actual benefit to them vis-à-vis that accruing to other ratepayers. That, with respect, misconstrues the nature of the statutory requirement. The respondents' approach, which found favour with the Court of Appeal, does not reflect a number of relevant factors, namely, the nature of the rating decision; the flexibility afforded to local authorities to determine the sources by which funding needs are to be met and the means of doing so; and the text of s 101.

[63] In terms of the nature of the rating system, the observations made in *Woolworths* hold good, albeit aspects of the legislative scheme are different now. The Court of Appeal in *Woolworths* noted the choices given to local authorities in terms of the rating system adopted. Local authorities continue to have a choice as to rating systems. The Court in *Woolworths* also saw "force" in the submission for Local Government New Zealand, namely, "that it 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".[44] There have been no relevant changes in this respect. Finally, although discussing a differential rate not a targeted rate, the Court made the point that the very ability to impose a differential for the general rate presumes:[45]

> … the entitlement to discriminate as between types or groups of properties. The very concept of differential rates involves casting a heavier burden than justified solely by relative capital values on one sector rather than another.

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44 *Woolworths*, above n 7, at 544.
45 At 544.

Again, that analysis continues to hold true.

[64] As to the flexibility afforded to local authorities, that flexibility reflects the democratic mandate given to local authorities in s 3 of the LGA 2002.[46] That broad mandate is underpinned by the various statutory requirements we have discussed for transparency and consultation.[47]

[65] Of course a local authority has to properly consider mandatory relevant factors such as the benefits referred to in s 101(3)(a)(ii). But the statutory scheme of the Rating Act also supports the view there does not need to be an exact equivalence, or a close correlation, between the benefit and the rate imposed.[48] For example, the relevant rating factors identified in sch 2 and sch 3 include features of the rating unit that may be unrelated to the benefit received from a particular activity.[49]

[66] In addition, as the Court of Appeal in *Woolworths* noted, the rating decision will involve consideration of "imponderables" which means an "elusive search for a direct relationship between services and benefits" is not called for.[50] The present case illustrates the point. There are real practical difficulties in undertaking the exercise contemplated by the respondents which envisages, for example, an itemised breakdown of the extent to which activities can be directly attributed to ATEED rather than, say, the accommodation providers' own destination marketing activities.[51] As the Council submits, the task is further complicated because consideration of benefits may involve an intangible forward looking aspect as a local authority considers the intended or expected future benefits from an activity that is to be funded.

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46 Local Government New Zealand in its submissions referred to observations about the importance of democratic accountability of local government in *City of Toronto v Attorney-General of Ontario* 2021 SCC 34, 462 DLR (4th) 1. Abella J, delivering the dissenting judgment of Abella, Karakatsanis, Martin and Kasirer JJ, noted that "[t]he democratically accountable character of municipalities [was] well established" in Canadian jurisprudence: at [117].

47 The same point is made in *Neil Construction Ltd v North Shore City Council* [2008] NZRMA 275 at [19] relied on by the respondents.

48 Under s 41 of the Rating Powers Act 1988, catchment boards were required to consider benefits in the context of decisions to impose differential rates. The section was addressed in *Brockelsby v Waikato Regional Council* CA117/07, 10 July 2002, but the analysis in that case does not add anything here.

49 See above at [33].

50 At 546.

51 See HC judgment, above n 3, at [235]–[236].

[67] Turning then to the terms of s 101 itself, we accept the submission for Local Government New Zealand that it is plain from the section that the allocation of liability for revenue via the rating system does not have to be undertaken by reference to the benefits of the activity as the defining criterion.[52] That is apparent from the fact that s 101(3)(a) does not provide for any one factor to take primacy. Subject to the reasonableness inquiry, "some" benefit, as here, may suffice.

[68] It is possible that a particular factor may assume greater significance in an individual case in a factual sense, but even then the factors may pull against each other. To take s 101(3)(a)(iv), an example discussed by Local Government New Zealand in its submission, that requires the local authority to consider those who have contributed to the need to undertake the activity, in other words, those who have caused the need. That consideration may stand in contrast to the assessment of the benefits via s 101(3)(a)(ii). And s 101(3)(b), which requires the local authority to consider "the overall impact of any allocation of liability for revenue needs on the current and future social, economic, environmental, and cultural well-being of the community",[53] must mean that the benefits to the targeted ratepayers is only a part of the analysis. That too tells against the idea that a close correlation between benefit and activity is necessary.

[69] We need to address here the respondents' argument that s 101(3) reflects a departure from the previous legislative regime. They rely, amongst other matters, on the omission of an equivalent to s 122I(4) of the Local Government Act 1974 which expressly recognised the complexity and inherent subjectivity of benefit allocation and the complexity of the assessment required.[54] Section 122I(4) is best seen as a provision for the avoidance of doubt. Certainly, we do not see the fact that the subsection was not carried through as affecting the statutory scheme which in substance reflected *Woolworths*.

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52 Section 101 has been considered in some High Court cases. See, for example, *Tacon v Hastings District Council* [2013] NZHC 1078, [2014] NZAR 49; *Paekakariki Informed Community Inc v Kapiti Coast District Council* HC Wellington CIV-2003-485-2760, 29 September 2004; and *Neil Construction*, above n 47.

53 To use the present wording, though we note the same can be said of s 101(3)(b) as at the time of the rating decisions.

54 (18 July 1996) 556 NZPD 13727. See also Supplementary Order Paper 1996 (220) Local Government Amendment Bill (No 5) 1995 (69-2D) (explanatory note) at 2.

The Council's assessment of benefits

[70] We start by setting out the key parts of the analysis undertaken in the staff report. We note at the outset that the respondents are critical of the brevity of the discussion.[55] That criticism reflects to a large degree the view that a closer correlation had to be shown between benefits and the activity. Moreover, the discussion in the staff report needs to be kept in context. In particular, the proposed targeted rate was just one of a number of issues relating to capital and operating budgets for the final Annual Budget for 2017/2018 being addressed in the staff report. Other issues canvassed included, by way of example, rates increases more generally and a living wage for Council employees.

[71] It is also apparent from some of the earlier documentation that the considerations which underlie the s 101(3)(a) factors were to the forefront. That is apparent, for example, from discussion at the steering group meeting on 19 December 2016, where the presentation noted that one of the Council's key policy criteria was the "connection between who would pay the rate and who is receiving benefits from the services to be funded".

[72] In its analysis of s 101(3)(a)(ii), "the distribution of benefits between the community as a whole, any identifiable part of the community, and individuals", the staff report had this to say:

> 71. 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 derive direct benefit from the expenditure and they can decide whether to absorb the increased cost or pass it on to their customers. Whether or not they choose to pass on the increased cost, and how, is entirely up to each accommodation provider to decide individually.
>
> 72. Submitters in support of the proposal pointed to the direct benefit received by businesses in the tourism industry and felt that general ratepayers should not be subsidising the promotion of these businesses. There was also a view expressed that additional visitors imposed extra costs on the city and residents through competition for services, congestion and pressure on infrastructure capacity.

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[55] As is apparent from our discussion, we reject the submission for the respondents that the consideration of s 101(3)(a)(ii) was undertaken as an afterthought or simply a box-ticking exercise.

[73] The report proceeded to summarise the key points from the feedback given by accommodation providers on this aspect. That feedback included a challenge to the effectiveness of ATEED; and the fact that other businesses, such as retail, food and beverage, and other tourism businesses also benefit from the activity as does Auckland as a whole. The report also noted the criticism of the exclusion of some accommodation providers from the proposal, particularly informal providers such as Airbnb, and that accommodation providers further away from the city centre do not benefit as much from the activity. Summarising this aspect, the report said it was "clear" that commercial accommodation providers received an immediate direct benefit from the expenditure of ATEED in attracting visitors to Auckland "but other businesses also benefit, as does the wider community".

[74] As part of the consultation materials, the Council included the following table which indicated that only 10 per cent of visitor spending was on accommodation. The Court of Appeal placed some reliance on this figure as do the respondents.[56]

| **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%** |

[75] However, as noted in the staff report, this table captured visits for all reasons including business, holidays, education and visiting friends and relatives. The report went on to explain that the Council relied on other statistics on expenditure by "overnight domestic visitors to Auckland for the year ending December 2012" that differentiated between the reason for visiting. This enabled the Council to assess the expenditure of business and leisure travellers since they were "the primary targets of ATEED's visitor attraction and major events expenditure". Using those statistics

56 CA judgment, above n 4, at [118].

showed the proportion of visitor spending by these visitors on accommodation was "higher at around 22 per cent":

| 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% |

[76] There may be room for debate about the utility of the 22 per cent figure. For example, ATEED's expenditure includes international visitors as well but the spend by those visitors is not included in the statistics giving the 22 per cent figure. The respondents' criticism, however, was that the survey captured those who stayed for only one night (ie overnight). As it transpires, that is not correct. The survey captures those staying more than one night as well.[57] As we see, consistently with the requirements of s 101(3)(a)(ii), what the Council was trying to do was capture the benefit and spend relevant to the rating exercise. In terms of those requirements, we do not consider it was necessary for the Council to go further in terms of its assessment of ATEED's activities or of how the respondents' own promotional activities affected the analysis. In other words, it was open to the Council to rely on the 22 per cent figure.

[77] The staff report went on to discuss practical difficulties in imposing the proposed rate on other sectors benefiting from ATEED's activities. We come back to those issues and also address relative benefits when we deal with unreasonableness. Given what we have said about the broad brush nature of the exercise required by s 101(3)(a)(ii), this aspect of the assessment met the requirements.

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[57] Ministry of Business, Innovation and Employment "Domestic Travel Survey definitions and classifications" <www.mbie.govt.nz>.

[78] We also reiterate the point already made that some of the modifications made to the scheme were to reflect the fact that some accommodation providers received less benefit. It is hard to see the changes as other than a reflection of the fact that the distribution of benefits was considered in terms of s 101(3)(a)(ii). Different views are obviously available on the merits of the approach which was to modify the proposal but proceed with the proposed targeted rate. But it is apparent that the Council did consider the matter in terms of the requirements of s 101(3)(a)(ii). The Court of Appeal erred in finding otherwise. The Council accordingly succeeds on this point.

**Unreasonableness**

*The approach in the Court of Appeal*

[79] Relevantly, the Court of Appeal took the view that in determining the reasonableness of the targeted rating decision, closer scrutiny than for a general rating decision was required. The Court explained that, "courts may be expected to scrutinise more closely a decision that disproportionately affects only a small group of ratepayers and for whom the democratic process offers little protection".[58] The Court distinguished *Woolworths* on the basis that its broad policy considerations were not as important in this case. A distinction was drawn between what the Court described as the "complex and inherently subjective decisions about benefit allocation affecting the general rate and differential rating" and the "narrowly targeted rate" which "imposed a substantial burden on a very small subset of ratepayers".[59]

[80] The Court of Appeal said that there was significant overlap between the claim based on the failure to comply with s 101(3) and that based on unreasonableness. That was especially so in terms of the Court's finding there was an "improper focus on the pass through assumption" and the effect of that focus on the assessment of the benefits.[60] The result of the improper approach was "the imposition of a disproportionate burden on the targeted ratepayers".[61] The Court continued:[62]

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58 CA judgment, above n 4, at [136].
59 At [136].
60 At [141].
61 At [141].
62 At [141].

> To the extent that visitor spend can be equated to benefit (Council's working assumption), we consider it was unreasonable to target a very small group that receives 10 per cent or less of this supposed benefit and exclude all other groups, despite them receiving a far greater share of that benefit. Had it been necessary for us to determine this ground, we would have concluded that a finding of unreasonableness was inevitable given the combination of (1) the failure to consider adequately the distribution of benefits and (2) the imposition of such a disproportionate burden on the targeted group.

*The parties' submissions*

[81] The Council's case is that *Woolworths* is equally applicable to a targeted rate and the Court of Appeal was incorrect not to apply it. The decision in this case, as in *Woolworths*, concerned the discretion to make a rating decision and involved the same considerations, namely, those in s 101(3). As to the proposition the targeted rate imposed a disproportionate burden on the commercial accommodation providers, the Council reiterates its approach, namely, that rating decisions were not intended to reflect a close correlation between the calculation of benefit and the allocation of the incidence of the rate imposed. Rather, it suffices for there to be a rational connection. The High Court was accordingly correct to conclude the decision to impose the rate was not unreasonable.

[82] On the approach to judicial review, the respondents emphasise the need for closer scrutiny of a decision like the present one which, in contrast to the decision in issue in *Woolworths*, directly and significantly adversely affects the rights of a small and identifiable group. By nature of their minority status, that group is otherwise not protected through the democratic process. The respondents also argue that since *Woolworths* there has been a shift away from the strict *Wednesbury* threshold and towards a more contextual, fact-specific inquiry. They further submit that to the extent that *Wednesbury* is seen as the appropriate test, the rate would in any event be unreasonable on that analysis. In addition, the respondents say the Council did not meet its fiduciary duties to them as ratepayers.[63]

[83] Although the two groups of respondents highlight differing matters, on the reasonableness of the decision, they essentially support the approach of the

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[63] The first and third respondents agreed the relationship was a fiduciary one but focused, as we have indicated, on the obligations derived directly from s 101.

Court of Appeal. It is said that the rate imposed was not rationally justified by the quantum and circumstances relied on by the Council to support its decision. We come back to the various aspects of the respondents' submissions when addressing the correctness of the Court of Appeal decision.

*Was the Court of Appeal correct to distinguish* Woolworths*?*

[84] The Court of Appeal in *Woolworths* dealt with a challenge by way of judicial review to the rating differential as between residential and commercial ratepayers fixed by the Wellington City Council.

[85] A number of commercial ratepayers challenged the decision for the 1994/1995 rating year to set the differential at 67:33 commercial to residential, a shift of one per cent from the previous rating year's differential of 68:32. The ratepayers argued that, to be valid, the differential rate in a capital value system should rest between approximately the benefits received by (ie the value of the services provided to) the relevant sector as a proportion of total benefits, and the capital value of the sector compared with the capital value of the whole city. The ratepayers, amongst other matters, drew on what they described as "the fiduciary duty owed by the Council to hold the balance among its ratepayers".[64] They also said the rate must take "into account the prime relevant factors of benefits (value of services) and ability to pay".[65]

[86] The ratepayers succeeded in the High Court. In allowing the appeal, the Court of Appeal addressed the relevant judicial review principles, referring to its earlier decision in *Mackenzie District Council v Electricity Corporation of New Zealand*.[66] The latter case was a successful challenge brought by way of judicial review to the levy of rates on Electricorp for the 1989/1990 rating year. The Court in *Woolworths* summarised the approach in this way:[67]

> … judicial 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

64 *Woolworths*, above n 7, at 539.
65 At 540.
66 *Mackenzie District Council v Electricity Corporation of New Zealand* [1992] 3 NZLR 41 (CA).
67 *Woolworths*, above n 7, at 545.

> 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.

[87] The Court noted earlier descriptions of unreasonableness as being "so outrageous in its defiance of logic or of accepted moral standards" that no sensible person would have arrived at it, "a pattern of perversity" or being "outside the limits of reason".[68] The Court of Appeal concluded that "[c]learly, the test is a stringent one".[69]

[88] The Court referred, as we have noted, to the nature of the rating decision which it saw as "essentially a matter for decision by elected representatives following the statutory process and exercising the choices available to them".[70] The Court also noted the "constitutional and democratic constraints on judicial involvement" in what were "wide public policy issues".[71] The Court took the view that:[72]

> 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.

[89] In determining the extent to which *Woolworths* should continue to govern the approach to judicial review of rating decisions we do not need to engage with the debates about the levels of scrutiny in judicial review.[73] It suffices to begin by reiterating that the principles articulated in *Woolworths* about the nature of those decisions logically remain applicable subsequent to the changes in the legislative

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68 At 545, citing respectively: *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (HL) at 410 per Lord Diplock; *Nottinghamshire County Council v Secretary of State for the Environment* [1986] AC 240 (HL) at 248 per Lord Scarman; and *Webster v Auckland Harbour Board* [1987] 2 NZLR 129 (CA) at 131 per Cooke P.

69 *Woolworths*, above n 7, at 545.

70 At 552.

71 At 546.

72 At 546.

73 Two examples suffice: M B Rodriguez Ferrere "An Impasse in New Zealand Administrative Law: How Did We Get Here?" (2017) 28 PLR 310; and Dean R Knight "Modulating the Depth of Scrutiny in Judicial Review: Scope, Grounds, Intensity, Context" [2016] NZ L Rev 63.

scheme. As we discuss, we see the approach in *Woolworths* as consistent with the statutory scheme and, indeed, arguably more so now given the changes in the legislative scheme since the original Local Government Act 1974.

[90] As both the Council and Local Government New Zealand submit, to give the decision-maker some latitude reflects the statutory context, in particular, the factors involved in the rating decision and the provision for accountability for local authorities by means of the processes prescribed and the democratic mandate given to local authorities. As we have indicated, we also see the direction of changes made to the legislative framework following on after the original Local Government Act 1974 as further support for an approach which gives some latitude to the decision-maker. Essentially, the current legislation provides for more extensive annual planning[74] and provides more detail in terms of both the purposes of local authorities[75] and the matters to be considered in terms of prudent financial management.[76] The following brief illustrations suffice.

[91] The original 1974 Act did not contain a great deal in the way of relevant procedural accountabilities. For example, annual planning requirements of the sort now provided for[77] were not imposed until an amendment in 1989.[78] Part 12A, added in 1989, provided a requirement to prepare and publish annual plans including a detailed budget and proposed funding source. The annual planning process covered the upcoming rating year and the two years following.[79] Section 223D(3)(b)(iii) imposed a requirement to include a statement of the authority's rating policy.[80] A special consultative procedure was to be followed in creating the plan.

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74 See above at [28]. The provision for the adoption of an annual plan in pt 6 of the LGA 2002 also provides for community consultation; and for consultation prior to the adoption of the long-term plan every three years (this plan is to include a revenue and financing policy and there are requirements for funding impact statements).

75 LGA 2002, ss 10, 12 and 14. Section 37K introduced to the Local Government Act 1974 in 1989 did contain a generalised list of nine purposes for local government.

76 Section 101.

77 United and regional councils were required by s 103 of the original Local Government Act 1974 to prepare annual estimates and, once approved, these estimates were to be publicly notified.

78 Local Government Amendment Act (No 2) 1989.

79 Local Government Act 1974, s 223D.

80 As amended by Local Government Amendment Act 1991.

[92] Under the Rating Powers Act 1988, a local authority was required to publish a statement prior to the rate taking effect, setting out, among other things, the "matters taken into account" in adopting a differential rate and the effect of the differential on the rates liability of different groups of ratepayers.[81] The statement had to be made publicly available.[82]

[93] Until the introduction to the Local Government Act 1974 of pt 7A in 1996 (and in particular s 122C),[83] there was no fully comparable equivalent to s 101 of the LGA 2002[84] which makes provision for prudent management that promotes the current and future needs of the community,[85] the need for a longer-term view of expenditure needs,[86] and then adds the list of relevant considerations in s 101(3). The other point to note about the current Act is the inclusion of s 12(4) and (5) which make it plain that local authorities must exercise their powers "wholly or principally for the benefit of" the district or region.[87]

[94] The development of the reasonableness standard in *Woolworths*, at least in part, must be seen as intended to supplement the statutory regime which, at the point *Woolworths* was decided, did not include s 101 or a fully comparable equivalent.[88] As the statutory scheme has moved on and added in the statutory features we have discussed, particularly those in s 101, in this context there is no reason to read down *Woolworths* or to distinguish it.

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81 Rating Powers Act 1988, s 84. The requirement for this statement has been a feature of the statutory arrangements for some time. See, for example: Local Government Act 1974, s 147 as amended by the Local Government Amendment Act (No 3) 1977; and Municipal Corporations Act 1954, s 92A.

82 It appears that implicit in this procedure was the right for ratepayers to make submissions: Kenneth A Palmer *Local Government Law in New Zealand* (2nd ed, The Law Book Company, Sydney, 1993) at 388.

83 Local Government Amendment Act (No 3) 1996.

84 In the original Local Government Act 1974, s 117(3) in dealing with general rates levied differently on different districts said the Council "shall have regard to the services it provides in the several constituent districts or parts thereof from the proceeds of the general rate".

85 LGA 2002, s 101(1).

86 Section 101(2).

87 See also the Local Government Bill 2001 (191-1) (explanatory note) at 1: referring to "a more broadly empowering legislative framework that focuses councils on meeting the needs of their communities".

88 The judgment in *Woolworths* was delivered on 24 May 1996. The relevant 1996 Amendment came into force on 26 July 1996; and see the observations of the Acting Minister of Local Government ("… the complementary relationship between the decision [*Woolworths*] and the legislation"): (18 July 1996) 556 NZPD 13727.

[95] We add that the ability to enforce the legal obligations imposed by the various statutory process requirements can also serve to protect the interests of minority groups.

[96] Further, the nature of rating decisions and the judgement to be exercised by local authorities in making them suggest an approach to judicial review in which the local authority as decision-maker is given some latitude in the rating decision.[89] The point fairly made by Local Government New Zealand is that these are complex decisions, often not amenable to right or wrong answers, requiring the resolution of factual issues, the weighing of competing interests, and competing policy considerations. These decisions ultimately require judgement on the part of local authorities.

[97] We also agree with the Council that there is no basis for distinguishing *Woolworths* on the grounds the present case involves a targeted rate not a differential general rate. Undoubtedly, there was some discrimination based on membership of a "target" group in *Woolworths*. And here, the considerations applicable to the exercise of the power (those in s 101(3)) are the same for general as they are for targeted rates.

[98] *Woolworths* has, as the Council points out, reflected the position in New Zealand for over 25 years in the context of rating decisions.[90] It appears to be both well-understood and to have provided a sufficient palimpsest or guiding standard for local authorities. We see no reason to depart from this settled position. The test is appropriate in a case such as this given the nature of the decision, and it is consistent with the processes and associated requirements for consultation and transparency in the statutory scheme and with the recognition of the democratic mandate.

*A role for fiduciary duties?*

[99] As we have indicated, the respondents place some weight on the concept of fiduciary duty in the context of the unreasonableness inquiry. The historical origins

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89 HC judgment, above n 3, at [160].

90 For a more recent application see, for example: *Kidd v Southland District Council* [2019] NZHC 1947 at [13]–[14]; and see also the observations in *Mangawhai Ratepayers and Residents Assoc Inc v Kaipara District Council* [2015] NZCA 612, [2016] 2 NZLR 437 at [90] and [101] per Miller J.

of that concept in its application to local authorities are discussed by Thomas J in his separate judgment in *Waitakere City Council v Lovelock*.[91] Thomas J observed that the notion of a trust, albeit indeterminate, "may date back to the change in the legal nature of municipal corporations" arising from the Municipal Corporations Act 1835 in the United Kingdom "when corporations ceased to be forms of property and became instruments of government".[92] Martin Loughlin also traces the historical origins of the concept noting, in agreement with Thomas J, that "the classic expression of the duty"[93] is as set out by Lord Atkinson in *Roberts v Hopwood*.[94] Loughlin also notes that subsequent consideration of the concept is "generally alluded to … in a fairly imprecise manner and without" articulation of the "precise nature of the fiduciary obligation" or of how it fits in with general administrative law principles.[95]

[100] The respondents' argument on fiduciary duties is as follows. They say that the Council did not fulfil its fiduciary duties to its ratepayers when targeting a rate to a small subset of ratepayers where the Council had not made any meaningful attempt to objectively identify the benefit to the ratepayers and had not considered the disproportionality and inequity of imposing the rate on the commercial accommodation providers. That argument has largely been addressed in the context of our discussion of error of law but, in any event, it does not add anything to the case that is made for unreasonableness by the respondents. It is not therefore necessary in terms of our reasoning to reach any concluded view on the relevance of the fiduciary duty concept in determining unreasonableness. That said, as we briefly explain, we doubt the ongoing utility of the fiduciary duty concept, at least in relation to decision-making under s 101(3)(a)(ii).

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91 *Waitakere City Council v Lovelock* [1997] 2 NZLR 385 (CA).

92 At 409.

93 Martin Loughlin *Legality and Locality: The Role of Law in Central-Local Government Relations* (Oxford University Press, Oxford, 1996) at 212. See also W Ivor Jennings "Central Control" in Harold J Laski, W Ivor Jennings and William A Robson (eds) *A Century of Municipal Progress: The Last Hundred Years* (George Allen & Unwin, London, 1936) 417 at 420–422.

94 *Roberts v Hopwood* [1925] AC 578 (HL). See Phil Fennell "Roberts v Hopwood: the Rule against Socialism" (1986) 13 Journal of Law and Society 401 at 402. See also *Bromley London Borough Council v Greater London Council* [1983] 1 AC 768 (HL).

95 At 213.

[101] The first point to make is that some of the considerations which have been treated in various cases as underlying a fiduciary duty in this area are considerations which are now effectively captured by s 101.[96]

[102] As Local Government New Zealand submits, the fiduciary duty concept was primarily drawn on by the court in cases such as *Mackenzie* as a basis for the conclusion that the benefits to a ratepayer were a mandatory relevant consideration. That approach is understandable in the context of *Mackenzie* where the imposition of the rate resulted in the ratepayer effectively creating a surplus for the Council of $1.9 million. Now, however, it is not generally necessary to rely on the concept of a fiduciary duty because the distribution of benefits is already a mandatory relevant consideration by virtue of s 101(3)(a)(ii).

[103] The second point to note is one made by the Court of Appeal in *Woolworths* and repeated by that Court in *Waitakere City Council v Lovelock*.[97] In *Woolworths* the Court of Appeal drew back somewhat from utilisation of the fiduciary duty concept. The Court suggested it was perhaps "more readily" applicable to spending than it was to funding decisions.[98] The Court went on to say, effectively, that the concept sat uneasily with the basis on which rates are levied. In particular, rates are imposed on property not on the ratepayer per se. Further, the Court of Appeal said, the relevant criteria to establish liability for rates were directed to the characteristics of the property to be rated rather than to the ratepayer.

[104] The Court in *Woolworths* was considering s 81 of the Rating Powers Act 1988 dealing with the type of groups of property for which a differential rate could be applied. The point made however applies equally to sch 2 of the Rating Act which, as we have said, sets out the matters that may be used to define the categories of rateable land, and to sch 3 which sets out the factors that may be used in calculating liability for targeted rates. In both schs 2 and 3 the relevant factors are directed to features of the property and not those of the ratepayer.

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96 The changes in the statutory scheme discussed above at [91]–[93] also suggest less need to rely on the fiduciary duty concept.

97 *Waitakere City Council*, above n 91, at 396–397 per Richardson P (with whom Blanchard J agreed). Contrast at 408–411 per Thomas J.

98 *Woolworths*, above n 7, at 546.

*The reasonableness of the decision*

[105] We turn then to the reasonableness of the current decision. In this case, we consider it essentially follows from our reasoning in relation to the first ground that there was no error of law that the decision was a reasonable one.

[106] That view follows because the Court of Appeal decision on unreasonableness hinged on the purportedly erroneous pass through assumption and on the failure to adequately consider the distribution of benefits. For instance, in its earlier discussion, the Court said that, absent the ability to pass through, "there could be no proper justification" for targeting only this small group to bear "the burden of funding an activity that provides greater benefits to four other larger groups as well as benefiting the wider Auckland community overall".[99] As this quote suggests, the Court's view that the result was a disproportionate burden (and therefore unreasonable) relies on the following: that pass through was well-nigh impossible; that these ratepayers only received a 10 per cent benefit; and that four other groups received a greater share of the benefit.

[107] We have already commented on the pass through assumption and the scope of the assessment required by the Council. Similarly, we have also already made the point that the Council could rely on the 22 per cent figure rather than the 10 per cent figure[100] and that the notion of a disproportionate burden as applied here is not apt.

[108] The second of the tables we set out at [75] above answers the suggestion the decision was unreasonable because other sectors received greater benefits than the commercial accommodation providers from ATEED's activities. Referring back to the first of the tables set out at [74], at 10 per cent, commercial accommodation providers rank below retail (42 per cent), other passenger transport (17 per cent), food and beverage (16 per cent), and other tourism (13 per cent). Using the statistics in the second table, accommodation spend in fact ranks second, behind transport.

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99 CA judgment, above n 4, at [101].

100 See above at [76].

[109] We add that it is clear from the staff report that it was well understood that other ratepayers, other than commercial accommodation providers, would benefit from ATEED's activities, noting that some of the community outcomes that ATEED's activities support concern "the overall prosperity and cultural richness of the city, and suggest a general rate mechanism may be appropriate". However, other outcomes were "more focused on the visitor economy and support the concept of a targeted funding mechanism".

[110] In addition, the staff report and consultation materials make clear that there were other practical features which drove the Council's decision to target commercial accommodation providers and not some of the other tourism sectors noted in the table. First, it was noted that many properties with a "large tourism footprint will only have a very small property footprint". This makes it difficult to target them in an equitable fashion with a property based rate. In terms of the rental car sector, for example, the supporting information made the point that the value of rental car properties has limited connection to actual or potential revenue generation. Second, as noted in the staff report's discussion of s 101(3)(a)(v):

> 88. It is administratively possible to implement a targeted rate for commercial accommodation providers. Most of the relevant information is already held and there would be only a small one-off administrative cost to establish and apply any differentials and also in assessing the apportionment between accommodation provision and other commercial activities in a property.
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> 89. In contrast, applying the targeted rate to the wider tourism sector (for example) would have considerable administrative challenges. It is not practically possible to identify all relevant businesses in the tourism sector. It would require arbitrary geographic and economic distinctions to be made between retail and food and beverage industries, some of whom will benefit more and others less from the visitor economy. An extreme example would be CBD restaurants compared to suburban takeaways.

[111] A similar point about the practical issues was made as part of the consideration of the overall impact as required by s 101(3)(b). It is also relevant that the alternative to the targeted rate that was being considered by the Council was that the general ratepayers would be funding 100 per cent of the cost of ATEED's activities. To that extent, at least, the decision to impose the targeted rate comprised consideration of the relative distribution of benefits, as the Council said in its submissions.

[112] Following on from that point, in assessing the reasonableness of the reliance on the 22 per cent figure, it is relevant that under the rate as finally imposed, 50 per cent of the costs of ATEED's expenditure was returned to the wider rating base to shoulder. That modification, arguably, reflected a cross-subsidy back — a point which only serves to confirm the complexity of the targeted rating decision.

[113] We turn then to consider the remaining submissions relied on by the respondents to show that the targeted rate was unreasonable. We do not see any merit in the challenge based on criticism of the analysis of ATEED's activities which in this context are essentially a challenge to its effectiveness, or rather perceived lack of effectiveness. The challenge must proceed on the basis ATEED was created by the Council to achieve its promotional goals and there is no suggestion that it was not within the Council's mandate to do so. Complaint by industry groups about what ATEED did or does are irrelevant, as are complaints that the accommodation providers themselves are better promoters.

[114] The respondents also submit that the effect of the targeted rate was that like cases were not treated alike. A number of matters are raised under this head. In particular, it is argued that the imposition of the rate led to horizontal inequities, namely, between the accommodation providers as against other sectors; formal as against informal accommodation providers; freehold as against strata title holders; targeted accommodation providers as against backpacker and camping providers; and owners as against operators.[101]

[115] In terms of informal providers, although they were subsequently included, the respondents also say that the Ratings Information Database was inadequate to identify all of them, thereby exacerbating any inequity. Further, in developing the submission about the impact on strata title holders, it is said that the fact the rate is based on capital value had the effect of disadvantaging properties owned in strata title. Using capital value also meant the rate applied regardless of whether people were staying with the providers or not.

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[101] See HC judgment, above n 3, at [246]–[255].

[116] On this aspect we agree with the High Court's analysis. Given the nature of a targeted rate there may well be some unfairness implicit in the regime but to constitute unreasonableness in this context, something more is needed than "simply apparent unfairness".[102] The matters raised by the respondents on analysis do not go beyond that when viewed in context,[103] or are another way of putting matters that have been addressed in our earlier discussion. It is also relevant that the Council responded to some of these concerns by changes to the scheme, such as the remissions policy.[104]

[117] There was a logic to the Council's approach. For example, in terms of the differential applied to backpackers and camping providers (who did not pay the rate), the Council had information suggesting their clientele was more price sensitive which restricted the ability of these providers to pass on the cost of the rate.[105] Similarly, the Council explained why it favoured the use of capital value noting, amongst other matters, that its use provided for factors reflecting variations between providers in respect of both benefits received and affordability. Informal providers were excluded because of the practical difficulties arising from the absence of a clearly identifiable part of the property used for non-residential purposes. The Council noted that there were ways to apportion use but the Council took the view the costs of administering such a scheme were disproportionate to the revenue gained. As we have mentioned, the Council nevertheless said it would review this in the future.

[118] The respondents' argument is that the Council's decision to proceed given the resultant inequities was precipitous. In effect they say the Council had to resolve all of these issues, particularly the problems with identifying informal providers before it could proceed at all. However, we agree with Moore J that it was not unreasonable to carry on and impose the rate having committed to reviewing the difficult aspects.[106] To suggest all of the wrinkles had to be ironed out from the outset would be to ignore

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102 At [268].

103 We include within this category the argument based on unfairness to strata title holders.

104 To the extent the respondents are critical of the application of the remissions policy, on that issue we adopt the approach of the High Court: at [279]–[280].

105 At [276]. See also above at [18].

106 As the High Court said "[t]he process of identification was always going to be a continuing and evolving process": HC judgment, above n 3, at [275].

the realities facing the Council. As Moore J said "[t]here must be a certain practical fluidity and flexibility in local government decision-making".[107]

[119] Finally, the respondents also say that the targeted rate was imposed without sufficient consideration of a less discriminatory regime. We have nothing to add to the High Court Judge's assessment of this aspect. Moore J stated:[108]

> The [Rating Act] 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. … [T]he Council was entitled to pursue a targeted rate to avoid either of these results.

[120] The Judge went on to note that in any event the evidence indicated that the voluntary "opt-in" model was not broadly supported across all elements of the sector.[109]

*Conclusion on reasonableness*

[121] We accept that there will be rating cases at one end of the spectrum like *Mackenzie*.[110] But, here, there was a rational connection between the imposition of the rate and the benefits from the activity. It is relevant to note that the rate was targeted at funding a niche operation, namely, tourism promotion. It is quite different from *Mackenzie* in which the ratepayer was targeted to subsidise local authority activity that really had nothing to do with the ratepayer. Instead this is a targeted rate to fund a targeted activity in which the nexus between the rate and the activity is close. Further, compromises were made both initially and subsequently to recognise the benefits received by other businesses and ratepayers from ATEED's activities.

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107 At [271].
108 At [284].
109 At [285].
110 In a similar category is *Electricity Corporation of New Zealand Ltd v The Waimate District Council* HC Christchurch CP47/90, 27 March 1992, where Electricorp was successful in the context of litigation about rating decisions.

[122] The Court of Appeal was wrong to find that the decision was unreasonable. The appeal accordingly succeeds on this ground as well.

**Costs**

[123] The appellant sought costs. No reason has been advanced as to why costs should not follow the event. Accordingly, the appellant is entitled to one set of costs of $35,000 and usual disbursements. We allow for second counsel.

[124] The High Court indicated the appellant, having succeeded, should be entitled to costs. Memoranda were to be filed if the parties could not agree. As we understand it, no costs orders have yet been made by the High Court. Costs in that Court are to be determined in the light of this Court's judgment allowing the appeal.

[125] The Court of Appeal awarded the respondents costs for a complex appeal on band B basis plus usual disbursements. The Court allowed for second counsel. That decision is quashed. Costs in the Court of Appeal are to be redetermined in the light of this Court's judgment allowing the appeal.

**Result**

[126] For these reasons, orders are made as follows:

(a) The appeal is allowed. The decision of the Court of Appeal is set aside. The decision of the High Court dismissing the respondents' application for judicial review is reinstated.

(b) The respondents must pay the appellant one set of costs of $35,000 plus usual disbursements. We allow for second counsel.

(c) The award of costs and disbursements made in favour of the respondents in the Court of Appeal is quashed. That Court should redetermine costs in light of this Court's judgment allowing the appeal.

(d) Costs in the High Court are to be determined by that Court in the light of this Court's judgment allowing the appeal.

(e) Leave is reserved to the parties to apply for consequential orders if required.

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