SUPREME COURT OF QUEENSLAND

CITATION:	*Island Resorts (Apartments) Pty Ltd v Gold Coast City Council* [2020] QSC 145
PARTIES:	**ISLAND RESORTS (APARTMENTS) PTY LTD** ACN 613 135 783 (applicant) **v** **GOLD COAST CITY COUNCIL** (respondent)
FILE NO:	BS 12297 of 2019
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland at Brisbane
DELIVERED ON:	29 May 2020
DELIVERED AT:	Brisbane
HEARING DATE:	13 March 2020
JUDGE:	Applegarth J
ORDER:	**1. The application is dismissed.** **2. Subject to any submissions as to costs, the applicant is to pay the respondent's costs of and incidental to the proceeding to be assessed on the standard basis.**
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – IRRELEVANT CONSIDERATIONS – where the applicant owns more than 70 properties within the respondent's local government area – where the respondent passed annual resolutions providing for differential general rates within certain categories and fixing a minimum general rate within each category – where the respondent levied the minimum general rates on the applicant's properties – where the principal difference between two ratings categories is whether a property is let to a "permanent resident" rather than an "itinerant" – where the applicant submits that in making the rating category decisions, the respondent took into account the personal characteristics of the persons in occupation of the applicant's properties – whether the respondent took into account an irrelevant consideration in making the rating category decisions – whether the fact that land is used to provide accommodation to "itinerants" rather than "permanent

residents" was an irrelevant consideration

ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – RELEVANT CONSIDERATIONS – FAILURE TO CONSIDER – where the applicant's properties are located within the Couran Cove Resort on South Stradbroke Island – where the respondent levied minimum general rates on the applicant's properties – where the applicant submits that the respondent does not provide any service for which "general rates" are prescribed and various services to the applicant's properties are privately provided – where the minimum general rates levied comprised almost 20 per cent of the unimproved value of each of the applicant's properties – where the applicant submits that the respondent was required to consider the extent to which the applicant's properties do not burden Council resources – whether the respondent failed to consider relevant considerations in levying minimum general rates on the applicant's properties

ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – UNREASONABLENESS – whether the respondent's exercise of power in levying minimum general rates on the applicant's properties was so unreasonable that no reasonable person could so exercise the power

LOCAL GOVERNMENT – POWERS, FUNCTIONS AND DUTIES OF COUNCILS GENERALLY – POWERS OVER LAND – CLASSIFICATION OF LAND – where the respondent levied minimum general rates on the applicant's properties pursuant to differential rating categories – where the principal difference between two ratings categories is whether a property is let to a "permanent resident" rather than an "itinerant" – where the applicant submits that in making the rating category decisions, the respondent took into account the personal characteristics of the persons in occupation of the applicant's properties – whether the fact that land is used to provide accommodation to "itinerants" rather than "permanent residents" was an irrelevant consideration

Local Government Act 2009 (Qld), s 92, s 93, s 94
Local Government Regulation 2012 (Qld), s 77, s 80, s 81

Buck v Bavone (1976) 135 CLR 110; [1976] HCA 24, cited
Marrickville Metro Shopping Centre Pty Ltd v Marrickville Council (2010) 174 LGERA 67; [2010] NSWCA 145, cited
Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986) 162 CLR 24; [1986] HCA 40, cited
Minister for Immigration and Border Protection v Eden (2016) 240 FCR 158; [2016] FCAFC 28, cited

Minister for Immigration and Border Protection v SZVFW (2018) 264 CLR 541; [2018] HCA 30, cited
Minister for Immigration and Citizenship v Li (2013) 249 CLR 332; [2013] HCA 18, cited
Ostwald Accommodation Pty Ltd v Western Downs Regional Council [2016] 2 Qd R 14; [2015] QSC 210, considered
Paton v Mackay Regional Council [2014] QSC 75, considered
Sunwater v Burdekin Shire Council (2002) 125 LGERA 263; [2002] QSC 433, cited
Tarong Energy Corporation Ltd v South Burnett Regional Council [2012] 1 Qd R 171; [2011] QSC 74, cited
Ugarin Pty Ltd v Lockyer Valley Regional Council (2017) 222 LGERA 199; [2017] QSC 122, cited
Sean Investments Pty Ltd v MacKellar (1981) 38 ALR 363, cited
Xstrata Coal Qld Pty Ltd v Council of the Shire of Bowen [2010] QCA 170, considered

COUNSEL: M D Martin QC, with B Kabel, for the applicant
A L Wheatley QC, with J P Hastie, for the respondent

SOLICITORS: Mills Oakley for the applicant
King & Company Solicitors for the respondent

[1] The applicant owns more than 70 properties within the Couran Cove Resort on South Stradbroke Island. The properties are within the local government area of the respondent.

[2] One of the respondent's functions as a council is to levy general rates on all rateable land within its local government area.

[3] Between 2014 and 2019, the respondent passed annual resolutions providing for differential general rates within certain categories and fixing a minimum general rate within those categories.

[4] In each of those years, the respondent explained its approach to levying differential general rates in its revenue statement. For example, in the 2014/15 year, it stated:

> "A differential system of general rates provides equity through recognising different uses made of different rateable lands (both generally and with respect to revenue-producing potential) and different service levels generated or potentially generated by different ratepayer land."

In that year, rateable land in the city was differentiated into 87 rating categories, detailed in tables.

[5] Each Revenue Statement and Resolution of Rates and Charges for the relevant year stated the following (or words to similar effect):

> "When categorising land for differential rating purposes, Council has also had regard to **the extent to which tourism and tourism-related business and industry uses continue to contribute to the demand for the provision of Council services across the City. Council considers that land used for those businesses (including premises used to provide rental accommodation to itinerants) and industries should generate a greater contribution to general rate revenue than land that is not used for a commercial purpose** (including premises used to provide rental accommodation to itinerants).
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> In addition, Council has had regard to its inspection program of all rental properties within the City. This program operates on a 3-year cycle during which all rental premises are inspected either internally or externally by Council officers in an effort to maintain an acceptable standard of rental accommodation throughout the City in accordance with its local laws. In such circumstances, Council considers that those rental properties should generate a greater contribution to general rate revenue than land that is not rented." (emphasis added)

[6] Among the rating categories that the respondent adopted for residential lots was a Category 2T and a Category 3T. The respondent resolved each year to levy minimum general rates for Categories 2T and 3T. Each category depended on whether the lot was used to provide rental accommodation to "permanent residents" (2T) or to "itinerants" (3T). The word "itinerant" was defined to mean a visitor or tourist, as distinct from a permanent resident.

The decisions or conduct the applicant seeks to review

[7] The applicant seeks judicial review of two kinds of decisions.

[8] The first are resolutions which adopted certain differential rating categories and levied a minimum general rate for each category. They are resolutions on 18 June 2014, 19 June 2015, 24 June 2016 to adopt a differential rating category 2T and to levy a minimum general rate within that category, and decisions on 24 June 2016, 19 June 2017, 21 June 2018 and 13 June 2019 to adopt a differential rating category 3T and levy a minimum general rate within that category. I will call these "the Category 2T and the Category 3T decisions".

[9] The second relates to decisions and/or conduct of the respondent in issuing rates notices to the applicant pursuant to those decisions. The applicant challenges the decisions and/or conduct of the respondent to issue rate notices to it for each of its properties at the Couran Cove Resort, which the respondent determined was within differential category 2T up to and including 31 December 2016 and thereafter within category 3T.

[10] The respondent submits that the decisions to issue rates notices to the applicant or any conduct in issuing rates notices are not "decisions" within the meaning of that term in s 4 of the *Judicial Review Act* 1991 (Qld) ("*JRA*"). It is unnecessary to outline its contentions in that regard at this stage.

[11] The applicant arguably requires an extension of time to bring an application to review some of the decisions. The issue turns on when the terms of the relevant decision were provided to it. It is unnecessary to pursue that matter because, if an extension of time is required, the respondent does not oppose it, and it is appropriate for the reasons given by the applicant to grant it.

The grounds of review

[12] The applicant seeks to have the decisions of the respondent set aside on three grounds, the second and third of which are factually related.

[13] The first ground is that in making the Category 2T and the Category 3T decisions the respondent is alleged to have taken into account an irrelevant consideration, namely the personal characteristics of the person in occupation of the property, which is not an attribute or characteristic of the property.

[14] The second and third grounds are that in making the relevant decisions the respondent is alleged to have failed to take into account what are said to be relevant considerations, or alternatively, its exercise of power in the circumstances was so unreasonable that no reasonable person could so exercise the power. The matters that are said to be relevant considerations which the respondent failed to take into account, or which made its exercise of power unreasonable in that sense, are that:

(a) the unimproved value of each of the applicant's properties was only $12,500;

(b) the respondent does not provide any services to those properties of the type falling within the definition of "general rates" in s 92 of the *Local Government Act* 2009 (Qld) ("*LGA*");

(c) the applicant, or the body corporate for the land, provides essential and other services to the properties including water supply, electricity supply, refuse disposal, transport services within, to and from the resort (including walking and other paths and tracks and a ferry service) and pest and inspect suppression;

(d) the supply of the aforesaid services was the subject of an agreement between the respondent and Interpacific Resorts (Australia) Pty Ltd, the developer of the land on 30 May 1998; and

(e) the minimum general rates comprised almost 20% of the unimproved value of the land.

The statutory context

[15] The *LGA* empowers a local government to levy various types of rates on rateable land.[1] Rateable land is "any land or building unit, in the local government area, that is not exempted from rates".[2] Section 92 defines those four types of rates and charges, being general rates (including differential rates), special rates and charges, utility charges and separate rates and charges.

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1 *LGA*, s 92, s 93(1), s 94.

2 *LGA*, s 93(2).

[16] A local government is required to levy general rates (including differential rates) on all rateable land within a local government area.[3] General rates (including differential rates) are defined in s 92(2):

> "***General rates*** are for services, facilities and activities that are supplied or undertaken for the benefit of the community in general (rather than a particular person).
>
> Example –
>
> General rates contribute to the cost of roads and library services that benefit the community in general."

They may be contrasted with other rates and charges. For example, utility charges are for a service, facility or activity such as waste management, sewerage or water.[4]

[17] Section 80 of the *Local Government Regulation* 2012 (Qld) ("*LGR*") provides that general rates that differ for different categories of rateable land within a local government area are termed "differential general rates".

[18] To levy differential general rates, a local government must first decide and describe the different categories of rateable land in the local government area by resolution at the local government's budget meeting.[5] It must then identify the rating category to which each parcel of rateable land in the local government area belongs and may do so "in any way it considers appropriate".[6]

[19] If the local government decides to levy differential general rates in a given financial year, it must give a land owner notice of the rating category determined for their land alongside the standard rate notice which is issued to the landowner.[7] A process is provided for in the *LGR* by which a landowner can object to the rating category imposed.[8]

[20] The sequential decision-making process for the making and levying of differential general rates may be listed as follows:

(a) the Council is to decide whether general rates or differential general rates are to be made and levied: s 80 *LGR*;

(b) if differential general rates are to be made and levied, the Council must decide on the different rating categories and provide descriptions of those different categories: s 81 *LGR* ("the rating category decision") ;

(c) the Council may fix a minimum amount of general rates: s 77 *LGR*; and

(d) the Council must identify the rating category to which each parcel of rateable land in the local government area belongs: s 81(4)-(5) *LGR*.

[21] The Council can only levy rates or charges by a rate notice: s 104 *LGR*. As noted, the relevant rate notice is to be accompanied by or contain a rating category

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3 *LGA*, s 94(1)(a).
4 *LGA*, s 92(4).
5 *LGR*, s 81(1), s 81(2).
6 *LGR*, s 81(4), s 81(5).
7 *LGR*, s 88, s 104(1).
8 *LGR*, s 90.

statement which includes the rating category for the land, upon which the rate is charged: s 88 *LGR*.

The resolutions and the contested categories

[22] The applicant challenges various resolutions that in different years created a Category 2T and a Category 3T. This is what I have described as a rating category decision. The challenge is concerned with the power to create such a category, not with whether a particular property owned by the applicant falls within that category.

[23] As highlighted in [5] above, in each of the relevant years, the Council stated that one of the factors it had taken into account in setting differential rates was:

> "… the extent to which tourism and tourism-related business and industry uses continue to contribute to the demand for the provision of Council services across the City. Council considers that land used for those businesses (including premises used to provide rental accommodation to itinerants) and industries should generate a greater contribution to general rate revenue than land that is not used for a commercial purpose …"

[24] In each resolution, save for minor drafting changes, the rating categories 2T and 3T were described as follows. I have highlighted words which are central to the issues in this proceeding.

Category 2T	**Category 3T**
A residential lot: (1) created on a Building Units plan or Building Format plan that is part of a community titles scheme; (2) located up to including 4 levels above ground; and (3) either: (a) **used to provide rental accommodation to permanent residents at any time during the financial year**; or (b) not used as a principal place of residence.	A residential lot: (1) created on a Building Units plan or Building Format plan that is part of a community titles scheme; (2) located up to including 4 levels above ground; and (3) **used to provide rental accommodation to itinerants at any time during the financial year.**

[25] The relevant definitions in each year (which did not materially change throughout the relevant financial years) were:

(a) itinerant: "… a visitor or tourist, as distinct from a permanent resident";

(b) visitor or tourist: "… a person visiting a person or place for a temporary period";

(c) permanent resident: "… a person who lives in the local government area, as distinct from an itinerant";

(d) lives: "… to make one's home in a particular place on a permanent basis"; and

(e) rental accommodation: "… land required to be licensed under Local Law No.16 (Licensing) 2014 for the operation of rental accommodation and for the purpose of categorisation includes land the subject of a time share scheme, or similar arrangement; includes land the subject of a lifetime lease, lifetime licence, company share scheme or time share scheme, or similar arrangement".

The first ground of judicial review: parties' submissions

[26] The applicant alleges that in making the rating category decisions in respect of Category 2T and Category 3T the respondent took into account an irrelevant consideration, namely the personal characteristics of the person in occupation of the property, which is not an attribute or characteristic of the property.

[27] It submits that each resolution made a distinction between accommodation which is let to permanent residents (2T) or to itinerants (3T) at any time during the financial year, and that this bears no relationship to the burdens of tourism upon the provision of the respondent's services.

[28] Reliance is placed upon cases which are said to support the proposition that a Council cannot, in setting differential rates, take into account the individual characteristics of the owner, but can only have regard to the value or attributes of the land in question. The category in this case is submitted to focus on the use to which the land is put by the owner, and not any attribute or characteristic of the land. The use is submitted to be entirely "owner dependent". In other words, it depends entirely upon the choice made by the owner to rent to a particular category of persons – itinerants – rather than permanent residents. It does not depend upon any characteristic of the land or its improvements.

[29] In reply, the respondent submits that the authorities do not support the applicant's case. In particular, the decision in *Xstrata Coal Qld Pty Ltd v Council of the Shire of Bowen*[9] upon which the applicant relies is submitted to recognize that it is permissible to take into account:

(a) the use to which land might be put, including its highest and best use;

(b) the burden the land or its use may place upon the Council's budget;

(c) the value of the land; and

(d) the potential for the land to earn income for its owner.

[30] The authorities are said to recognize that the respondent was entitled to have regard to the extent to which land used for the purposes of tourist accommodation contributes to the demand for the provision of Council services. The respondent's submissions refer to this as the "demand consideration".

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9 [2010] QCA 170 ("*Xstrata"*).

[31] According to the respondent, the use to which land is put is not an irrelevant consideration when deciding differential rating categories or when fixing a minimum general rate. Any use necessarily involves a decision by the owner about how the land should, in fact, be used. Categories 2T and 3T engage upon the use of land for a category of accommodation.

[32] The respondent submits that it was entitled to have regard to the "demand consideration" in making a decision that involved a "quasi-legislative" function. The decisions evaluated the level of demand that land used for the purposes of providing tourist accommodation places on council services. This is said to be a permissible and relevant consideration in making a rating category decision that distinguishes between a lot used to provide rental accommodation to permanent residents (2T) or to visitors and tourists (3T).

Irrelevant considerations

[33] Where a statute confers a discretion which in its terms is unconfined, the factors that may be taken into account in the exercise of the discretion "are similarly unconfined, except in so far as there may be found in the subject-matter, scope and purpose of the statute some implied limitation on the factors to which the decision-maker may legitimately have regard".[10]

[34] There are no relevant express statutory constraints on the exercise of the power to decide differing rating categories.[11] The exercise of the Council's rating power involves a "quasi-legislative" function in setting a tax in circumstances where the statute expressly permits differentiation.[12] There is no warrant to read limits into those powers because of the court's notions of equity and fairness in making distinctions between rating categories. This is because assessments of equity and fairness are the province of the local government in making decisions to levy differential general rates.[13]

[35] In *Ostwald*, Jackson J observed:

> "In some cases, statutory provisions for a local government to impose or levy differential general rates like those in question in this case have been described as "quasi-legislative". The imposition of a tax by an elected body politic passing a law to do so is recognised as legislative. The imposition or levy of a general rate by a body corporate local government acting through the organ of its elected representative councillors making a resolution at a meeting is a closely analogous process.
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> In *Sunwater*, decided under the progenitors to the present sections, Cullinane J said that substantial latitude must be allowed in a local authority in choosing the criteria for determining the relevant categories of land, meaning rating categories.

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10 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 40.

11 *Ostwald Accommodation Pty Ltd v Western Downs Regional Council* [2016] 2 Qd R 14 ("*Ostwald*") at 28 [58] – 29 [64]; *Ugarin Pty Ltd v Lockyer Valley Regional Council* (2017) 222 LGERA 199 at [7] and [53].

12 *Tarong Energy Corporation Ltd v South Burnett Regional Council* [2012] 1 Qd R 171 at 190 [78]; *Marrickville Metro Shopping Centre Pty Ltd v Marrickville Council* (2010) 174 LGERA 67 at [99].

13 *Ostwald* at 38 [129].

> Another helpful statement is that made by Douglas J in *Cassels v Brisbane City Council*, as to "the unconfined factors that may be taken into account of setting the rate", referring also to the "width of the language used" in provisions in the *City of Brisbane Act* 1924, that are not readily distinguished from the relevant provisions in the present case."[14]

[36] Section 77 of the *LGR* confers a discretion on a Council to fix a minimum amount of general rates and s 77(2) states it may do so "in any way the local government considers appropriate".

The authorities

Xstrata Coal Qld Pty Ltd v Council of the Shire of Bowen[15]

[37] In *Xstrata*, the appellants had challenged a Council's decision to fix differential rates with respect to categories of coal mining land. They submitted that the Council's rating decisions took into consideration the ability of landowners to pay the proposed rates. The only issue on the appeal was whether the Council, in resolving on the particular categories of land and in fixing the differential rate with respect to each category, took into account the capacity of the landowners to pay the increased burden. The appellants argued that it did and that the consideration was irrelevant.[16] They argued that the Act did not contemplate anything other than some attribute or characteristic of the land which was to be categorised and differentially rated being taken into account when determining the rate. Chesterman JA (with whom de Jersey CJ and Holmes JA agreed) summarised the appellants' submission as follows:

> "The appellants submit that what might be taken into account were such things as the use to which the land might be put, including its highest and best use, the burden the land or its use may have upon the Council's budget and, of course, the value of the land including its potential to earn income for the land owner. The appellants submit, emphatically, that the Council was not entitled to take into account any characteristic of the owner of the land, such as wealth, when fixing a differential rate."[17]

[38] This submission was accepted. Chesterman JA stated that the statutory provisions made it clear:

> "… that a differential general rate must be set by reference to some attribute of the land which is the basis for its inclusion in a particular category for the purposes of setting a differential general rate. That is to say, if a Council is to utilise the statutory powers to set a differential general rate it must divide the land in its area into categories; and the categorisation must occur by reference to identifiable criteria which in some way describe the land. The fact that a differential general rate must be applied to each category is an

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14 [2016] 2 Qd R 14 at 29 [62]-[64] (footnotes omitted).
15 [2010] QCA 170.
16 At [10].
17 At [21].

> explicit statutory recognition that it is some attribute of the land which leads to its categorisation which in turn forms the basis for the setting of the differential rate."[18]

[39] In *Xstrata*, the respondent conceded that it would not be lawful to set rates by reference to an individual ratepayer's financial resources.[19] Its submission was that the differential rates in question were not set by reference to the appellant's capacity to pay, but that the financial capacity taken into account was that derived from the potential of the lands in question to generate income and wealth, and that capacity was an attribute of the land which could properly form the basis for setting a differential rate. Chesterman JA formulated the issue on the appeal:

> "The point in contention on the appeal therefore condenses to this: were the differential rates set by reference to the appellant's *personal* capacity to pay rates, or by reference to the capacity of the *land* in the separate categories to produce the capacity to pay? If it were the former, the terms of the Act, authority and the respondent's concession would invalidate the Council's resolutions. If it were the latter, the appellants' challenge to the resolution and the rates would fail."[20]

[40] The Court concluded that, on the basis of the facts before the primary judge, the appellant's personal capacity to pay was taken into account in setting the differential general rates. The Council's resolutions were set aside.

[41] *Xstrata* is authority for the point conceded on the appeal by the respondent, namely that it would not be lawful to set differential rates by reference to the landowner's *personal* capacity to pay rates. It would not be permissible to take into account such a personal capacity which was unrelated to an attribute of the land. Nevertheless, the Court of Appeal accepted that a Council might take into account the landowner's capacity to pay rates by virtue of the value of the land "including its potential to earn income for the landowner".[21] The Court's acceptance of the appellants' submissions in that case also recognized that a Council may take into account the use to which the land might be put. This was regarded as an attribute of the land which could form the basis for setting a differential rate.

[42] Importantly for the purposes of the present case, the Court of Appeal also accepted the appellants' submission that the Council might take into account "the burden the land or its use may have upon the Council's budget".[22]

[43] *Xstrata* might be said to have made the following distinction. An irrelevant and impermissible consideration would be some personal characteristic of the landowner, unrelated to the land in question, such as the ratepayer's *personal* capacity to pay rates. Relevant considerations would include a characteristic or attribute of the land. The latter are not confined to a physical characteristic. The appellants' submission accepted by the Court of Appeal was that the Council might take into account things such as:

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18 At [22].
19 At [26].
20 At [27] (emphasis in original).
21 At [21].
22 At [21].

(a) the use to which the land might be put, including its highest and best use;

(b) the burden the land or its use may have upon the Council's budget; and

(c) the value of the land, including its potential to earn income for its owner.

Paton v Mackay Regional Council [23]

[44] In this matter the Council adopted revenue statements and created various differential rate categories, including "Investor Residential Band 2" and "Residential Band 2". The latter was property used solely as the owner's principal place of residence. McMeekin J concluded that the categorisation "impermissibly took into account characteristics personal to the owners of the land and failed to restrict itself to characteristics of the subject land itself".[24] This conclusion built upon the following analysis:

> "[31] It can be immediately seen that the effect of the categories adopted by the Council is that it would be quite possible to have two neighbouring blocks of land, identical in every respect, each owned by an individual, with one occupied by tenants – say a family of two adults and two children – and the other occupied by the owner – say his (or her) family of two adults and two children – with the former being categorised as "Investor" and the latter not.
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> [32] The burden of the two households on the local council is precisely the same. The highest and best use is the same. The actual use as a residence is precisely the same. In the circumstances postulated one lot has precisely the same capacity to generate income as the other. It is true that the land does generate income for the owner in one case and not the other. But it is not any characteristic of the land which causes it to be differentiated but rather the decision of the owner whether to live on one block or the other and his or her decision to rent out the other block. The owner has that choice because he or she owns two (or more) blocks of land. Hence it is the personal characteristics of the owner – here that the owner owns more than one lot – that results in the differing treatment."

[45] McMeekin J concluded that the "use" of the land and the potential of the land to earn income in the examples given by him were precisely the same. His Honour interpreted the word "use" in the phrase "the use to which the land might be put" in *Xstrata* as "not owner dependent but derived from some characteristic of the land."[25]

Ostwald Accommodation Pty Ltd v Western Downs Regional Council[26]

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23 [2014] QSC 75.
24 At [52].
25 At [43].
26 [2016] 2 Qd R 14; [2015] QSC 10.

[46] This authority concerned the validity of decisions levying a differential general rate. The challenged rating category depended, in part, on whether land used for providing intensive accommodation for more than 100 but less than 200 people was used for persons "other than the ordinary travelling public", such as workers' accommodation. The Court rejected the ratepayer's contention that this impermissibly involved consideration of the personal characteristics of the persons who temporarily occupied the land. The applicant in that case submitted that a use within the challenged rating category "is impermanent and owes nothing to any characteristic of the land as such".[27]

[47] Jackson J noted that the applicant did not submit that land use, per se, was an impermissible criterion, and that it could not have done so having regard to the examples of use given under the *LGR*. Most examples of differential rating categories in that regulation were expressly defined by the text "land that is used for …"[28] Jackson J went on to state:

> "The use of land is a relevant consideration in making a decision as to differential rating categories."[29]

[48] Jackson J addressed the applicant's argument that the distinction made in the challenged rating category between workers and persons who are ordinary travelling public was a characteristic of the persons who temporarily occupied the land or the type of people who stay in the premises, and was an irrelevant consideration in making a decision as to a rating category for the purpose of levying differential general rates.

> "[108] The challenged rating category does not engage upon a category of persons as such. It engages upon land use for a category of accommodation. I accept that the persons for whom the accommodation is provided, namely workers (or single persons as well), comprise an element of the category. I accept also that land used for accommodation for those persons is distinguished from land used for the accommodation of the ordinary travelling public. But that is not the only element of the challenged rating category. A second element engages upon the number of rooms and types of rooms and services provided to the accommodated persons. A third element is the number of persons who are not members of the ordinary travelling public for whom accommodation is provided. A fourth element is that the accommodation provided constitutes workers' accommodation, single person's quarters, workers' camps, accommodation villages, barracks or other multi-accommodation units.
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> [109] These elements engage upon the nature of the improvements on the land and the use of those improvements. They are not characteristics that are 'owner dependent'. They are mostly characteristics that fall within

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27 At 28 [56].
28 Ibid.
29 At 35 [112].

> the meaning of the expression an 'attribute of the land' including improvements."

[49] After analysing the decisions in *Xstrata* and *Paton*, Jackson J confirmed that the use of land in its improved state can be a relevant factor in setting rating categories.[30] His Honour was conscious that *Paton* was authority for the proposition that the difference between land used for residential purposes by an owner or their permitted occupant and land used for residential purposes by a rent paying tenant of the owner might be insufficient to constitute a valid basis for a separate rating category.[31] It might be argued, by analogy, that the difference between land used for the purpose of supplying accommodation services to a particular group of patrons, namely the ordinary travelling public and land used for the purpose of supplying those services to another group of patrons, namely workers or single persons engaged in industry located away from the accommodation property, was similarly insufficient.[32] However, this analogous reasoning was said to go too far. The use of land for a major income earning activity was a relevant consideration to take into account in making a decision to establish a rating category and the related decision to levy differential general rates. The economic realities were that some industries and activities for which land is used are capable of generating much greater income than others.[33]

Discussion of the authorities

[50] The authorities which I have discussed illuminate the relevant principles. The application of those principles in these cases depended upon particular facts, different rating categories and different justifications for those categories. For example, in *Ostwald*, the challenged rating category engaged upon land used for a category of accommodation, with characteristics that were not "owner dependent". The use of the land was a relevant consideration because some industries and activities for which land is used are capable of generating much greater income than others. The economic use and value of that land use may be taken into account as a relevant factor, unless there is some express or implied limit on the scope of the power to levy differential general rates.[34] The differential rate in *Ostwald*, unlike this case, was not justified on the basis of the burden that a certain use might place upon the local government's budget.

[51] The decision in *Paton* is similarly distinguishable because there was no suggested justification in that case that the different categories of use placed different burdens upon the local government.

[52] Neither *Xstrata* nor any other case is authority for the proposition that the choice of a landowner to use land for a use which is evaluated to place a greater burden upon the Council's budget is an impermissible consideration. In fact, *Xstrata* recognized that the use to which land might be put is a permissible consideration. If the use of land may be a relevant characteristic because of the increased burden which that use may place upon the Council's budget, it is impossible to sustain the proposition that

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30 At 37 [120].
31 At 37 [124].
32 At 37 [124].
33 At 37-38 [125].
34 *Ostwald* at 37 [120].

the choice of the owner to use the land in that particular way is an irrelevant personal characteristic.

The applicant's essential arguments on ground one

[53] In its submissions in reply, the applicant reiterates its submission that a decision by an owner to let to a permanent resident as opposed to an itinerant is an irrelevant consideration in setting categories and minimum rates. It argues that, despite the contents of the Revenue Statement, the categories in fact imposed do not take into account the extent to which accommodation is let to permanent residents or itinerants, or any consequential impact it might have upon the respondent's resources. The same category applies whether the rental accommodation is offered or provided to itinerants for a single day or for the entire year, and is said to bear no relationship whatsoever to the burdens of tourism upon the provision of the respondent's services. According to this analysis, the respondent took into account not only the matters stated in the Revenue Statement, but also whether the lot is used to provide rental accommodation to permanent residents (2T) or to "itinerants" (3T) at any time during the financial year, regardless of the impact of the burdens upon Council resources.

[54] The applicant submits that if this analysis is accepted and the Council had regard to whether the lot was used to provide rental accommodation to permanent residents (2T) or to itinerants (3T), regardless of the impact of the burden upon Council resources, then the matter is a simple one. Upon that analysis, the issue is whether it is permissible, in setting categories and minimum rates, for a Council to take into account that a landowner has chosen to let land to person A instead of person B.

Determination of the first ground of judicial review

[55] I do not accept the applicant's key submission that a decision by an owner to let to a permanent resident, as opposed to an itinerant, is an irrelevant consideration in setting categories and minimum rates. The use of land is a relevant consideration in making a decision as to differential rating categories. *Xstrata* accepts this proposition and *Ostwald* confirms it.

[56] The use of a residential lot to provide rental accommodation to "itinerants" as distinct from "permanent residents" is a permissible consideration. It relates to an attribute of the land, namely the use to which it is put. That use may involve a decision by the owner about the use to which a lot is put. But that does not make its use a personal characteristic of the owner, unrelated to the land. The rental of property for a use which is permitted by law can always be described as "owner dependent". But those words tend to confuse the issue. For instance, the use of rented commercial premises as a funeral parlour, rather than an ice cream parlour, is, in a sense, "owner dependent". But that does not mean that the different use to which the premises are put by its owners cannot be a relevant consideration for the purposes of a rating category decision or a decision to levy a minimum general rate in a chosen category.

[57] In this matter, the issue is whether the rating category decisions, which I have described as the Category 2T and the Category 3T decisions, took into account an irrelevant consideration. The resolution of that issue is not assisted by framing the issue at a level of generality or abstraction as to whether it is permissible, in setting

categories and minimum rates, for a Council to take into account that a landowner has chosen to let land to person A instead of person B. This is because it is possible to imagine that in some cases the choice to let to person A instead of person B involves a distinction which has no bearing on the use of the premises or any other attribute of the property. In such a case a rating category decision which made a distinction between renting to a group of which A is a member as distinct to a group of which B is a member would have nothing to do with the use to which the land was to be put, the burden that use placed upon the Council's budget, the value of the land, including its potential to earn income for its owner, or any other attribute of the land. However, as *Ostwald* illustrates, there may be occasions when the circumstances of the person in occupation of the property bears upon the property's use and may be a relevant consideration in defining a category.

[58] In this case, the challenge is not to a distinction between property that is occupied by its owner and property that is rented by its owner.[35] The challenge is based on the fact that Categories 2T and 3T depend on whether the property is used to provide rental accommodation to "itinerants" as distinct from "permanent residents".

[59] The Category 2T and the Category 3T decisions are justified by the respondent on the basis of the "demand consideration". Lest it not be clear, I conclude that it is permissible to define differential rating categories and to levy a minimum general rate for such a category by taking into account the use to which the land might be put or the use to which it is in fact put, and the burden that use may place upon the Council's budget. *Xstrata* recognised those as relevant considerations which concerned an attribute of the land.

[60] The applicant appears to accept that the respondent was entitled to have regard to the extent to which land used for the purposes of tourism accommodation contributes to the demand for the provision of Council services. As noted, part of its argument is that the categories do not take into account *the extent* to which accommodation is let to permanent residents or itinerants, and any consequential impact that might have upon the respondent's resources.

[61] It is possible to imagine a circumstance in which a lot is used to provide rental accommodation to a "permanent resident" (a person who lives in the local government area, as distinct from an itinerant) or "permanent residents" for some part of the year and for some other part of the year, say a week or two, it is used to provide rental accommodation to an "itinerant" (a visitor or a tourist, as distinct from a permanent resident) or "itinerants". On a literal interpretation of the categories, such a lot might be thought to fall simultaneously within both Category 2T and Category 3T because at some time of the year it is used to provide rental accommodation to permanent residents and at some other time it is used to provide rental accommodation to itinerants. However, it is unlikely that in defining these categories the respondent intended such uncertainty and inconvenience. The interpretation of the categories is assisted by their context, which includes Category 1T. The description of Category 1T differs from Category 2T and Category 3T in

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35 cf *Paton*. I should note that the effect of *Paton* was altered by the introduction of s 94(1A) into the *LGA* which allows a local government to categorise rateable land and decide differential rates according to whether or not the land is the principal place of residence of the owner.

its third paragraph. Category 1T, which was adopted by resolutions on 18 June 2014, 19 June 2015 and 24 June 2016, has as the third element of the description:

> "Not used to provide rental accommodation to either permanent residents or itinerants at any time during the financial year."

The description of Category 1T by resolutions on 19 June 2017, 21 June 2018 and 13 June 2019 also has those words and adds a fourth condition:

> "Is used as a principal place of residence by at least one of the owners."

[62] It is reasonably apparent from these definitions that if a residential lot of the kind described in each of the categories is used to provide rental accommodation to either permanent residents or itinerants at any time during the year then it will not fall within Category 1T. If it is used to provide rental accommodation to permanent residents at any time during the year, it falls into Category 2T. If it is used to provide rental accommodation to itinerants at any time during the year, it falls within Category 3T.

[63] If this interpretation is accepted, then a residential lot will fall within Category 3T if it is used to provide rental accommodation to itinerants at any time during the financial year. Rather than shifting between Category 2T and Category 3T depending upon whether the lot is used to provide rental accommodation to permanent residents or to itinerants from time to time, the lot will be within Category 3T even if it is used to provide rental accommodation to itinerants for a very short period during the financial year. On this interpretation, the same category applies whether the rental accommodation is provided to tourists for a few days or for the entire year. In the case of a lot which is used to provide rental accommodation to tourists for only a short period, the increased burden upon Council resources based upon the "demand consideration" compared to the lot being used to provide rental accommodation to permanent residents for the whole year would be minimal. The applicant argues that having the same category apply whether the rental accommodation is provided to tourists for a short period or for the entire year means that the category "bears no relationship whatsoever to the burdens of tourism upon the provision of the respondent's services".

[64] That a residential lot would fall within Category 3T irrespective of whether rental accommodation in it is provided to tourists for a short period or for the entire year may be said to produce unfair and harsh results and be difficult to justify by reference to the demand consideration. A competing argument is that in making a rating category decision by reference to whether a lot is used to provide rental accommodation to "itinerants" (tourists), a council must draw the line somewhere. It is always possible to imagine a case in which a definition operates harshly. The example given by the applicant of rental accommodation that is provided to tourists for only a single day in a year is a good one. It would be possible to devise a differently defined category that would place a residential lot within Category 3T only if it was used to provide rental accommodation to itinerants for a certain period, or by reference to a percentage of the time in which the unit is occupied during the financial year. However, any such system would be complex and hard to administer. It might result in a particular lot transitioning between Category 2T and Category 3T, depending upon whether the relevant period of weeks or the relevant

percentage was exceeded. While the defined categories might be said to operate harshly in particular cases, they have the virtue of allowing landowners to know where they stand if they allow their lot to be used to provide rental accommodation to tourists, as distinct from permanent residents, at any time during the relevant financial year.

[65] If the categories are to be interpreted in the manner the applicant suggests, with Category 3T applying if rental accommodation is provided to itinerants for even a short period during the year, then they have the potential to operate harshly, depending upon the choices made by the landowner. However, a definition like Category 3T falls within the "quasi-legislative" power of a local authority to choose a criteria for determining a category of premises that is used to provide rental accommodation to tourists. The definition of Category 3T is apt to apply to lots in a tourist resort as well as residential lots in buildings which are rented to a substantial extent by tourists. Arguably, it also captures lots whose owner chooses to rent to tourists for only some parts of the year.

[66] The category applies to lots used to provide accommodation to tourists across a potentially wide range of periods, depending on the style of the property and choices made by owners. This does not alter the fact that the category applies to lots that are used to provide rental accommodation to tourists. Although in some particular cases the use to which the lot is put in providing tourist accommodation may have a minimal additional impact upon the Council's resources, the category itself is justified by reference to the demand consideration. It has a relationship to the burdens of tourism upon the provision of the respondent's services.

[67] I conclude that it is permissible for the respondent in making rating category decisions to have regard to whether premises are used to provide rental accommodation to "itinerants" because of the perceived contribution of tourism to the demand for the provision of Council services across the city. It is permissible to define a category according to whether the premises are used to provide rental accommodation to tourists at any stage of the year. While the definition of Category 3T and the levying of a minimum general rate for that category may operate harshly in some cases in which accommodation is provided to tourists for only a short period, it would be inappropriate to limit the Council's power to make a rating category decision of the kind under challenge only to premises which are used exclusively, predominantly, substantially or for at least some stated period by itinerants. The legislature has given the local authority a broad power to define rating categories and the Court should be slow to conclude that a rating category decision of the kind under review is not an evaluation which is open to an elected body which seeks to determine a relevant category based upon the demand consideration.

[68] In summary, it was not an impermissible consideration that a lot is used to provide rental accommodation to "itinerants" rather than to "permanent residents" at any stage during the year. I do not accept the applicant's contention that the respondent took into account an irrelevant consideration, being the personal characteristics of the person in occupation of the property. It took into account a relevant consideration, namely the use of the property to provide rental accommodation to "itinerants". The use of the property to provide rental accommodation to "itinerants" is an attribute of the property. It is a use which, according to the

respondent's evaluation, resulted in premises used across the city to provide rental accommodation to "itinerants" contributing to tourism, which increased demand for the provision of Council services.

[69] The applicant's first ground for judicial review fails.

The second and third grounds of judicial review

[70] As previewed at [14], the second and third grounds are that in making the relevant decisions the respondent is alleged to have failed to take into account what are said to be relevant considerations, or alternatively, its exercise of power in the circumstances was so unreasonable that no reasonable person could so exercise the power. The matters that are said to be relevant considerations which the respondent failed to take into account, or which made its exercise of power unreasonable in that sense, are that:

(a) the unimproved value of each of the applicant's properties was only $12,500;

(b) the respondent does not provide any services to those properties of the type falling within the definition of "general rates" in s 92 of the *LGA*;

(c) the applicant, or the body corporate for the land, provides essential and other services to the properties including water supply, electricity supply, refuse disposal, transport services within, to and from the resort (including walking and other paths and tracks and a ferry service) and pest and inspect suppression;

(d) the supply of the aforesaid services was the subject of an agreement between the respondent and Interpacific Resorts (Australia) Pty Ltd, the developer of the land on 30 May 1998; and

(e) the minimum general rates comprised almost 20% of the unimproved value of the land.

The evidence

[71] The Couran Cove resort is located on South Stradbroke Island. The resort comprises a number of residential precincts including what are described as "358 total properties and attendant facilities for the resort". About 50 permanent residents live at the resort and, at any time, less than 1,200 people would reside there.

[72] The resort facilities are provided and managed by Island Resorts (Facilities and Management) Pty Ltd and Island Resorts (Infrastructure) Pty Ltd under arrangements with the body corporate of the resort.

[73] The sole director of the applicant describes the resort as "a wholly self sufficient mixed use development". I understand this to mean that the body corporate of the resort provides services of water supply, electricity supply, refuse disposal, transport services to and from the resort and aerial spraying for mosquitoes. This occurs pursuant to an agreement to which the respondent was a party in May 1998.

[74] Because of its location, access to the resort is by ferry funded by the operator of the resort or by private vessel.

[75] There are no internal roads in the resort. Walking paths and golf cart tracks are maintained by the body corporate. The respondent does not manage any parks or public spaces within the resort.

[76] Each of the more than 70 properties owned by the applicant and which form part of the resort has an unimproved value of $12,500. The rates imposed by the respondent over those properties comprise approximately 20 per cent of that value.

Ground 2 – relevant considerations – legal principles

[77] In *Sean Investments Pty Ltd v MacKellar*, Deane J stated:

> "…The ground of failure to take into account a relevant consideration will only be made good if it is shown that the decision-maker has failed to take into account a consideration which he was, in the circumstances, bound to take into account for there to be a valid exercise of the power to decide."[36]

[78] Whether or not a particular matter is a "relevant consideration" for the purposes of judicial review is determined by reference to the subject matter, scope and purpose of the Act.[37] As Mason J stated in *Minister for Aboriginal Affairs v Peko-Wallsend*:

> "… where the ground of review is that a relevant consideration has not been taken into account and the discretion is unconfined by the terms of the statute, the court will not find that the decision-maker is bound to take a particular matter into account unless an implication that he is bound to do so is to be found in the subject-matter, scope and purpose of the Act."[38]

[79] In *Sean Investments*, Deane J observed that, whilst a failure to take into account a relevant consideration is a permissible ground of review:

> "This does not, however, mean that a party affected by a decision is entitled to make an exhaustive list of all the matters which the decision-maker might conceivably regard as relevant and then attack the decision on the ground that a particular one of them was not specifically taken into account."[39]

[80] His Honour then cited English authority that:

> "It is not for the court to prescribe a list of matters which must always be considered or to prescribe which factors should be given more weight than others. It is worth repeating that the function of the court, where such issues are raised, is not to substitute its own opinion or decision on matters which Parliament has left to the judgment of the local authority but to decide whether the local authority in reaching its decision has acted in accordance with the statutory provisions."[40]

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36 (1981) 38 ALR 363 at 375.
37 *Minister for Aboriginal Affairs v Peko-Wallsend Limited* (1986) 162 CLR 24 at 39-40.
38 At 40.
39 (1981) 30 ALR 363 at 375.
40 *Elliott v Southwark London Borough Council* [1976] 1 WLR 499 at 507.

[81] If a particular matter is not a mandatory relevant consideration then it may be disregarded or given little or no weight without committing legal error.[41] As Basten JA observed in *Lo v Chief Commissioner of State Revenue*, the term "relevant consideration":

> "… refers to a matter which the decision-maker is bound to take into account. The obligation may derive from the express terms of the power-conferring statute or may be implied from its subject matter, scope and purpose. A preferable term would be 'mandatory consideration'. Further, a matter traditionally described as an 'irrelevant consideration' is one which is prohibited because, having regard to the subject matter, scope and purpose of the power being exercised, it can be seen to reflect an extraneous or improper purpose or to render the decision arbitrary or capricious. Between these two categories is usually a wide range of permissible considerations which the decision-maker may weigh or disregard without committing an error of law."[42]

Applicant's submissions – relevant considerations

[82] The applicant submits that each of the matters particularised by it are relevant considerations and that there is no evidence that the respondent took any of them into account in its decision to levy the minimum general rate in respect of the Category 2T and the Category 3T decisions and in its conduct in issuing rate notices to the applicant in accordance with those decisions. It argues that each of those matters are "plainly relevant" because if, as the respondent contends, the extent to which particular land uses impose additional burdens upon the respondent's resources is a relevant consideration, it must also be correct to say that it is relevant to consider the extent to which categories of property do *not* impose those burdens, and, in particular, the extent to which properties or a category of property have a peculiarly limited impact upon such burdens.

[83] The properties at Couran Cove Resort are said to have a peculiarly limited impact on the respondent's resources because the respondent has no obligation to provide the services which are contemplated by the Development Agreement, being services it otherwise would have provided.

Respondent's submissions – relevant considerations

[84] The respondent submits that the features particularised by the applicant are not "relevant considerations" in the sense used in the *JRA*, being matters which the respondent was bound to take into account in making the impugned decisions or engaging in the challenged conduct. Each matter is said to relate to the specific circumstances or discrete features of the land. The rating category decisions to create differential rating categories 2T and 3T were decisions that applied generally to properties within the respondent's local government area, based upon data and estimates about the number of properties that would likely fall into those categories. For the 2019/2020 financial year there were over 39,000 properties in Category 2T and 4,813 properties in Category 3T. The respondent submits that, having regard to

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41 *Lo v Chief Commissioner of State Revenue* (2013) 85 NSWLR 86 at 89 [9].

42 (2013) 85 NSWLR 86 at 89 [9].

the subject matter, scope and purpose of the legislation, it was not required, in formulating the minimum general rates within Category 2T or Category 3T, to take into account the particular circumstances of each of the parcels of land within that category. It argues that the particular circumstances of each parcel of land are not a mandatory relevant consideration in making the rating category decisions which are challenged by the applicant.

[85] According to the respondent, while the system of differential general rating permits land to be categorised based on common features, it does not require finer points of distinction or identification of the kind suggested by the applicant to be considered when a decision is made to fix a minimum general rate.

[86] The respondent also submits that the unimproved land value of any particular parcel is not a relevant consideration in deciding whether a minimum general rate should be fixed or the amount of that minimum general rate. The decision to levy a minimum general rate on a particular parcel is the consequence of antecedent decisions to set differential general rating categories, to set a rate in the dollar amount and to fix a minimum general rate. The respondent says that it did, however, have regard to the unimproved or site value of land and the incidence of rates.

[87] Next, the respondent submits that the fact that the body corporate provides services such as water, electricity, refuse disposal, transport services and pest and insect suppression are not relevant considerations in relation to decisions about differential general rates or minimum general rates. Electricity is not a service which the Council provides. Other services such as water and refuse disposal may be provided by a Council, but are services which are funded by utility charges, not a general rate. Utility charges were not levied on the applicant's land. Therefore, the fact that those services are the subject of the Development Agreement made in 1998 is submitted to be not relevant to decisions about differential general rates or minimum general rates.

[88] Finally, the respondent contests the assertion that it does not provide *any* services of the type falling within the definition of "general rates" in s 92. A general rate is levied for the purposes of funding the services, facilities and activities which the Council provides for the benefit of the community in general and within the local government area. The respondent submits that those services do not necessarily have any connection with any particular parcel of land, and that there are many functions which a local government performs which provide no easily quantifiable benefit to any particular parcel of land. These include administrative functions such as the maintenance of a system of controls on town planning and contribution to the cost of roads in the local government area. These would include roads which persons going to and from South Stradbroke Island would use when on the mainland.

Applicant's submissions in reply

[89] The applicant submits in reply that the respondent misunderstands it as submitting that the respondent was required to determine minimum general rates by reference to the particular individual circumstances of each property. Instead, the applicant submits that, in taking into account the burdens placed upon it by the category of land under consideration, the respondent was required to consider the extent to

which the particular category of land, in part or in whole, does *not* place the same burden upon the respondent. The resort comprises at least 358 properties, or about 7.4 per cent of the properties within Category 3T for 2019/2020. According to the applicant, the respondent was not entitled to ignore nearly 10 per cent of the properties comprising a category. If the system of differential general rating permits land to be categorised based upon common features, then the applicant submits that the features upon which it relies, namely the absence of burden on the respondent's resources, required consideration.

Were the features relied upon by the applicant "relevant considerations"?

[90] That the unimproved value of each of the applicant's properties was only $12,500 and, as a consequence, the minimum general rates comprised almost 20 per cent of the unimproved value of the property is not, in my view, a "relevant consideration" in the sense discussed in respect of either the rating category decisions which created differential Categories 2T and 3T, or the respondent's decision to levy a minimum general rate within each category. In making those decisions the Council might have regard to the unimproved or site value of land falling within the proposed categories. There is some evidence that it did so. However, there may be reasons as to why a particular landowner's property, which falls within a defined category, has a low unimproved value.

[91] The unimproved value of a property does not necessarily bear a relationship to the burdens which its occupants place upon services that are provided by a council for the benefit of the community in general. The fact that certain properties within a proposed category have an unusually low unimproved value may signal some common feature in those properties which *may* justify a decision to create a separate differential rating category. It *may* prompt the Council to consider whether the proposed minimum general rate is appropriate in the circumstances. However, the Council was not *bound* to take into account the unimproved value of each of the applicant's properties in making the rating category decisions which it did, or in levying a minimum general rate which was thought to be appropriate for the thousands of properties in that category.

[92] I accept the respondent's submission that the fact that the body corporate for the land provided essential services such as water, electricity and refuse disposal was not a "relevant consideration" for the purpose of decisions in relation to general rates. The fact that such services were provided by the body corporate, rather than by the Council, would be relevant to utility charges. However, they would not be relevant to differential general rates or an evaluation of the minimum general rate which is levied for the purpose of funding a variety of services and facilities within the entire local government area for the benefit of the community in general.

[93] The contention that the respondent does not provide *any* services falling within the definition of "general rates" in s 92 of the *LGA* is not established. The respondent correctly submits that many services which a Council provides for the benefit of the community in general do not have a necessary connection with any particular parcel of land. Some ratepayers will gain greater benefit from the provision of certain community facilities, such as libraries, than others. Moreover, there is a distinction between the provision of services, such as waste disposal, *to* a property and the provision of services which benefit the community in general, including occupants of properties within a local government area.

[94] The applicant has not established that the respondent does not provide any services of the type falling within the definition of "general rates" in s 92 which might benefit the community in general, including persons residing on South Stradbroke Island. Apart from the general administration of local government, one would have thought that the provision of services, facilities and activities on the mainland benefited residents on the island, including tourists, who might use local roads to come and go from the island, to shop and to seek a range of services such as medical treatment.

[95] If the applicant had established that the respondent did not provide any services of the type falling within the definition of "general rates", then this might have been a relevant consideration. It has not done so. The applicant's real complaint appears to be the *extent* to which it and others who own properties in the resort gain the benefit of services, facilities and activities which the Council provides for the benefit of the community in general and which are funded by the levying of general rates.

[96] In general, the applicant has failed to establish that the respondent failed to take into account "relevant considerations", since the matters which it points to are not matters which the respondent was *bound* to take into account in making the impugned decisions.

Ground 3 – *Wednesbury* unreasonableness

[97] It is unnecessary to survey the law concerning what is sometimes described as "legal unreasonableness". The present issue is whether the impugned decisions were so unreasonable that no reasonable person could exercise the power in the manner which the respondent did. It is not concerned with the reasonableness of the decisions in some general sense. It is concerned with whether the decision was within the scope of the statutory authority conferred on the respondent.

[98] The term "legal unreasonableness" is used to describe the particular qualities of decisions that exceed the limits and boundaries of statutory power.[43] Expressions that have been used to describe a decision which is "legally unreasonable" include "irrational", "arbitrary" and "lacking in evident or intelligible justification". The concept of "legal unreasonableness" recognises that there is an area within which a decision-maker has a genuinely free discretion.[44] Reasonableness is concerned with whether the decision "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law".[45]

[99] The concept of "legal unreasonableness" does not invite impermissible merits review. An assessment of whether a decision was beyond power because it was "legally unreasonable" depends on the application of the relevant principles to the particular factual circumstances of the case.[46] Judicial intervention is constrained

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43 *Minister for Immigration and Border Protection v Eden* [2016] FCAFC 28; (2016) 240 FCR 158 at 172 [65].

44 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 363 [66].

45 Ibid at 375 [105].

46 *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541 at 574 [84].

where the exercise of the decision-maker's power depends an opinion which rests upon value judgments.[47]

[100] Unreasonableness in the sense discussed is not a vehicle for challenging an evaluative judgment that was rationally open to the decision-maker, but with which a court disagrees.[48]

[101] As earlier discussed, the authorities recognise that decisions such as rating category decisions and the levying of a minimum general rate are "quasi-legislative". Substantial latitude must be allowed to a local authority in choosing the criteria for determining relevant categories. Section 77 of the *LGR* confers a discretion to fix a minimum amount of general rates and states that the Council may do so "in any way the local government considers appropriate". A decision will not be unreasonable in the legal sense if it fell within the area of "decisional freedom" available to the decision-maker, and is not perverse, arbitrary or lacking in any evident and intelligible justification. However, it is possible to imagine a rating category decision or a decision to levy a minimum general rate for a category that is so capricious to be outside the boundaries of a reasonable exercise of the local authority's powers.[49]

[102] For similar reasons to those discussed in connection with the second ground of judicial review, I am not persuaded that the exercise of power in making the impugned decisions was so unreasonable that no reasonable person could so exercise the power.

[103] Insofar as Ground 3 seeks to challenge the rating category decisions, there was a rational basis to impose differential general rates on lots falling within Categories 2T and 3T and a justification for creating different categories for rental accommodation provided to "permanent residents" and to "itinerants". Having established those categories, there was a legitimate basis to impose a minimum amount of general rates for those categories. It involved an evaluation of the burden to be imposed on landowners in that category and the amount to be raised for the community's benefit by a general rate.

[104] The applicant's unreasonableness ground, like the second ground of its application, relates not so much to the creation of categories by the Category 2T and Category 3T decisions or the levying of a minimum general rate within those categories. That involved an evaluation of what was a suitable minimum rate for the overwhelming majority of properties in that category. The applicant's real complaint appears to be that a different category was not created for properties in the Couran Cove Resort because of their unusual features.

[105] The matters relied upon by the applicant in connection with Grounds 2 and 3 might be said to justify, as a matter of fairness, the creation of a special category for the Couran Cove Resort and any similar resort which, because of its location or other features, placed little demand on services, facilities and activities that are supplied or undertaken by the Council for the benefit of the community in general. However, once it is accepted that those services, facilities and activities benefited the

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47 *Buck v Bavone* (1976) 135 CLR 110 at 118-119.
48 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 351 [30].
49 *Sunwater v Burdekin Shire Council* (2002) 125 LGERA 263 at [48].

community in general, and thereby directly or indirectly benefited residents of the local government area, including residents of South Stradbroke Island, it was open to the respondent to conclude that no special category should be created for the Couran Cove Resort.

[106] The Act confers a quasi-legislative function upon the respondent in creating categories and levying a minimum general rate within a category. Once it is accepted that it was open to include lots in the Couran Cove Resort fitting the description in the category, the matters raised by the applicant concern reasonableness in a more general sense. They concern the unreasonableness of imposing a minimum general rate which was 20 per cent of the unimproved value of the lot in respect of the provision of services, facilities and activities for the benefit of the community in general, but which were likely to be used by residents on the island or to benefit them to a lesser extent than residents on the mainland.

[107] The effect of the respondent's decisions was to impose in the relevant years on a Category 3 property approximately double the amount imposed upon a "non-tourism" property in Category 2T. However, the matters relied upon by the applicant do not render the decisions ones that no reasonable person could have made in creating the relevant categories or in fixing a minimum rate in those categories.

[108] I am not persuaded that the Category 2T and the Category 3T decisions or the decisions to levy a minimum general rate in those categories were so unreasonable that no reasonable person could have exercised the power in the manner in which the respondent did. I decline to set aside those decisions.

[109] Because those decisions are not set aside, it is unnecessary to address whether the decisions and/or conduct of the respondent to issue rate notices to the applicant are "decisions" to which the *JRA* applies. The applicant does not reply to the respondent's substantial arguments as to why the giving of a rate notice is not a "decision" and why the conduct of issuing a rate notice is not "conduct" within the meaning of the *JRA*. The respondent's arguments in this regard appear to me to have substantial merit. However, it is unnecessary to decide them in the circumstances. The issuing of rate notices followed the operative decisions to create categories, to fix a minimum rate for those categories and identify the rating category to which the applicant's properties belonged.

[110] The essence of the applicant's grievance is not with the consequential conduct to issue rate notices or any decision that a property fell within the definition of Category 2T or Category 3T, but with the anterior decisions to create Categories 2T and 3T and to fix minimum rates within those categories.

[111] The applicant's judicial review challenges to those decisions fail.

[112] The application is dismissed.

[113] Subject to any submissions as to costs, the discretion to order costs under the *JRA* should, in my view, be exercised by ordering the applicant to pay the respondent's costs of and incidental to the proceeding to be assessed on the standard basis.