IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2016-485-000080
[2017] NZHC 48

BETWEEN	MERIDIAN ENERGY COMPANY Plaintiff
AND	WELLINGTON CITY COUNCIL Defendant

Hearing: 31 October 2016 and 1 November 2016

Counsel: A S Olney and E J Rushbrook for Plaintiff
I R Millard QC and M S Hill for Defendant

Judgment: 31 January 2017

JUDGMENT OF COLLINS J

Introduction

[1] The principal question raised by this proceeding is whether the Wellington City Council (the Council) acted lawfully when, for rating purposes, it divided into two parts the rural properties upon which Meridian Energy Ltd (Meridian) has constructed wind farm facilities. The Council divided the rating units in question by relying on the use to which the land was put and the value of the wind farms. The Council used these criteria to set differential rates in respect of the wind farm facilities and the rural land upon which the wind farm facilities are constructed.

[2] The answer to this question hinges upon the meaning of s 27(5) of the Local Government (Rating) Act 2002 (the Rating Act). That subsection enables a local authority to divide rateable units into two or more parts when setting differential rates.

[3] This judgment explains why I am satisfied that the Council did not act unlawfully when it made the rating decisions which Meridian has challenged in this proceeding.

[4] In particular, the Council acted lawfully when it divided the rating units into two parts and placed the wind farm facilities portion of the rating units into the Council's Commercial, Industrial and Business Differential rating category.

[5] Meridian's subsidiary grounds do not raise matters that warrant the granting of judicial review.

[6] This judgment is divided into two parts. Part I sets out the background and explains how rates are set, assessed and collected, the Council's rating instruments, how the Council set the rates in this case and the basis of Meridian's claim for judicial review. Part II of this judgment analyses the issues and explains the reasons for the conclusions I have reached.

PART I - BACKGROUND

How are rates set, assessed and collected?

Overview

[7] Rates are a property tax[1] that are set, assessed and collected by local authorities to help fund their activities.

[8] The Rating Act is the primary source of the powers of local authorities to set, assess and collect rates. Key sections in the Rating Act interlock with provisions in the Local Government Act 2002, and the Rating Valuations Act 1998.

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[1] *Broad v County of Tauranga* [1928] NZLR 702 (SC); *Wellington City Council v Woolworths New Zealand Ltd (No 2)* [1996] 2 NZLR 537 (CA); *Waitakere City Council v Lovelock* [1997] 2 NZLR 385 (CA) and *Carter Holt Harvey Ltd v North Shore City Council* [2006] 2 NZLR 787 (HC).

[9] The purposes of the Rating Act include:[2]

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

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

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

[10] Before it can set a rate, a local authority is required to issue a long-term plan[3] and an annual plan.[4] Long-term plans and annual plans contain "funding impact statements"[5] that are required to identify the sources of funds to be used by a local authority, and which explain the amount of funds expected to be produced from each source and how the funds are to be applied. A funding impact statement must identify the sources of funds to be used by the local authority, explain the amount of funds expected to be produced from each source and explain how the funds are to be applied.

[11] Rates can only be set by a resolution of the local authority.[6] Any rate that is set must relate to a financial year, or part of a financial year, and be set in accordance with the relevant provisions of the local authority's long-term plan and funding impact statement for the financial year to which the rate relates.

[12] The term "rate" is defined in s 5 of the Rating Act. Part of the definition explains that "rate" "means a general rate, a targeted rate, or a uniform annual general charge …". The issues in this case concern the way the Council has set a general rate.

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2 Local Government (Rating) Act 2002, s 3.

3 Local Government Act 2002, s 93. A long-term plan is adopted every three years and covers a minimum period of 10 years from the date it is adopted.

4 Section 95. An annual plan must be adopted in each financial year, other than those in which a long-term plan is adopted.

5 Schedule 10, cls 15 and 20.

6 Local Government (Rating) Act 2002, s 23.

[13] Section 13 of the Rating Act authorises a local authority to set general rates for all rateable land within its boundaries. A general rate is based on the rateable value of the land, which is in turn defined to mean the annual value, the capital value or the land value of the land in question.[7] Whichever method is used, it must be explained in the local authority's funding impact statement.[8] In this case, the Council uses capital value as the rateable value of the land in its region.

[14] A general rate may be set in one of two ways, namely:[9]

(1) at a uniform rate; or

(2) at a differential rate, which means the general rate is set at different rates in the dollar of rateable value for different categories of rateable land.

[15] If a local authority chooses to set a general rate on a differential basis then it is required to identify the categories of rateable land in its funding impact statement and define the different categories by reference to one or more of the matters listed in Schedule 2 of the Rating Act.[10]

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7 Local Government (Rating) Act 2002, s 13(3)(a).

8 Section 13(3)(b).

9 Section 13(2).

10 Section 14 and **Schedule 2 Matters that may be used to define categories of rateable land**

1. The use to which the land is put.
2. The activities that are permitted, controlled, or discretionary for the area in which the land is situated, and the rules to which the land is subject under an operative district plan or regional plan under the Resource Management Act 1991.
3. The activities that are proposed to be permitted, controlled, or discretionary activities, and the proposed rules for the area in which the land is situated under a proposed district plan or proposed regional plan under the Resource Management Act 1991, but only if–
    (a) no submissions in opposition have been made under clause 6 of Schedule 1 of that Act on those proposed activities or rules, and the time for making submissions has expired; or
    (b) all submissions in opposition, and any appeals, have been determined, withdrawn, or dismissed.
4. The area of land within each rating unit.
5. The provision or availability to the land of a service provided by, or on behalf of, the local authority.
6. Where the land is situated.
7. The annual value of the land.
8. The capital value of the land.
9. The land value of the land.

[16] Sections 16 and 17 of the Rating Act also authorises local authorities to set targeted rates for one or more activities, or groups of activity provided those activities are identified in the local authority's funding impact statement.

Rating information database

[17] The rating information database is central to the way a local authority sets and assesses rates. Section 27 of the Rating Act requires a local authority to keep and maintain a rating information database. The purpose of the rating information database is:[11]

> (1) to record all information required for setting and assessing rates; and
>
> (2) to enable a local authority to communicate with ratepayers; and
>
> (3) to enable members of the public to have reasonable access to the information in the database relating to the calculation of liability for rates.

[18] Section 27(4) of the Rating Act states that the rating information database must include, in relation to each rating unit within the local authority's district, all information that relates to the unit that is included in the district valuation roll.[12] The essential elements of a district valuation roll are explained in paragraphs [21] and [22]. In addition, a rating information database must include all information that relates to the unit that is required to determine the category, if any, the unit belongs to for the purposes of setting a general differential rate.

[19] Section 27(5) of the Rating Act provides that the information in a rating information database may be recorded separately for different parts of a rating unit if this is necessary because of differential rating.[13]

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[11] Local Government (Rating) Act 2002, s 27(3).

[12] In its amended statement of claim Meridian alleges the Council's rating information database was inadequate. This point was not pursued in Meridian's submissions. For completeness I record that it is sufficient that the differential rating category is listed in the rating information database as either the "Commercial Differential" or the "Base Differential".

[13] The relevant parts of s 27(4) and (5) provide:

> (4) The database must include, in relation to each rating unit within the local authority's district,—
>
> (a) all information that relates to the unit that is included in the district valuation roll for the district; and
>
> (b) all information that relates to the unit that is required to—
>
> (i) determine the category (if any) to which the unit belongs for setting a general rate in

[20] A rating unit is normally the land identified in the certificate of title for that land. There are currently 76,888 rating units within the Council's district.

District valuation roll

[21] Under s 7 of the Rating Valuations Act 1998 local authorities are required to maintain a district valuation roll, which records the value of each rating unit. The Council has contracted the maintenance of its district valuation roll to Quotable Value New Zealand (Quotable Value). The district valuation roll is a subset of the information that must be recorded on the rating information database and the Council maintains the rating information database independently of Quotable Value.

[22] The Rating Valuations Rules 2008 explain what information must be included in a district valuation roll. The required information includes data about a number of land uses identified in Appendix C of the Rating Valuations Rules. The matters referred to in Schedule C of those rules include information about zoning and actual property use. The rules also further classify "actual property use" by reference to descriptions of actual property use and codes in a district valuation roll. These codes are either primary level use codes or secondary level use codes. For present purposes, it is sufficient to refer to the following primary level uses and codes in the district valuation roll:

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accordance with section 13(2)(b) [at a differential rate].

...

(5) The information in subsection (4) may be recorded separately for different parts of a rating unit if separate records are necessary because of different rating treatment of each part resulting from:

(a) the inclusion of different parts in different categories under subsection (4)(b)(i) or (ii):

(b) the application of Part 1 or Part 2 of Schedule 1 to one or more parts of the rating unit:

(c) the application of a remission policy, a postponement policy, or a rates relief policy for Māori freehold land to one or more parts of the rating unit.

Use	Code
Rural industry	1
Lifestyle	2
Utility services	6
Industrial	7
Commercial	8

Rating assessments

[23] A ratepayer only becomes liable for rates on a rating unit when the local authority delivers to the ratepayer the rates assessment for that rating unit.[14]

[24] Section 43(1)(a) and (b) of the Rating Act provides that:

> (1) Rates must be assessed in accordance with either—
>
> (a) a rating unit and its rateable values that are set out in the rating information database; or
>
> (b) the factors relevant to a rating unit that are set out in the rating information database; …

[25] Section 45(1)(h) of the Rating Act provides:

> (1) A rates assessment must clearly identify all of the following:
>
> ...
>
> (h) the relevant matters in Schedule 2 that are required to determine—

[14] Local Government (Rating Act) 2002, s 44.

(i) the category (if any) to which the rating unit belongs for the purposes of setting general rates differentially ...

...

[26] Subsections 45(3) and (4) of the Rating Act are also relevant. Those subsections provide:

(3) A rates assessment may be in 2 or more parts to identify the different treatment, for rating purposes, of different parts of a rating unit.

(4) If subsection (3) applies,—

(a) the information required under subsection (1) must be given for each part of the assessment as if each part were a separate assessment; and

(b) each part must state that it is part of the rates assessment for the rating unit and identify the number of other parts that are included in the assessment.

Objections

[27] The grounds upon which objections can be made by a ratepayer to the rating information database include "that information included in the database, other than information entered from the district valuation roll, is incorrect".[15] A ratepayer may also object to rates records on the grounds, "that the rates are incorrectly calculated".[16] Any objection is required to be lodged with the local authority which must notify the ratepayer in writing of its response to the objection.[17] There is no provision in the legislation for a ratepayer to appeal the outcome of an objection lodged under ss 29(1)(c) or 39(1)(a) of the Rating Act. Judicial review may, however, be available in an appropriate case.

The Council's rating instruments

[28] The Council has, for the years relevant to this proceeding, established a differential rating scheme for general rates that is based on two differential rating categories, namely a Base Differential category and a Commercial, Industrial and Business Differential category.

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15 Local Government (Rating Act) 2002, s 29(1)(c).
16 Section 39(1)(a).
17 Sections 29(3) and 39(3).

[29] It is convenient to explain the relevant parts of the Council's differential rating scheme by quoting the following section from the Council's funding impact statement for rating mechanisms in its long-term plan for 2015 to 2025:[18]

> **GENERAL RATES**
>
> General rates are set under section 13 of the [Rating] Act on all rateable rating units in the City of Wellington.
>
> The Council proposes to set a general rate based on the capital value of each rating unit within the city.
>
> The general rate will be set on a differential basis, based on land use. All rating units (or part thereof) will be classified for the purposes of general rates within one of the following rating differentials.
>
> **DIFFERENTIAL RATING CATEGORIES**
>
> **Base Differential**
>
> This includes:
>
> …
>
> (c) Rural land (including farmland and lifestyle blocks) under the District Plan that is administered by the Council, but excluding any rating unit that is used for rural industrial purposes.
>
> …
>
> This category has a general rate differential rating factor of 1.0.
>
> **Commercial, Industrial and Business Differential**
>
> This includes:
>
> (1) Separately-rateable land used for a commercial or industrial purpose.
>
> …
>
> (f) Utility networks.
>
> (g) Any property not otherwise categorised within the Base Differential.
>
> This category has a general rate differential rating factor of 2.8.

[18] *Our 10-year Plan*, Wellington City Council's Long Term Plan 2015-2025 Vol One, at 167 and 168.

Differential Rating Category Conditions

Differential rating 2.8:1 Commercial: Base

- The differential apportionment for the commercial, industrial and business sector is 2.8 times the General rate per dollar of capital value payable by those properties incorporated under the Base (Residential) differential …

- The separated parts of a rating unit will be differentially rated where a part of the property is non-rateable or the property fits under one or more rating differential and either:[19]

  (a) The total capital value of the rating unit is above $800,000 or

  (b) Minority use(s) account for more than 30 per cent of the total capital value of the rating unit.

In any other case, the General rate differential is determined by principal use.

…

[30] The rural land exclusion of "any rating unit that is used for rural industrial purposes" in the rural land sub-category of the Base Differential was introduced by the Council in 2014. Prior to then the rural land exclusion referred to "any rating unit that is zoned rural industrial". There was never however, any "rural industrial" zone under the Council's District Plan.

[31] The Council's Revenue and Financing Policy in its long-term plan clarifies that "the general rate is split between the base differential rate, which applies to residential ratepayers, community organisations and rural land, and the commercial industrial and business differential rate".[20] The policy further explains that "a commercial sector ratepayer will contribute 2.8 times more to the general rate than a residential ratepayer for each dollar of rateable property capital value".[21]

[32] The Council has also, throughout the relevant period, set and collected targeted rates. The Council has three categories of targeted rates, namely, sector base targeted rates, area base targeted rates and service base targeted rates. The sector base targeted rates impose a rate on identified sectors. There are two sector base

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19 The parties agree this is an error. The long-term plan should state "… the property fits under more than one rating differential …".

20 *Our 10-year Plan*, above n 18, Vol Two at 10.

21 At 11.

targeted rates, which mirror the general differential rating categories namely, a Base Sector targeted rate and a Commercial, Industrial and Business Sector targeted rate.

Meridian's wind farms

[33] In 2004 the Resource Management Act 1991 was amended to facilitate the development of renewable energy. Thereafter the Wellington City District Plan was changed to make wind farming a discretionary activity in rural areas.[22]

[34] Meridian developed two wind farms at Makara in the western fringes of the Council's territory. The first wind farm was the West Wind project. The second wind farm is called Mill Creek. The wind farms were constructed on approximately 5,300 ha of open field within the rural area of the Council's District Plan. Approximately 98.5 per cent of the land occupied by the wind farms is used for grazing sheep and cattle.

[35] In order to build the wind farms Meridian acquired one farm for itself and entered into agreements with the owners of six other farms. By agreement, Meridian reimburses the other land owners on which its wind farms have been constructed for that part of the rates levied by the Council which relates to the capital value of the wind farm. These agreements were not produced in evidence.

[36] There are currently 62 turbines at West Wind and 26 turbines at Mill Creek. Each turbine is a significant structure. The height of each turbine from the ground to the nacelle, which is the part of the turbine to which the roter blades are connected, is 67 metres. Each turbine is constructed on foundations that include 370 m^2 of concrete and 48 tonnes of reinforcing steel. In addition to the turbines there are access roads, electricity substations and permanent buildings associated with the wind farms. Fifteen fulltime staff are involved on site in operating the wind farms. There is also a significant amount of cabling used to connect the turbines to the electricity grid.

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[22] Wellington City District Plan, rule 26.3.1. Under s 87A(4) of the Resource Management Act 1991, a discretionary activity requires a resource consent for the activity and the consent authority may decline the consent or grant the consent with or without conditions.

[37] Meridian's wind farms have recently been re-valued. That re-valuation, which takes effect in the 2016/2017 rating year, has seen the value of Meridian's wind farms increase from approximately $51.8 million to just over $172 million. The increase in the value of Meridian's assets has had a corresponding increase in the rates imposed by the Council.

How did the Council fix Meridian's rates?

[38] In or around late March 2009 when the West Wind facility was nearing completion, the Council decided that the wind farm constituted a different and additional use of the land from the rural use classification that had been in place for preceding years. The Council therefore decided to reassess the rating units at West Wind owned by Meridian and two other companies upon which the West Wind wind farm facility was constructed.[23]

[39] On 1 April 2009, the Council asked Quotable Value to create new divisions for the West Wind rateable units, including one for a "wind farm portion". At the same time the Council sought from Quotable Value an updated valuation of the capital value of the rateable units.

[40] Mr Nagal, a registered valuer at Quotable Value, has explained that when Quotable Value undertakes a valuation of rating units it provides two types of valuations, namely the land value and the capital value. Both types of valuation are calculated on a willing seller/ willing buyer basis and are based on the best use of the land in the rating unit.

[41] In the case of wind farms, the capital value is determined by first assessing the improvements on the site that are not related to the generation of electricity (ie the improvements associated with the farming operations on the land) and then making an assessment of the structural improvements associated with the generation of electricity. This valuation is undertaken on an "optimised depreciated

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[23] Te Kamaru Station Ltd and Terawhiti Farming Co Ltd.

replacement cost (ODRC)" methodology. The two assessments are then added together to determine the capital value of the rating unit.[24]

[42] On 30 June 2009, Quotable Value provided the Council with valuations for the wind farm portion and the rural portion of the rateable units at West Wind. Quotable Value also amended the district valuation roll to reflect the wind farm portion as being "utility services-electricity (code 6-2)" meaning utility services was the primary level use category and electricity was the secondary level use category. Quotable Value considered this to be the "best fit" for the divisions in terms of the available codes within the Rating Valuation Rules 2008.[25] The Council then updated its rating information database to reflect the information provided by Quotable Value, including the divisions and land use codes for the rateable units.

[43] The Council decided that the divisions of the rateable units that applied to the wind farms "fitted" into the Commercial, Industrial and Business Differential. The divisions were also given the billing code C8, which has the definition "utilities without sewerage or water connection/s and storm water collection and disposal". The only billing code directly available for "utilities" is C8.

[44] Mr Read, an employee of the Council who is responsible for managing the Council's rates, has explained the wind farm at West Wind was assessed by the Council as falling within the Commercial, Industrial and Business Differential because it was a "major industrial activity and a business undertaken by Meridian for commercial gain. As such [the wind farm facility] naturally fell within the commercial and industrial differential. That [was] their best fit".[26] Mr Read supported this assessment by referring to West Wind's generation capacity,[27] the magnitude of the facilities and by drawing comparisons between the generation capacity of the West Wind facility with major hydro-electric dams and geothermal power stations owned by Meridian, Mighty River Power Ltd and Contact Energy Ltd.

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24 Affidavit of D R Nagal, 22 August 2016 at [16].
25 At [45].
26 Affidavit of M J S Read, 22 August 2016 at [157].
27 142.6 megawatts. This is enough to power 60,000 average New Zealand homes.

[45] The Council decided that, conversely, the wind farm divisions of the capital value of the rateable units did not fall within the definitions of "rural"[28] and "farm land"[29] in the Base Differential which had been previously applied by the Council. The Council also considered that the wind farm divisions could potentially be "separately rateable parts as evidenced by the division" and therefore "fell" within part (a) of the Commercial, Industrial and Business Differential definition that relates to separately rateable land used for a commercial or industrial purpose.[30]

[46] Mr Read explained in his evidence that the Council did not identify any discrete physical part of the rateable units relating to the wind farm facilities when setting the differential rates. He said there were no land areas recorded against the wind farm portion of the rateable units because "the approach to divisions [was] done on a valuation basis".[31] He also said the divisions were undertaken in accordance with the Council's "divisions policy" and that "the relevant rating units fitted under one or more differential categories (ie portions of the land were used for commercial, industrial and business purposes and other portions for uses within the base differential category) …".[32]

[47] From 2013 and 2014, representatives of energy generators, local authorities, land owners and the Office of the Valuer-General conferred over aspects of the application of the ODRC methodology to wind farms and agreed on a new methodology in late 2013.[33] They also reached agreement over which parts of the wind farm features were to be included in the district valuation roll.[34] This new approach to valuing wind farm facilities, which took effect for rating purposes from 1 July 2016, significantly increased the valuations of many wind farms throughout New Zealand.

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28 "'Rural' had been defined by the Council for rating purposes since at least 2002 as meaning "any land which is either within the Makara/Ohariu Community Board Area or is a lifestyle block or land of a rural nature within the 16690 Valuation Roll listing and is not used for industrial or commercial purposes".

29 "'Farm land' had been defined under the Rating Powers Act 1988 as being land used exclusively or principally for agriculture, horticulture or pastoral purposes, or for the keeping of bees or poultry or other livestock".

30 Affidavit of M J S Read, above n 26, at [170].

31 At [128].

32 At [127].

33 Affidavit of G M T Waipara, 15 July 2016 at [53].

34 Affidavit of D R Nagal, above n 24, at [19]-[23].

[48] During the course of April to June 2014, the Council set the rates for the Mill Creek wind farm which was by that stage, nearing completion. The Council used the same reasoning process that it had used when setting the rates for the West Wind wind farm.

[49] On 29 July 2014, the Council notified the owners of the four farms that comprised the Mill Creek wind farm that a new rate assessment had been set in relation to the wind energy facilities on their property. The Council informed the land owners what rates had been assessed for their rating units for the 2014/2015 year and that the new portion of their rates was classified under the Commercial, Industrial and Business Differential.

[50] On 4 November 2015, the Council notified Meridian and the owners of the other six farms on which the wind farms are constructed of new valuations for the relevant rating units. Thereafter Meridian lodged an objection to the land valuation aspect of the new valuations. That objection was considered by the Council and resolved. The settled valuations have been applied in the rating assessments for the 2016/2017 year. The amount of the rates assessed for the divisions of the rateable units that relate to the wind farms is $1,321,782.10 for the 2016/2017 year.

Meridian's concerns

[51] Meridian's case is that the Council made reviewable errors of law when it placed the wind farms in the Commercial, Industrial and Business Differential. Meridian says the wind farms should have been placed in the Base Differential category. Meridian takes no issue with the methodology used to value its wind farms or the valuation arrived at using that methodology.[35]

[52] Meridian first raised its concerns on 17 April 2015 when it made a submission to the Council about the draft 2015 to 2025 long-term plan.

[53] Mr Waipara, an employee of Meridian who is responsible for the operation and maintenance of the West Wind and Mill Creek wind farms, has explained that in

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[35] Affidavit of G M T Waipara, above n 33, at [56].

its submission to the Council, Meridian "… sought the removal of the Commercial Differential from Meridian's wind farms and that the land be rated on the Base Differential as a rural property no different for rating purposes to the surrounding rural land".[36]

[54] The Council declined to accede to Meridian's request and on 24 June 2015 adopted its 2015 to 2025 long-term plan. Thereafter, Meridian sought further information from the Council to assist it in understanding the reasoning process followed by the Council when it decided to place the wind farms in the Commercial, Industrial and Business Differential.

[55] It is not necessary to traverse all the communications between Meridian and the Council. Suffice to record that during this period the Council appreciated that the wind farm was not strictly a "utility network". The parties agree that the concept "utility network" includes systems for distributing electricity but not facilities that generate electricity. Notwithstanding this concession, the Council maintained the wind farm divisions were classified as fitting the land use code "utility services-electricity (code 6-2)" as determined by Quotable Value. The parties could not reach agreement on whether the Council had properly placed the wind farm portions of the rating units into the Commercial, Industrial and Business Differential.

[56] Meridian forwarded a draft of its statement of claim to the Council in December 2015 and commenced its proceeding for judicial review on 5 February 2016.

[57] On 29 July 2016, Meridian lodged objections under ss 29 and 39 of the Rating Act with the Council. The objections were to the Council's approach to rating Meridian's wind farms, and in particular its decisions to categorise those facilities in the Commercial, Industrial and Business Differential, rather than in the rural land sub-category of the Base Differential.

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[36] Affidavit of G M T Waipara, above n 33, at [59](d).

[58] The Council decided that because the matters set out in Meridian's objection relate directly to the issues in this proceeding, it would "put the objection on hold until after these proceedings are resolved".[37]

[59] In explaining the impact of the Council's decisions, Mr Waipara has said "… Meridian stands to pay $1,321,782 in rates (including GST) on its wind farms for the 2016/2017 year, which would be reduced to just over $475,000 (including GST) if the base differential was applied".[38] Meridian has calculated that if the base differential had been applied from the 2009/2010 year to the present time then its rates bill would be $1,239,771.41 (including GST) lower than the rates it has actually paid.

Grounds for judicial review

[60] Meridian's primary grounds for judicial review challenge the lawfulness of the Council's decisions. There are two parts to this aspect of Meridian's claim:[39]

(1) First, Meridian says the Council acted unlawfully when deciding to create a division to reflect two uses of land, namely:

- the underlying land and non-wind farm improvements; and
- the value of the wind farm improvements.

(2) Second, Meridian says the Council's decision to categorise the wind farm facility as falling within the Commercial, Industrial and Business Differential category was also unlawful.

[61] Meridian's secondary grounds for judicial review indentify a number of considerations, which Meridian says were irrelevant and unlawfully relied upon by the Council. For present purposes it is sufficient to briefly identify the alleged irrelevant considerations in the following way:[40]

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37 Affidavit of M J S Read, above n 26, at [250].
38 Affidavit of G M T Waipara, above n 33, at [81].
39 Plaintiff's submissions, 3 October 2016 at [5.1].
40 At [6.1] to [6.19].

(1) *Ability to claim GST credits*

In his affidavit Mr Read suggested Meridian had a greater ability to pay rates because it can claim a GST input credit and deduct the "cost" of rates for tax purposes. Meridian says this was not a relevant consideration.

(2) *Relative profitability*

Mr Read also referred to the profitability of Meridian compared to other ratepayers in rural areas. Meridian says this was not a relevant consideration.

(3) *Discretionary activities*

Mr Read referred to the fact that wind farming is a discretionary and not a permitted activity under the Council's District Plan and as such wind farming is not a rural activity. Meridian says this was also an irrelevant consideration.

(4) *Rates remission*

Mr Read referred to the Council's "rural open space remission" policy whereby a rates remission of 50% of the base general rate will be granted to rating units that are classified as rural under the District Plan and which is used principally for farming or conservation purposes.[41] The land within Meridian's wind farms which is rated at the Base Differential receives the benefit of this remission.[42] Meridian says that was also an irrelevant consideration.

[62] Meridian also supplements its primary applications for judicial review on the ground that the Council's decision involved an inconsistent application of procedures and created inconsistent outcomes. Meridian says the closest comparable rating

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41 *Our 10-year Plan*, above n 18, Vol Two at 117.
42 Affidavit of G M T Waipara, above n 33, at [39].

units to Meridian's wind farms are rural properties used for stock grazing and that the wind farm portion of the rateable units should be treated in the same way as the rural use portions of the properties in question.[43]

[63] Meridian seeks by way of relief:

(1) a declaration that the Commercial, Industrial and Business Differential categorisation decision made by the Council is invalid;

(2) an order setting aside the Commercial, Industrial and Business Differential categorisation decision;

(3) a declaration that the wind farm portions within the wind farm land, as long as that separation is to be maintained, should have been categorised as rural land within the Base Differential; and

(4) an order that the Council pay the amounts overpaid to Meridian by way of restitution (or an inquiry to establish those amounts as appropriate).

PART II

ANALYSIS

Meridian's primary grounds for Judicial Review

The division of the rating units

[64] Meridian contends the relevant provisions of the Rating Act and the Council's rating instruments required the Council to take the following steps when determining whether or not to divide the rating units:

(1) First, decide whether the rating unit as a whole fitted into more than one differential category.

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[43] Plaintiff's submissions, above n 39, at [7.1] to [7.16].

(2) Second, if the rating unit as a whole fitted into only one differential category the Council was required to decide which differential category applied, that is to say, the Council had to decide if the rating unit was within the Base Differential category or Commercial, Industrial and Business Differential category.

(3) Third, if the rating unit fitted into more than one differential category, the Council had to follow the policies set out in its rating instruments when dividing the rating units.

[65] Meridian's first ground for judicial review raises concerns about the processes followed by the Council when it divided the rating units. The substantive issue however, raised by Meridian's first ground for judicial review, asks if the Council could lawfully divide the rating units without first identifying physically separate and discrete portions of the land that is used in relation to the wind farm facilities and as rural land. In other words, could the division of the rateable units be undertaken on a land use and "valuation" basis (to quote Mr Read) or was it necessary for the rating units to be divided into physically discrete and separate parts in the way Meridian contends? Clearly, if the Council could not undertake the division of the rating units in the way it did, on a land use and "valuation" basis, then Meridian's first ground for judicial review succeeds.

[66] Ordinarily judicial review focuses on processes rather than substantive outcomes.[44] This case is an exception for two reasons. First, it is an integral part of Meridian's case that the Council's failure to follow what Meridian says was the right decision-making formula resulted in the Council reaching the wrong substantive outcome. This is a case in which the formula followed by the Council when making decisions and the substantive outcome are intertwined. Second, Meridian seeks substantive relief in the form of a declaration and reimbursement in respect of the alleged overpayment of rates. Meridian is not asking for an order requiring the Council to reassess the wind farm rates following what Meridian says is the correct formula. If the rates are found to have been unlawfully set, the Court is entitled to

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[44] *New Zealand Fishing Industry Association Inc v Minister of Agriculture and Fisheries* [1988] 1 NZLR 544 (CA) and *Fraser v State Services Commission* [1984] 1 NZLR 116 (CA).

indicate the proper basis on which a restitutionary remedy should be granted.[45] For these reasons I shall focus on the substantive issues raised by the first ground for judicial review.

[67] The answer to the substantive question raised by the first ground for judicial review requires a careful evaluation of the powers of the Council to set differential rates.

[68] In *Wellington City Council v Woolworths New Zealand Ltd (No 2)*,[46] the Court of Appeal explained that the statutory power of a local body to establish a differential rating scheme was expressed in very broad terms. The Court of Appeal recorded:[47]

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

[69] Although the Court of Appeal was dealing with a different rating statute when it made these observations, its comments apply with equal force to the Rating Act.

[70] The Council's authority under the Rating Act to set differential rates is cast in broad terms. As I explained in paragraph [14], s 13(2) of the Rating Act authorised the Council to set a general rate in one of two ways, namely as a uniform rate or as a differential rate. There is nothing in the Rating Act that says under what circumstances a local body may set a differential rate. The only constraints in the Rating Act are that if a local body sets a differential rate it is required to identify the

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45 See *Woolwich Building Society v Inland Revenue Commissioners (No 2)* [1993] AC 70 (HL) at 173 per Lord Goff: "logic appears to demand that the right of recovery should require neither mistake nor compulsion, and that the simple fact that the tax was exacted unlawfully should prima facie be enough to require its repayment." That principle has been held to extend to charges levied under statutory power in *Waikato Regional Airport Ltd v Attorney-General* [2003] UKPC 50, [2004] 3 NZLR 1 at [80]. The *Woolwich*-principle has also been referred to in *Wool Board Disestablishment Co Ltd v Saxmere Co Ltd* [2010] NZCA 513, [2011] 2 NZLR 442 at [178].

46 *Wellington City Council v Woolworths New Zealand Ltd (No 2)*, above n 1.

47 At 544-545.

categories of differential rates by reference to one or more of the matters listed in Schedule 2 of the Rating Act and identify the categories of rateable land in its funding impact statement.

[71] The criteria in Schedule 2 set out a list of nine matters that the Council may use to define categories of rateable land. The first matter that is identified in Schedule 2 is "the use to which the land is put". It is also significant that since the Rating Act was passed local authorities can use "the capital value of the land" when defining categories of rateable land.[48]

[72] The parties accept that the wind farms are not separate rating units and that ss 27(5) and 45(3) and (4) of the Rating Act permit the Council to divide a rating unit into two or more parts to reflect the different rating consequences that may follow from a differential rating system.

[73] The parties also accept that, despite the obvious typographical error I have explained in footnote 19, the Council has set out in its long-term plan and its funding impact statements for the relevant years an explanation of the policies it will follow when making divisions of a rating unit if the property fits under more than one rating differential.

[74] The Council's policy concerning the division of a rating unit into separate parts if the property in question fits under more than one differential category reflects the text and purposes of s 27(5) of the Rating Act. As is explained in paragraphs [18] to [19], s 27(4) and (5) of the Rating Act authorises a local authority to record in its rating information database separate information concerning different parts of a rating unit where differential rating leads to different rates for each part of a rating unit.

[75] The Council's policy concerning the division of a rating unit into separate parts is also consistent with s 45(3) and (4) of the Rating Act, which provides that a

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[48] Under s 81 of the Rating Powers Act 1988, now repealed, "the capital value of the land" was not specified as one of the criteria for establishing types or groups of property for differential rating purposes.

rates assessment may be issued in two or more parts to reflect the different treatment, for rating purposes, of different parts of a rating unit.

[76] The first ground for judicial review is underpinned by the contention that the reference in ss 27(5) and 45(3) of the Rating Act to different "parts" of a rating unit means a separately identifiable and physically discrete part of the rating unit. Meridian says the land on which the wind farm facilities are constructed needed to be physically separated from the land and structures used for farm purposes before the Council could engage in the exercise of setting differential rates.

Blair judgments

[77] Meridian claims support for this part of its argument from two judgments of the High Court in *Blair v Upper Hutt City Council*[49] referred to as the *Blair appeal judgment* and the *Blair judicial review judgment*. As those judgments feature significantly in Meridian's case, it is necessary to explain them in a little detail.

[78] The *Blair appeal judgment* concerned an appeal from the Valuation Tribunal following a decision by the Upper Hutt City Council to change the basis upon which rates were assessed for a property called "Brentwood Manor" in Upper Hutt, owned by Mr Blair's family trust. Brentwood Manor was Mr Blair's family home. After Mr Blair obtained various consents to enable Brentwood Manor to be used as a bed and breakfast business, the Upper Hutt City Council, without making any allocation, determined there had been a change in use of the property to a commercial use. Mr Blair appealed the Council's decision to the Valuation Tribunal. In its decision the Valuation Tribunal apportioned the rates for Brentwood Manor on a 65 per cent commercial and 35 per cent residential basis.

[79] The decisions concerning Brentwood Manor were made under s 105 of the Rating Powers Act 1988 and the Rating Act which replaced the Rating Powers Act with effect from 1 July 2003.

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[49] *Blair v Upper Hutt City Council* HC Wellington CIV-2005-485-1961, 8 May 2007 [*Blair appeal judgment*] and *Blair v Upper Hutt City Council* HC Wellington CIV-2005-485-2268, 22 December 2008 [*Blair judicial review judgment*].

[80] Relevant for present purposes are the observations of the High Court, comprising Clifford J and Mr Young, a lay member, who heard and determined Mr Blair's appeal from the Valuation Tribunal. The High Court explained that an apportionment under s 105(4) of the Rating Powers Act was:[50]

> … predicated on a prior decision of the local authority to allocate various parts of a separately rateable property to a number of different types or groups of property. Where a separately rateable property was allocated to a single differential there was no need to affect an apportionment under s 105(4) …

[81] Rate decisions by the Upper Hutt City Council concerning Brentwood Manor made after 1 July 2003 were governed by the Rating Act. The High Court noted that there was no provision in the Rating Act equivalent to s 105 of the Rating Powers Act. The Court observed however that the setting and assessing of rates on a differential basis was "not substantially different from the framework that operated under the old Rating Powers Act".[51] The Court said that the Rating Act "… envisions that the local authority makes the decision to identify separate parts of a single rating unit and allocates them to different categories under the differential rating scheme".[52]

[82] In the *Blair judicial review judgment*, Clifford J explained the *Blair appeal judgment* in the following way:[53]

> (a) The Council's differential rating scheme did not, prior to July 2003, provide for the possibility of the allocation of parts of a property to different types or groups of property. Therefore there was no basis for the Tribunal to have made an apportionment decision …
>
> (b) In terms of the position from July 2003 onwards, when the Council's differential rating policy did provide for the allocation of parts of the property to different types or groups of property within that scheme, the Council itself was first required to identify those parts, and to allocate them to [the different] types or groups [of property under the scheme]. To do that, the Council had to be able to allocate *separately identifiable and physically discrete parts of the property* as being the subject of the relevant types or groups of property for the purposes of the differential rating scheme. The Council had

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50 *Blair appeal judgment*, above n 49, at [58].
51 At [87].
52 At [93].
53 *Blair judicial review judgment*, above n 49, at [59](a)-(b).

> never done [this] in the case of Brentwood Manor.[54] (emphasis added)

…

[83] In the *Blair appeal judgment* the High Court quashed the Tribunal's decision apportioning the rateable value of Brentwood Manor thereby leaving intact the Upper Hutt City Council's decision to allocate Brentwood Manor into its commercial use differential category. *The Blair appeal judgment* was therefore a pyrrhic success for Mr Blair. In the *Blair judicial review judgment* however, Clifford J held the Upper Hutt City Council had made reviewable errors of law when allocating Brentwood Manor into the commercial differential rating category. This in turn led to the Council refunding Mr Blair the difference in the commercial and residential rates he had paid during the relevant years.

[84] While the *Blair judgments* provide a helpful analysis of the relevant legislative provisions, sight should not be lost of the fact that the key issue in the *Blair appeal judgment* was whether the Valuation Tribunal could undertake the allocation of the differential rates that were in issue without the local authority having previously done so. The High Court's decision was that the allocation of differential rates was for the Upper Hutt City Council in the first place. That is quite different from the present case where the issue is whether the Council undertook the setting of differential rates in a lawful way.

[85] I acknowledge the *Blair judgments* do refer to "separately identifiable and physically discrete parts of the property" in question. Those observations must, however, be considered in context. Brentwood Manor could be used for both personal and commercial purposes. There was no obvious point of differentiation between the uses that were made of Brentwood Manor. A bedroom, for example, could be used for personal use on one day and let to a paying customer on the next day. The commercial and personal uses of Brentwood Manor were intermingled.

[86] There are six clear points of distinction between the facts in the *Blair judgments* and the present case.

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[54] Citing *Blair appeal judgment*, above n 49, at [67].

Physical distinctions

[87] The wind turbine towers and buildings that form part of the wind farm facilities are physically different from the surrounding rural land. The wind farm structures are significant physical towers and the related buildings are quite different from the land and buildings used for farming purposes. At Brentwood Manor there was no obvious physical difference between those parts of the building used for personal use and those parts that were used for commercial purposes.

Different uses

[88] The wind farm facilities involve a use of the land in question that is significantly different from rural use.[55] The farming operations cannot be undertaken on the bases of the wind farm towers or in the buildings that form part of the wind farm facilities. This is quite different from Brentwood Manor where all parts of the building could be used for both personal and commercial purposes.

Permanence of the structures

[89] The wind farm facilities are permanent structures. At Brentwood Manor, rooms and facilities were used for commercial purposes on a temporary basis.

Independent ownership

[90] Meridian owns the wind farm facilities. Although paying guests at Brentwood Manor paid a rate for the privilege of staying at the manor, visitors did not independently own the rooms and facilities they used.

Capital investment

[91] Finally, Meridian has clearly invested significant capital in constructing the wind farm facilities. Guests at Brentwood Manor merely paid a nightly rate or some other fee for the rooms they occupied.

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[55] While in this case the wind farms are located in a rural setting, there are many examples around the world where wind farms are not constructed in rural settings, see for example the offshore wind farms at London Array and Gywnt y Môr in the United Kingdom and the Global Tech wind farms in Germany.

Identifiable parts

[92] Finally, while the wind farm division was undertaken without identifying physically discrete "parts" of the rateable land, the wind farm portions are still separately identifiable by reason of the use to which the land is put and the capital value of the wind farm facilities. This is a significant point of difference between the *Blair* cases and the issues I have to resolve.

[93] In summary, while the *Blair judgments* provide useful guidance, they involved issues which are quite distinct from the present case.

Sections 31 and 128 of the Rating Act

[94] Meridian also refers to ss 31[56] and 128[57] of the Rating Act in support of its first ground of judicial review. In those sections, the term "part of a rating unit" is used in the context of the sale or transfer of parts of a rateable unit. Meridian says that this clearly refers to a legally separate and identifiable part of the rateable unit and that applying the presumption that words within a statute have consistent meaning, the ability to divide rating units into "parts" under s 27(5) of the Rating Act means separately identifiable and physically discrete parts of the land in question.

[95] Sections 31 and 128 however, must be read in context. Clearly, where parts of a rating unit are to be sold or transferred, they must be capable of being physically separated and divided. Whilst it would be a logistically challenging exercise, if Meridian wished to sell or transfer individual turbines it could no doubt physically separate the wind farm facilities from the surrounding farmland. This does not mean however that because ss 31 and 128 of the Rating Act refers to separate and identical parts of a rating unit that the Council was required to separately identify the land on which the wind farm facilities are constructed before setting a differential rate for the

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[56] **31 Notification of change of ownership of rating unit**
(1) If an owner of a rating unit sells or otherwise transfers the unit, or any part of the unit, the owner must notify the relevant local authority of the sale or transfer within 1 month after the effective date of the sale or transfer.
…

[57] **128 Subdivision of rating unit**
(1) Subsection (2) applies if—
(a) part of a rating unit for the relevant year is sold or otherwise transferred; and
…

relevant rating unit. The reasons for this are clear when careful attention is paid to the text and purpose of the relevant legislative provisions.

Text

[96] The meaning of the word "part" or "parts" depends on whether it is used as a noun, verb or adverb. There is no suggestion that Parliament used the word "parts" in s 27(5) of the Rating Act as a verb or adverb. When used as a noun, "part" means "a piece or segment of something which combined with others makes up the whole" or "some but not all of something".[58]

[97] When the ordinary meaning of the word "part" is applied to the facts of this case it is apparent that the wind farm structures comprise a "piece" or "segment" of the rating units, which when combined with the farmland and farm structures make up the whole of the rating units. The wind farm facilities comprise some, but not all of the rating units. While it would be helpful in some circumstances to physically separate the wind farm facilities from the farmlands (if, for example, the wind farm facilities were to be sold or transferred), the natural and ordinary meaning of the word "part" or "parts" does not require the land on which the wind farm facilities are constructed to be physically separated from the land used for rural purposes when the Council set the differential rates.

[98] My understanding of the meaning of the word "part" in s 27(5) of the Rating Act is reaffirmed when consideration is given to the wider context of the Council's powers to set differential rates.

[99] As previously explained, s 14 of the Rating Act required the Council, when setting different categories of differential rates, to do so by reference to one or more of the matters listed in Schedule 2 of the Rating Act. It is logical to also rely on the criteria in Schedule 2 to guide decisions concerning divisions of rating units. This is because the ultimate purpose of any division is to place a separate "part" of a rating unit into a separate differential category which has been created by reference to the criteria in Schedule 2 of the Rating Act.

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[58] See Catherine Soanes and Angus Stevenson (eds) *Concise Oxford English Dictionary* (11th ed, Oxford University Press, Oxford, 2006).

[100] The first of the criteria listed in Schedule 2 is "the use to which the land is put". In the *Blair appeal judgment* it was noted that it is "relevant" that "use" is the first of the matters listed in Schedule 2 of the Rating Act.[59] The significance of land use is further underpinned by the Council's differential rating policy which refers to land use. In particular, the Council's policy states "the general rate will be set on a differential basis, based on land use".[60]

[101] Mr Read makes clear in his affidavit that in this case, the "division of rating units" undertaken by the Council and Quotable Value was driven by the different uses to which parts of the rating units were put. He said "because the differential categories are based on use, the division of a rating unit in this context is also based upon the use of parts of it".[61]

[102] Before the Council created the "wind farm portions"[62] or placed those portions into the Commercial, Industrial and Business Differential category, it is clear the Council considered the wind farm portions constituted a different "use" of the land. Mr Read stated that:[63]

> In or around late March 2009, the Council became aware that construction of the wind energy facilities was substantially completed … The Council decided the wind energy operation on the site was an additional and different use of the land from the rural use that had been assessed.

The initial decision to divide the land was therefore guided by the use of the land in accordance with the first criterion listed in Schedule 2 of the Rating Act.

[103] Schedule 2 of the Rating Act also permits the "capital value of the land" to be a matter that may be used to define categories of rateable land. Capital value was introduced into Schedule 2 when the Rating Act was passed. Therefore, while a division decision is not the same as a valuation decision, the "capital value of the land" can still be a relevant consideration when making a division for differential rating purposes.

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59 *Blair appeal judgment*, above n 49, at [119].
60 Refer [29] above and *Our 10-year Plan*, above n 18, at 167.
61 Affidavit of M J S Read, above n 26, at [121].
62 This was the legal description given in the rating information database as opposed to the "rural portions".
63 Affidavit of M J S Read, above n 26, at [149].

[104] In the present case, land use and capital value were relevant criteria in Schedule 2 of the Rating Act that the Council could consider when identifying categories of land for differential rating purposes under s 14 of the Rating Act. Those same criteria were also able to be used by the Council when dividing the rating units in question into parts in accordance with s 27(5) of the Rating Act. Mr Read's evidence is that these criteria were relied upon by the Council when dividing the rating units into the wind farm portions and the rural portions. The approach taken by the Council is therefore consistent with the text of the relevant provisions of the Rating Act.

Purpose

[105] The analysis of the textual meaning of "parts" in s 27(5) of the Rating Act set out in paragraphs [96] to [104] is also consistent with the purposes of the Rating Act which include providing local bodies with flexible powers to set, assess and collect rates to fund local government activities.[64]

[106] In my assessment, s 27(5) of the Rating Act must be interpreted consistently with Parliament's intention to confer upon local bodies broad and flexible powers to set, amongst other matters, differential rates. Requiring the Council to isolate "separately identifiable and physically discrete parts" of the land under which the wind farm facilities are constructed before setting a differential rate in relation to those facilities would offend one of the basic purposes of the Rating Act.

[107] The textual and purposive analysis which has been undertaken in paragraphs [96] to [106] concerning the relevant provisions of the Rating Act leads to the conclusion that the Council acted lawfully when it created the divisions to the rateable units thereby creating separately rateable parts that reflected the two uses of the land in question without first identifying separately and physically discrete parts of the land upon which the wind farm facilities were constructed.

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[64] Local Government (Rating) Act 2002, s 3; refer [9.1] and which was explained by the Court of Appeal in *Wellington City Council v Woolworths New Zealand Ltd (No 2)*, above n 1, refer paragraph [67].

[108] I accordingly conclude that the Council acted lawfully when it decided to create divisions to the rateable units to reflect the two uses of the relevant land, namely:

- the underlying land and non-wind farm improvements; and
- the wind farm improvements.

This conclusion answers the substantive question raised by the first ground for judicial review.

Second Ground for Judicial Review

The correct categorisation

[109] Meridian's second ground for judicial review is that the Council erred in law when it decided not to place the rateable units entirely in the Base Differential and when it decided to place the wind farm portion of the rateable units into the Commercial, Industrial and Business Differential.

[110] The differential rating categories have been explained at paragraph [29]. Under this ground for judicial review I will first explain why the Council was correct to place the wind farm facilities into the Commercial Industrial and Business differential. I will then explain why the Base Differential does not apply to the wind farm facilities.

[111] As a preliminary point, I note the Council's decision as to which differential category the relevant "part" should be placed is a binary decision. The Council's differential rating policy and relevant statutory provisions do not require the rating unit to be assigned to a particular sub-group within either differential category. The policy explains "[a]ll rating units (or part thereof) will be classified for the purposes of general rates within one of the following differentials" and goes on to explain the two categories, the Base Differential and the Commercial, Industrial and Business Differential.[65] The policy also specifically states that "the separated parts of a rating

[65] Refer [29] above and *Our 10-year Plan*, above n 18, at 167.

unit will be differentially rated where a part of the property is non-rateable or the property *fits* under [more than one] rating differential…" (emphasis added).[66] Mr Read was therefore entitled to rely on what he describes as the "best fit" within the Base Differential or, alternatively, the Commercial, Industrial and Business Differential.

[112] When the Council lawfully decided to divide the rating units on the basis of the uses and capital values that applied to the two different parts of the rating units then it was entitled to place the wind farm portion of the rating units into the Commercial, Industrial and Business Differential.

[113] The wind farm facilities are a significant commercial enterprise. Meridian is a registered company and the wind farm facilities it owns form part of a large business. In addition, the natural and ordinary meaning of the word "industrial" means "of or relating to industry or industries" and "industry", in turn, ordinarily means "a branch of manufacture or trade" or "a large commercial enterprise".[67] The wind farm facilities fall within both definitions. The land upon which the wind farm facilities is constructed is therefore land used for a "commercial or industrial purpose" within the first sub-category of uses referred to in the Commercial, Industrial and Business Differential.

[114] Having concluded that those parts of the rateable unit that are used for the wind farm facilities is "separately rateable" it follows that the land on which the wind farm facilities is constructed is "separately rateable land used for a commercial or industrial purpose". The wind farm facilities therefore fit squarely within the first category of the Commercial, Industrial and Business Differential.

[115] Although the wind farm facilities clearly fall under the first category of the Commercial, Industrial and Business Differential, it is necessary to comment on the remaining sub-categories that were referred to by counsel as having relevance to these proceedings. The multiple possibilities for sub-categorisation put forward by Mr Millard QC, senior counsel for the Council, reinforces my view that if the

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66 Refer [29] above and *Our 10-year Plan*, above n 18, at 168.

67 See Catherine Soanes and Angus Stevenson (eds) *Concise Oxford English Dictionary*, above n 58.

Council is on a future occasion to find itself in situations where multiple sub-categories apply, the "best fit" in relation to the primary differential category should prevail.

[116] Contrary to the understanding the parties had reached prior to this proceeding being commenced, the Council submitted sub-category (f) "utility networks" also applied to the wind farm facilities. This is explained in Mr Read's affidavit when he said:[68]

> The divisions were also considered to be for utilities and therefore within the commercial category. From the Council's perspective it did not matter whether the use for electricity generation was a "utility network" or just a "utility".

[117] Meridian submitted that earlier communications from the Council suggested that sub-category (f) "utility networks" was actually the sole basis for its categorisation. In particular, Meridian referred to communications in August 2015 from Mr Matthews, the manager of financial strategy and planning for the Council, who said the division was applied due to the property fitting more than one rating differential "being utility networks (commercial) and rural land (base)".

[118] Meridian submitted that the wind farm facilities do not fall under the definition of "utility network". Although there is no definition of "utility network" under the Council's differential rating policy, Meridian says there is an established meaning of "utility network" that covers electricity distribution but not electricity generation thereby excluding the wind farm facilities. Meridian says that meaning is consistent with:

(1) *Valuing Utility Networks for District Valuation Rolls.*[69] The types of "utility networks" currently listed on the district valuation roll is limited (in respect of electricity infrastructure) to "electricity transmission distribution networks".

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68 Affidavit of M J S Read, above n 26, at [171].

69 New Zealand Utilities Advisory Group 2005, *Valuing Utility Networks for District Valuation Rolls: National Guidelines* (July 2005).

(2) *District Plan "general provisions".*[70] The definition of "utility network" does not refer to electricity generators. In particular a "utility structure" is defined to exclude "the generation of matter or energy transmitted by the network utility operation".

[119] Even though the wind farm facilities did not fall strictly within the definition of a "utility network", the electricity component of the wind farms, their structure and the land-use code of "utilities services – electricity" (given to the wind farm portions by Quotable Value) demonstrates there are at least overlapping features of the wind farm facilities and "utility networks". Importantly, these overlapping characteristics underpin the criteria of land use and the ultimate determination of placing the wind farm portions in the Commercial, Industrial and Business Differential.

[120] While I do not strictly need to determine the point, I also consider the wind farm facilities fall under sub-category (g) "any property not otherwise categorised within the Base Differential". The Council, having lawfully carried out a division, was entitled to conclude the wind farm facilities constituted a separate "part" to the rural land rating units that fell under the Base Differential category.

[121] Turning now to the rural land sub-category of the Base Differential category, Meridian's argument focuses upon the words "rural land under the District Plan". Meridian submits that as the land in question is rural, it properly fits exclusively within the Base Differential. It is also part of Meridian's case that prior to 2014, the exclusion to the rural land Base Differential sub-category referred to "any rating unit that is zoned rural industrial". Meridian asserts the land upon which the wind farm facilities is constructed has not been zoned "rural industrial". In fact no such zoning existed.

[122] The confusing state of affairs prior to 2014 where "any rating unit that is zoned rural industrial" was excluded under the rural land sub-category of the Base Differential is not as helpful to Meridian as it suggests. It is accepted that because a

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[70] Affidavit of CA Foster, 5 September 2016 citing *Wellington City's District Plan,* General Provisions (last amended 19 November 2014) at 3.

"rural industrial" zone was not within the Council's District Plan, the wind farm facilities could not have strictly been excluded prior to 2014. It is also accepted the wind farm facilities are located on rural land as classified under the District Plan. However, there are two reasons why, even prior to 2014, the land might have been properly excluded from that sub-category. First, as there was no such zone under the District Plan the purported exclusion had no effect prior to it being amended in 2014. Second, the zoning on the land is not determinative of the wind farm facilities falling within the Base Differential category. For reasons already traversed, land use is a key consideration for the purposes of setting rates on a differential basis. Once the Council could lawfully divide the rating units by reference to land use it did not matter what zoning category the land was in.

[123] Since the exclusion now reads following amendment in 2014 "any rating unit that is used for rural industrial purposes", it is much clearer the Council would have acted unlawfully had it placed the wind farm facilities as a separate rating unit under the Base Differential category. The Council is correct when it says that the wind farm facilities is "a rural industrial use". This is because the natural and ordinary meaning of the word "industrial" includes "a large commercial enterprise".[71]

[124] As I am satisfied that the Council's decision to categorise the wind farm facilities as falling within the Commercial, Industrial and Business Differential, the second ground for judicial review must also be dismissed.

Secondary grounds for judicial review

Irrelevant considerations

[125] In light of my conclusion that the Council's classification of the wind farm facilities into the Commercial, Industrial and Business Differential category was correct, any infirmities in the reasoning of the Council are no longer relevant to the remedy sought by Meridian, namely a declaration that the wind farm facilities should have been placed into the Base Differential. Nevertheless, I will address the secondary concerns raised by Meridian.

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[71] See Catherine Soanes and Angus Stevenson (eds) *Concise Oxford English Dictionary*, above n 58.

Ability to claim GST input credits

[126] At paragraph [38] of his first affidavit Mr Read refers to Meridian's ability to pay rates because it can claim a GST input credit and can deduct the "cost" of rates for tax purposes.

[127] This comment was made by Mr Read in the context of explaining aspects of the Council's rating policy objectives and was part of a general comment about the ability of the commercial, industrial and business sector to pay rates.

[128] When viewed in context it is clear Mr Read was not saying the wind farm facilities needed to be classified in the Commercial, Industrial and Business Differential because of Meridian's capacity to pay greater rates than other users of rural land. All Mr Read was saying in paragraph [38] of his first affidavit was that, in general, Meridian and other members of the commercial, industrial and business sector have a greater capacity to pay rates than some others in the rural sector.

Meridian's profitability

[129] Similarly, in paragraph [39] of his first affidavit, Mr Read refers to Meridian's profitability compared to the "asset rich and cash poor" farmers in rural areas.

[130] Again, when viewed in context it is apparent Mr Read was not saying that Meridian's wind farm facilities needed to be classified in the Commercial, Industrial and Business Differential because of Meridian's profitability. Mr Read's comments were general observations that fell significantly short of being matters that were taken into account when the Council made the differential rating decisions in issue in this case.

Discretionary activity

[131] In paragraphs [99] to [105] of his first affidavit, Mr Read refers to the activity status of the wind farm facilities as being a discretionary rather than a permitted activity under the District Plan.

[132] When viewed in context, however, it is very clear that Mr Read's comments about the wind farm facilities having been discretionary activities was not a reason for the Council to place the wind farm facilities into the Commercial, Industrial and Business Differential category.

Rates remission

[133] In paragraph [161] Mr Read states the "Council's view was that the parts did not fall within the rural land aspect of the base category definition because this aspect related, and continues to relate, to rural land eligible for a rates remission, for historical reasons".

[134] Although Mr Read made the comments about the rates remission policy, that I have explained in paragraph [61(4)], in my assessment, when viewed in context, these comments did not constitute a substantive reason for the decision made by the Council that are the subject of Meridian's challenge.

[135] The secondary grounds for judicial review advanced by Meridian do not identify irrelevant considerations that were actually taken into account by the Council when it made the decisions that are the primary focus of Meridian's application for judicial review. I therefore conclude that the secondary grounds for judicial review do not assist Meridian's case.

Inconsistency

[136] The final limb to Meridian's claim for judicial review was the submission that the application of the Commercial, Industrial and Business Differential, together with the high capital value of the wind farm facilities "creates a severe imbalance between the benefit and burden" to Meridian.[72] Meridian refers to the policy objective of the Council that its funding mechanisms:[73]

> … spread the incidence of rates as equitably as possible, by balancing the level of service provided by the council with ability to pay and the incidence of costs in relation to the benefits received.

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72 Plaintiff's submissions, above n 39, at [7.8].
73 *Our 10-year Plan*, above n 18, at 167.

[137] In addition Meridian submits the Council's rating treatment of the wind farms offends the public law expectation that "like cases be treated alike". It is submitted the closest comparable rating units to Meridian's wind farms are other rural properties used for stock grazing.

[138] I have already determined under the first ground of judicial review that there are important differences between the wind farm portions and the rural land portions of the rating units that allowed the Council to create a division in the rating units. These differences underpin why Meridian's wind farms are more closely aligned with other comparable uses of the land, such as Transpower New Zealand Limited's high voltage transmission lines that are towers in rurally zoned areas and which are clearly "utility networks" and fall within the Commercial, Industrial and Business Differential category.[74]

[139] The use which Meridian makes of those parts of the rating units that are used for wind farming is vastly different from the traditional rural uses that the rest of the rating units are used for. No legitimate comparison can be drawn between wind farming and grazing sheep and cattle.

[140] Meridian has submitted that the high capital value of the wind farm facilities creates an imbalance between the benefit and burden to Meridian. Any imbalance however is not significant in light of my conclusions that the division of the rating units was lawful and the rural land component of the land is separate to that of the wind farm facilities.

[141] In any event, a "balance" between benefit and burden is not a mandatory factor in determining whether the differential categorisation carried out by the Council was lawful. As the Court of Appeal pointed out in *Wellington City Council v Woolworths (No 2),*[75] there are no special considerations governing the exercise of the power to make a differential general rate. In particular:[76]

> … The legislation proceeds on the premise that the wider substantive judgments are made by the popularly elected representatives exercising a

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74 Affidavit of M J S Read, above n 26, at [143].
75 *Wellington City Council v Woolworths (No 2)*, above n 1.
76 At 545.

> broad political assessment, and of particular relevance in the present case having regard to the full range of matters specified in the s 84(1)(c) [of the Rating Powers Act 1988] explanation which forms part of the resolution introducing or altering differential rating, *and without the explicit mandatory linkage to benefits required where special purpose authorities adopt differential rating*. (emphasis added)

Affirmative Defences

[142] In view of the conclusions I have reached concerning the substantive merits of Meridian's claim, it is not necessary for me to consider in any depth the Council's affirmative defences to the claim for judicial review. Those affirmative defences are referred to under the headings of "alternative remedies" and "delay".

Alternative remedies

[143] It is part of the Council's case that as Meridian has not exhausted possible grounds of objection under ss 29 and 39 of the Rating Act its claim for judicial review should be rejected. This is not an appealing argument in view of the fact that the Council elected to place Meridian's objectives "… on hold until after these proceedings are resolved".[77]

Delay

[144] The Council also submits that delays on the part of Meridian weigh against the granting of judicial review because Meridian chose not to challenge the way the Court has set the wind farm rates until July 2015.

[145] I have sympathy for the Council's concerns about Meridian's delays in bringing its application for judicial review. Counterbalancing that concern however is the fact that the issues raised by this case involve complex questions of fact and law and Meridian's case has evolved and developed as it has gained a better appreciation of the basis of the Council's decisions. It is also significant that the gravamen of this case involves the lawfulness of a tax. Notwithstanding Meridian's delays, had I concluded the Council had acted unlawfully I would have granted

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[77] Affidavit of M J S Read, above n 26.

Meridian's application for judicial review because money paid to a public authority in the form of an unlawful tax ought to attract a remedy.[78]

Conclusion

[146] Meridian's application for judicial review is dismissed.

[147] The Council is entitled to costs on a scale 2B basis. I certify that this is a case which justified two counsel.

D B Collins J

Solicitors:
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[78] *Woolwich Building Society v Inland Revenue Commissioners,* above n 45, at 177.