SUPREME COURT OF QUEENSLAND

CITATION:	*Paton & Ors v Mackay Regional Council* [2014] QSC 75
PARTIES:	**Ayril Richard Paton** First Applicant **And** **Peter John Crossan** Second Applicant **And** **Maincrest Pty Ltd** **ACN 054 304 933** Third Applicant **v** **Mackay Regional Council** **ABN 56 240 712 069** Respondent
FILE NO/S:	S50/13
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court Mackay
DELIVERED ON:	30 April 2014
DELIVERED AT:	Rockhampton
HEARING DATE:	16 April 2014
JUDGE:	McMeekin J
ORDERS:	**1. The parties to agree on and file formal orders within seven days consistently with these reasons.**
CATCHWORDS	REAL PROPERTY – RATES AND CHARGES – RATING OF LAND – TYPES OF RATES – DIFFERENTIAL RATES – where the applicant submits that the respondent's decisions to impose differential rates are invalid – where the applicant contends that the respondent took into account irrelevant considerations including the capacity of landowners to pay rates in making its decision – whether the decision to impose

differential rates by the respondent is invalid.

Local Government Act 2009 (Qld) s 91, s 92, s 94, s 96.
Local Government Regulation 2012 (Qld) s 80, s 81, s169(2), s 172(1)(a), s 193
Judicial Review Act 1991 (Qld) s 20(2)(e), s 20(2)(f), s 21(2)(e), s 21(2)f)

Xstrata Coal Qld P/L & Ors v Council of the Shire of Bowen [2010] QCA 170 applied

COUNSEL: S Anderson for the applicants
M Hinson QC for the respondents

SOLICITORS: SR Wallace & Wallace for the applicants
S.B. Wright & Wright and Condie for the respondents

[1] **McMeekin J:** This is an application for a statutory order of review. The point in issue concerns the limits on a Council's ability to impose differential general rates.

[2] The applicants own various parcels of land which are located within the local government area for which the respondent, the Mackay Regional Council, is responsible. The applicants argue that the Mackay Regional Council ("the Council"), brought into account irrelevant matters in fixing the rates applicable to their land. They seek judicial review of the respondent's decision to charge those differential rates. Sections 20(2)(e) and (f) and 21(2)(e) and (f) of the *Judicial Review Act 1991* (Qld) are relevant.

The Rival Contentions

[3] In its budget for 2013-14 the Council introduced a new categorisation of land for the purposes of differential rating – that which the owner identified as his or her principal place of residence. The applicants contend that in doing so, the Council, in resolving on the particular categories of land, and in fixing the differential rate with respect to such a category, impermissibly took into account the following matters:

> (a) "whether or not the land is revenue producing, or has the capacity to produce revenue (bearing in mind that revenues provide a source of funds which is relevant to the net impact of the landowner, and also that most revenue producing lands are used for a business for which rates are tax deductible)"
>
> (b)"Ability to pay"
>
> (c) "the capacity of the property to generate revenue"

(d) That "certain categories of land have varying degrees of potential to produce income"

(e) That "a key outcome [was] to keep rate increases as low as possible and to provide relief to pensioners and people living in their own home."

(f) That "Council wanted to spread the burden and people or companies that own rental properties have the capacity to claim a tax deduction for rates and other expenses."

[4] The applicants contend that these various statements, to be found in the Council's revenue statement[1]; revenue policy[2]; in statements by the Mayor in her budget speech to Council[3]; in statements by the Mayor reported in the press after the budget meeting[4]; and in statements by the Council's corporate services director Mr McKinley reported in the press subsequent to the budget meeting[5], show that the Council took into account an irrelevant consideration namely the capacity of the landowner to pay the increased rates. It is submitted that they show that the Council was not concerned with any aspect of the land in question in categorising their land.

[5] The respondent objects that the matters set out in paragraphs (e) and (f) above, as a matter of evidence, are not shown to be matters taken into account by the Council.

[6] It is common ground that if the Council did take into account the capacity of the individual landowner to pay the rates then that would have been irrelevant and the resolution would be vitiated by error: *Xstrata Coal Qld P/L & Ors v Council of the Shire of Bowen*.[6]

[7] The Council's justification for its approach is at paragraph 25 of its written outline:

> "According to the decision in *Xstrata*, land may be categorised for differential general rating purposes according to some attribute or characteristic of the land which includes:-
>
> (a) the use to which the land might be put, including its highest and best use;
> (b) the burden imposed on the Council's budget by the land or its use;
> (c) the value of the land, including its potential to earn income for the landowner;
> (d) the capacity of the land to produce a capacity to pay rates."

[8] The Council argues that each of the relevant matters in [3] above – that is those factors set out in paragraphs (a) to (d) – when construed in context, fall within one or other of those four attributes. The Council argues that the distinction, that it

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1 Para (a) of [3] above found in the last dot point of s 3 of the revenue statement quoted below at [21]

2 Para (b) of [3] found in the first paragraph of s 6.1 of the revenue policy; para (c) of [3] also found in s 6.1; para (d) of [3] found in the first dot point of s 6.2.2 of the revenue policy. The revenue policy is quoted below at [20]

3 My attention was taken to a passage in the speech where the Mayor spoke in similar terms to the corporate services director as set out in (f) of [3]: "People who own investment properties have the ability to earn income and claim a tax deduction for rates and other expenses for their investment property" – see p52 of Ex A to the affidavit of Mr Omundson

4 Para (e) of [3] above found in press clippings tendered by the applicants. I will have the press clippings marked "A" for identification

5 Para (f) of [3] above found in press clippings tendered by the applicants

6 [2010] QCA 170 at [27] per Chesterman JA, de Jersey CJ and Holmes JA agreeing. While the legislation has since been amended there is no material change

makes, namely the use of land as a principal place of residence, is a permissible one, as it relates to a characteristic of the land. I detect a secondary argument and that is that even if the distinction would otherwise be impermissible the decision is not amenable to judicial review as it cannot be shown that the Council in arriving at that decision adopted any irrelevant criterion.

An Objection

[9] As I have mentioned the Council objects to the admissibility of each of the statements attributed to the Mayor and the Council's employee arguing that such statements do not prove the matters that the Council brought into account. The Council argues that the only evidence that can be looked at for determining the matters that the Council brought into account are the revenue statement and revenue policy that were formally adopted by resolution at the Council's budget meeting. No authority was cited for so sweeping a proposition. In the usual course no doubt the formal record of the Council meeting as set out in the minutes provides the best evidence of its considerations. And there are difficulties in determining what matters a body such as a Council has brought into account. But, as a matter of law, I doubt that it can be right to assert that such statements as are in contention here are inadmissible.

[10] No affidavit has been filed on behalf of the respondent asserting that the statements said to have been made by the Mayor or by the Council's corporate services director are wrongly reported or do not accurately state the matters that the Mayor and the Council's corporate services director believe that the Council considered, nor has any Councillor filed an affidavit denying that the Mayor accurately stated the matters that the Council brought into account.

[11] I am puzzled by the objection. In the absence of a denial that the reports are accurate I assume they are. There can be no doubt about the contents of the Mayor's budget speech as it has been tendered by the respondent.[7] Either the matters that the two officers are reported to have said reflect what was in fact considered or they do not. The respondent is in the invidious position of either pretending to the Court that it did not take into account the matters that it did, or having two of its senior officers, one of whom assisted in the decision making and the other responsible for drafting the report adopted by the Council as its decision, misunderstand the matters relevant to the Council's decision and, by their public statements of their beliefs, misrepresent, through negligence or malice matters not, the Council's position to the community they represent.

[12] However that may be I have determined that it is not necessary to rule on the objection. Each side accepted that their argument would be precisely the same whether the statements were included or excluded. It seems to me that the matters brought into account can be readily discerned from the documents adopted at the budget meeting, the decision made and its effect.

The Relevant Legislation

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7 See pp51-56 of Ex A to the affidavit of Mr Omundson

[13] There is no express statement in the legislation governing the Council's power to levy rates limiting the matters that the Council can consider in setting the rates for its area.

[14] At the relevant time the governing legislation was the *Local Government Act* 2009[8] ("LGA"). The Council was under a duty to levy "general rates on all rateable land within the local government area": s 94(1)(a) of the LGA. It had a discretionary power to levy "special rates and charges": s 94(1)(b) LGA. It was required to "decide, by resolution at the local government's budget meeting for a financial year, what rates and charges are to be levied for that financial year": s 94(2) LGA.

[15] Sections 91 and 92 LGA explained the purpose of those rates and charges:

> "**91 What this part is about**
> (1) This part is about rates and charges.
>
> (2) **Rates and charges** are levies that a local government imposes—
> (a) on land; and
> (b) for a service, facility or activity that is supplied or undertaken by—
> (i) the local government; or
> (ii) someone on behalf of the local government (including a garbage collection contractor, for example)."
>
> "**92 Types of rates and charges**
> (1) There are 4 types of rates and charges—
> (a) general rates (including differential rates); and
> (b) special rates and charges; and
> (c) utility charges; and
> (d) separate rates and charges.
> (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."

[16] Of particular interest here is the levying of differential general rates. Section 96 LGA provides:

> "**96 Regulations for rates and charges**
> A regulation may provide for any matter connected with rates and charges, including for example—
> (a) concessions; and
> (b) the categorisation of land for rates and charges; and
> ..."

[17] Sections 80 and 81 of the *Local Government Regulation* 2012[9] "(LGR") are relevant here and provide:

> "**80 Differential general rates**

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8 As in force on 11 July 2013 when the Council made its decision.

9 Again as in force on 11 July 2013 when the Council made its decision

(1) A local government may levy general rates that differ for different categories of rateable land in the local government area.
(2) These rates are called **differential general rates.**
(3) For example, a local government may decide the amount of the general rates on a parcel of residential land will be more than the general rates on the same size parcel of rural land.
(4) However, the differential general rates for a category of rateable land may be the same as the differential general rates for another category of rateable land.
(5) If a local government makes and levies a differential general rate for rateable land for a financial year, the local government must not make and levy a general rate for the land for the year.
(6) A differential general rate may be made and levied on a lot under a community titles Act as if it were a parcel of rateable land.

81 Categorisation of land for differential general rates
(1) Before a local government levies differential general rates, it must decide the different categories (each a **rating category)** of rateable land in the local government area.
(2) The local government must, by resolution, make the decision at the local government's budget meeting.
(3) The resolution must state—
(a) the rating categories of rateable land in the local government area; and
(b) a description of each of the rating categories.
Example—
A resolution may state that the rating categories, and a description of each of the rating categories, are as follows—
(a) residential land - land that is used for residential purposes in particular urban centres, rural localities, park residential estates and coastal villages;
(b) commercial and industrial land - land that is used solely for commerce or industry in particular urban centres and rural localities, other than land used for manufacturing sugar or another rural production industry;
(c) grazing and livestock land -land that is used, for commercial purposes, for grazing and livestock;
(d) sugar cane land - land that is used for producing sugar cane;
(e) sugar milling land - land that is used for manufacturing sugar;
(f) rural land -
(i) land that is not in an urban centre or locality; or
(ii) land that is not used for grazing and livestock; or
(iii) land that is not sugar cane land or sugar milling land;
(g) other land—any other type of land.
(4) After the rating categories and descriptions have been decided, the local government must identify the rating category to which each parcel of rateable land in the local government area belongs.
(5) The local government may do so in any way it considers appropriate.
(6) The fact that some parcels of rateable land are inadvertently not categorised does not stop differential general rates being levied on rateable land that has been categorised."

[18] Sections 169(2)(b) and (c) of the LGR provide that a budget must include a revenue statement and a revenue policy. In relation to differential general rates, s 172(1)(a) of the LGR provides as follows:-

"**172 Revenue statement**
(1) The revenue statement for a local government must state—
(a) if the local government levies differential general rates—
(i) the rating categories for rateable land in the local government area; and

(ii) a description of each rating category;"

[19] In relation to a revenue policy, s 193 of the LGR relevantly provides:

"**193 Revenue policy**
(1) A local government's revenue policy for a financial year must state—
(a) the principles that the local government intends to apply in the financial year for—
(i) levying rates and charges; and
(ii) granting concessions for rates and charges; and
(iii) recovering overdue rates and charges; and
(iv) cost-recovery methods; and
…

(2) The revenue policy may state guidelines that may be used for preparing the local government's revenue statement."

The Council's Policies & Statement

[20] At its budget meeting on 11 July 2013 the Council resolved to adopt a revenue policy for the financial year 2013-2014 which included particular policies with respect to levying rates and charges. The relevant policies are at paragraphs 6.1 and 6.2.2 as follows:

"6.1 Principles applied in levying Rates and Charges
Council intends to achieve an equitable distribution of the cost of its operations between different groups of ratepayers. This would be achieved by balancing the conflicting principles of User Pays, where the cost of a service is borne by each user of the service in proportion to the benefit that particular user obtains from the service, **and Ability to Pay, where the level of contribution to services provided for the benefit of the whole community is collected according to measures that have regard to the attributes of the land being rated, including the capacity of the property to generate revenue**.
...

6.2 Application of the Principles
6.2.2 Differential General Rates
Council considers that the valuation relativities between Residential, Rural, Commercial and Industrial lands within the Local Government area do not accurately reflect the intensity of the use of land nor the impact that the various categories of properties have upon the operational outputs and services provided by the Council.
In particular:

- **Certain categories of land have varying degrees of potential to produce income;**
- **Land used for residential purposes deserves additional consideration as to whether the residence is occupied as the owners principal place of residence or otherwise**;
- Council has further enhanced the equitable distribution of the rates burden by expanding the use of differential rating categories. This has been

achieved, with the use of valuation banding within the residential rating category;

- Certain groups of strata title developments have a relatively low proportional allocation of rateable land value per property, which would provide a disproportionately low contribution in comparison to the benefits obtained, and impact on Council's cost base if they were to be retained in a general residential category.

Certain residential properties that display different attributes to standard residential properties, including those with multiple residential occupancies, those with limited home based non-residential uses, properties with a development approval for residential purposes and properties subject to Sections 49-51 of the *Land Valuation Act* 2010 will be categorised separately for rating purposes;…

- Activities associated with Drive-in Shopping Centres, Sugar Mills and Sugar Refineries, Major Port Industries and other significant Commercial or Industrial activities result in an even more intensive use of lands and higher impact upon the operational outputs and services provided by Council than other properties within commercial or industrial categories in relation to the valuations assessed for the properties;

- In its budget deliberations, Council may identify additional categories of properties that merit a Differential General Rate based on identified criteria. These categories may then be included in Council's Revenue Statement without necessarily being directly mentioned in this Revenue Policy.

Council will therefore adopt a categorisation of land for differential rating and differential rates reflecting these impacts which will enable Council to make strategic decisions as to the appropriate level of revenue required from each category."[10]

[21] At the same budget meeting the Council adopted a revenue statement. The revenue statement relevantly provides:

"**3. DIFFERENTIAL GENERAL RATES 2013/2014:**
The Council is required to raise an appropriate amount of revenue to maintain assets and provide services to the region as a whole. In determining its general rating strategies, the matters Council considered included:

- The rateable value of the land and the equity or otherwise of the level of rates which would be payable if only one general rate were adopted.

- Relative valuation as between different types of land.

- The level of services provided to land within the region and the cost of providing the services compared to the rate burden that would apply under a single general rate.

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10 My emphasis throughout

- The demand that some land uses place on the services which Council is required to provide.

- **Whether or not the land is revenue producing, or has the capacity to produce revenue, (bearing in mind that revenues provide a source of funds which is relevant to the net impact on the landowner, and also that most revenue producing lands are used for a business for which rates are tax deductible).**

Having regard to the above matters, and in accordance with the provisions of Part 5 of Chapter 4 of the Regulation, Council will adopt a differential general rating scheme. The categories into which rateable land is categorised and the description by which land is categorised is as follows: -
…"[11]

[22] For present purposes the revenue statement provided for 31 differential rating categories, 14 of which are residential categories. The 14 residential categories are divided into seven groups. The seven groups are:

(a) Residential Band 1;
(b) Residential Band 2;
(c) Residential Band 3;
(d) Residential Band 4;
(e) Residential Other;
(f) Special Residential Strata – Horizontal;
(g) Special Residential Strata – Vertical.

[23] There is no complaint made about the division into seven groupings. It is accepted that that division is in accordance with principle. For example Residential Bands 1 to 4 are categorised according to the familiar criterion of unimproved capital value of the land.

[24] Each group contains a separate and distinct category described as "Investor Residential Band 1", "Investor Residential Band 2", "Investor Residential Other", "Investor Special Residential Strata – Horizontal" etc. Land categorised as falling within the "investor" band is rated at a higher level than land not so categorised. Complaint is made about this subdivision.

[25] To make the relevant distinction clear it will be necessary to refer only to one of the investor bands. Precisely the same argument applies to all relevant categories. I will consider the "Investor Residential Band 2" category and compare that with the "Residential Band 2" category.

[26] Category 1.2(i) (Investor Residential Band 2) is described in the revenue statement as follows:

"**Category 1.2i - Investor Residential Band 2**
Description
The property is used solely for residential purposes or if vacant land, is zoned for residential use under the Planning Schemes or Shire Plan relevant to Mackay

[11] Again my emphasis throughout

Regional Council, and intended for use for residential purposes only, or if zoned otherwise, be approved for a residential purpose only and not included in any other category.
Rateable value of the land is above $175,000 and up to and including $345,000.
The intention of this description is: -

1. That this category will cover all land, where the dominant purpose for which that land is used or intended for use is a residential purpose within the valuation range specified and not included in any other category.
2. **That such land will not be the owner's principal place of residence**.
3. That in the case of land on which there is erected a single unit domestic dwelling to the extent that the dominant use of the land is residential, it will fall into this category regardless of the zoning of the land.
4. That this category will not include Retirement Villages or equivalent where the individual residences are not separately rateable nor to any residential property categorised in another category."

[27] Category 1.2 (Residential Band 2) is described in the revenue statement as follows:

"**Category 1.2 - Residential Band 2**
Description
The property is used solely for residential purposes **as an owner's principal place of residence** or if vacant land, is zoned for residential use under the Planning Schemes or Shire Plan relevant to Mackay Regional Council, and intended for use for residential purposes only, or if zoned otherwise, be approved for a residential purpose only and not included in any other category.
Rateable Value of the land is above $175,000 and up to and including $345,000
The intention of this description is: -

1. That this category will cover all land, **owned by an individual (and therefore does not include whole or partial ownership by a company, trust, organisation or any other entity who is not an individual**), where the dominant purpose for which that land is used or intended to be used is residential, within the valuation range specified and not included in any other category.
2. **That such land will be the owner's principal place of residence**.
3. That in the case of land on which there is erected a single unit domestic dwelling to the extent that the dominant use of the land is residential, it will fall into this category regardless of the zoning of the land
4. That this category will not include Retirement Villages or equivalent where the individual residences are not separately rateable nor to any residential property categorised in another category."[12]

[28] To avoid categorisation as falling within the "Investor" band it is therefore necessary that the property be used solely as the owner's principal place of residence or, if vacant, is owned by an individual and is intended for use solely as the owner's principal place of residence. The "Investor" categories cover land owned by other than natural persons and land owned by a natural person but not used or intended for use as that person's principal place of residence.

The Categories Relevant Here

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12 My emphasis to highlight the relevant differences

[29] Mr Paton's land falls within category 1.2(i) (Investor Residential Band 2). Mr Crossan owns land categorised as within category 1.1(i) (Investor Residential Band 1), 1.2(i) (Investor Residential Band 2), and 1.5(i) (Investor – Residential - Other). Maincrest Pty Ltd owns land categorised as within category 1.1(i) (Investor Residential Band 1).

[30] Each of the applicants contend that their land should have been rated as falling within what I will call the non investor category – described as Residential Band 1, or Band 2, or Category 1.5 as the case might be.

A Characteristic of the Land?

[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.

[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.

[33] Take another hypothesis – again assume two adjacent blocks of land, one owned by a company, the other by an individual. The individual lives on his (or her) block with his (or her) partner. His (or her) land falls into "Residential Band 1". Assume the company is a private company with two shareholders – let us say a husband and wife. The shareholders live on their block too. The company's land falls into "Investor Residential Band 1". The company pays a higher rate than its neighbours. Why? Because of the personal characteristics of the owner - it is a company - not any characteristic of the land.

[34] Indeed an allotment will be subject to two different rates with a change in ownership – from an owner occupier to an owner who lives elsewhere. Plainly enough it is the owner, not any characteristic of the land, that determines the level of rates.

[35] Examples could be multiplied. The Council does not deny that the rating provisions have this effect but contends that it is immaterial. A categorisation based on whether the rate payer lives in a dwelling on the land, or intends to, is contended to be a distinction as to a use of the land and unimpeachable.

Xstrata Coal

[36] As I have mentioned the legislation is silent on the point. While that permits the Council to bring in a very wide range of criteria in determining the relevant differential categories[13] it was common ground that there were limits, limits identified in *Xstrata Coal.*

[37] The Council argued that the decision in *Xstrata Coal* supported its approach of categorising land according to whether the land was the principal place of residence of the rate payer. It is true, as the Council contended, that in the course of his reasons Chesterman JA expressly accepted[14] as accurate the following submission there made by the applicant:

> "[21] The appellants ... argue 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. 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."[15]

[38] From this passage the Council derived support for its submission of the four relevant and permissible criteria[16] that a Council can bring into account. That in my opinion is to misunderstand what was there meant by the submission. It needs to be borne in mind, of course, that Chesterman JA's reasons are not to be read as if analysing a statute. His acceptance of the proposition put was entirely in the context of the argument before the Court.

[39] The precise point that I have to decide was not before the Court in *Xstrata Coal*. There the issue, stated and rejected by Chesterman JA, was:

> "A ratepayer's wealth is irrelevant to the process of deciding what rates should be levied on its property. That proposition is undoubted. The comparative wealth of the owner of a particular type of land, in this case coal mines, as against the wealth of owners of other uses of land, is likewise irrelevant. In both cases what forms the reference point for the levying of the rate is the worth of the land owner, not the value or some other attribute of the property to be rated."[17]

[40] But each side argued that the decision in *Xstrata* supported their position. What then did *Xstrata Coal* stand for? The *ratio decidendi* of the case, fairly evidently, is in the express rejection by the Court of a ratepayer's capacity to pay as a relevant criterion on which to assess a differential rate. So much is evident from the following passages in Chesterman JA's judgment:

> "The point in contention on the appeal therefore condenses to this: were the

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13 *Minister for Aboriginal Affairs v Peko Wallsend Pty Ltd* (1986) 162 CLR 24 at 39-42 per Mason J
14 [2010] QCA 170 at [22]
15 My emphasis
16 See [7] above
17 [2010] QCA 170 at [36]

> 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."[18]
>
> and
>
> "There are good reasons why the Act would not contemplate that wealth, or capacity to pay rates, should be a factor relevant to the rates fixed by a local government in its budget…."[19]

[41] *Xstrata Coal* then stands for the proposition that in setting differential rates it is not the individual circumstances of the owner that are relevant but rather only the characteristics of the land in question.

[42] The legislation under consideration in *Xstrata Coal* is not materially different from the legislation relevant here.[20] The terms of the Act and authority are equally compelling here as there in denying that in the setting of differential rates the personal capacity of a rate payer to pay rates is a relevant criterion. No contrary submission was made.

[43] The fallacy, which I think the Council argument that *Xstrata Coal* provides support for its approach contains, is in the interpretation of the word "use" in the phrase "the use to which the land might be put" and the scope that the Council gives to the phrase "the value of the land including its potential to earn income for the land owner". The relevant "use" that the submission intended (or at least as Chesterman JA clearly accepted it as meaning) was not owner dependent but derived from some characteristic of the land. The potentiality of the land to earn income was not intended to be dependent on any decision of the owner – which invariably depends on many things idiosyncratic to the owner - but again was intended to reflect some characteristic of the land.

Adoption of Presumed Capacity to Pay

[44] In fact the "use", properly understood, and the potential of the land to earn income in each of the examples that I have postulated above is precisely the same. It is only the characteristics of the owner which varies. A rational exercise of the power vested in the Council should not have the result that the amount of rates paid in respect of a given parcel of land should vary dependent upon its owner from time to time. That suggests that the decision reached was arrived at in an impermissible way.

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18 *Ibid* [27]

19 *Ibid* [40]

20 I can detect only one difference and that is the presence of s 977 in the legislation under consideration in *Xstrata Coal* and its requirement that the Council state the criteria by which land is to be categorised. As Mr Hinson of Queens Counsel pointed out that compares to the present requirement that the Council state a description of each rating category: ss 81(3) and 17291)(a)(ii) of the LGR

[45] And when one turns to the revenue statement and policy, it is evident that it is the owner's presumed capacity to pay that is the determining feature.

[46] That the Council took the view that owners who were not occupiers had a greater capacity to pay, and that therefore should be subject to a higher rate, is quite plain from the following statements that I have highlighted in the Council's revenue statement and policy, when read in their context and as a whole:

(a) Revenue Policy paragraph 6.1 under the heading *Principles applied in levying Rates and Charges*: "Ability to Pay, where the level of contribution to services provided for the benefit of the whole community is collected according to measures that have regard to the attributes of the land being rated, **including the capacity of the property to generate revenue**"[21]

(b) Revenue Policy paragraph 6.2.2 under the heading *Application of the Principles - Differential General Rate*s: "Certain categories of land have varying degrees of potential to produce income; **Land used for residential purposes deserves additional consideration as to whether the residence is occupied as the owners' principal place of residence or otherwise**; Council has further enhanced the equitable distribution of the rates burden by expanding the use of differential rating categories. This has been achieved, with the use of valuation banding within the residential rating category".[22]

(c) Section 3 of the Revenue Statement: "In determining its general rating strategies, the matters Council considered included … **Whether or not the land is revenue producing, or has the capacity to produce revenue, (bearing in mind that revenues provide a source of funds which is relevant to the net impact on the landowner, and also that most revenue producing lands are used for a business for which rates are tax deductible)**."[23]

[47] These statements taken together justify this conclusion: the premise underlying the Council's approach is that land that is not owner occupied can bear a higher level of rates because of two features which land that is owner occupied does not share - a capacity to produce income and, where income is produced, the availability of tax deductions to lessen the burden of rates.

[48] In taking this approach the Council has in fact gone one step further than did the Council in *Xstrata Coal.* There the Council knew the owners had an income earning business conducted on the subject lands and assumed that the ratepayer had a greater capacity to pay because of that. Here the Council is not concerned whether there is in fact an income earning business on the land at all. It simply assumes there to be one or that there could be one, on any residential land that is not owner occupied ("the first assumption"). It then makes the further assumption that that business, or putative business, is sufficiently successful, or would be sufficiently successful, such that the burden of rates can more easily be borne, i.e. that the ratepayer has a greater capacity to pay ("the second assumption"), "bearing in mind that revenues provide a source of funds which is relevant to the net impact on the

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21 See p39 of Ex A to the affidavit of Mr Omundson

22 See pp39-40 of Ex A to the affidavit of Mr Omundson

23 See p2 of Ex A to the affidavit of Mr Omundson

landowner", and also because "most revenue producing lands are used for a business for which rates are tax deductible".[24]

[49] If it matters, and I am not sure that it does, it is clear that neither assumption is necessarily justified. As to the first assumption there are many reasons why land not used as the principal place of residence may not be used to support an income earning business. Some might use the home as a residence for children unable, perhaps through geographical separation and educational needs, to live in the parent's home. Some may have children or grandchildren or other relatives with no capacity to pay a commercial rent with special needs and wish to support them with a residence. Some might keep a residence as a holiday home. Some might keep land as vacant land in the hope that values rise over the years and a capital gain might be made. Some might through disability have to give up living in their home but have no wish, energy or capacity to rent their previous residence. Again the examples could be multiplied.

[50] As to the second assumption it too is flawed as Chesterman JA pointed out in *Xstrata Coal*:

> "To make an assessment of wealth, or capacity to pay, one needs more than an indication of the ownership of valuable land, or an apparently profitable enterprise conducted on land, or the income of the ratepayer. Before an assessment could be made one must know also the level of debt obligation and the cost of operations. I doubt that any local authority would have access to such information concerning its ratepayers."[25]

[51] This was said in the context of explaining why the legislature did not envisage that the personal capacity of the owner to pay could be adopted as a criterion for the setting of rates. But the factors identified in the passage quoted above highlight the *non sequitur* involved in the Council's approach and apply with equal force to the argument here.

Conclusion

[52] The issue of course is not whether the Council's assumptions are flawed but whether the statute permits the Council to categorise land for differential rating purposes by reference to the occupation of it by the owner. In my opinion it does not. To justify the categorisation the Council impermissibly took into account characteristics personal to the owners of the land and failed to restrict itself to characteristics of the subject land itself. It is simply a misuse of language to claim that the owner's decision to reside on land, or not, is in some way a characteristic of the land. No provision of the LGA was shown to support that approach. The only authority relied on as supporting it, *Xstrata Coal*, does not but rather requires that the opposite conclusion be reached.

[53] It follows that in my view the making of the decision to adopt the differential rating categories identified as:

(a) Category 1.1i – Investor Residential Band 1
(b) Category 1.2i – Investor Residential Band 2
(c) Category 1.3i – Investor Residential Band 3

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[24] Each quote from section 3 of the Council's Revenue Statement
[25] [2010] QCA 170 at [40]

(d) Category 1.4i – Investor Residential Band 4
(e) Category 1.5i – Investor Residential - Other
(f) Category 2.1i – Investor Special Residential - Horizontal
(g) Category 2.2i – Investor Special Residential - Vertical

was an improper exercise of the power conferred on the respondent under the LGA.

[54] It follows that the Council's resolution of 11 July 2013 by which it made and levied a differential general rate in relation to each of those categories should be set aside as should the various rate notices issued to the applicants dependent upon those categories. In that regard I note that the application only refers to the rate notices relevant to the original applicant, Mr Paton.

[55] The applicants should have their costs.

[56] I will hear from the parties as to the formal orders that should be made in the light of these reasons.