IN THE COURT OF APPEAL OF NEW ZEALAND

CA120/2016
[2017] NZCA 302

BETWEEN	WELLINGTON CITY COUNCIL Appellant
AND	MINOTAUR CUSTODIANS LTD Respondent

Hearing:	16 March 2017
Court:	Brown, S France and J Williams JJ
Counsel:	A L Holloway and E B Sweet for Appellant P S J Withnall for Respondent
Judgment:	26 July 2017 at 4.00 pm

JUDGMENT OF THE COURT

A **The appeal is allowed. The judgment in the High Court is set aside and the order quashed.**

B **The respondent must pay the appellant costs for a standard appeal on a band A basis and usual disbursements.**

C **The award of costs in favour of the respondent in the High Court is set aside. Costs in the High Court are to be dealt with in the High Court in light of the result in this judgment.**

REASONS OF THE COURT

(Given by J Williams J)

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Introduction

[1] The respondent, Minotaur Custodians Ltd (Minotaur), owns several units in an apartment complex in Wellington. In a city-wide review of parking policy, Wellington City Council (the Council) decided to change the eligibility criteria for residents' parking permits in the vicinity of those apartments. Its effect was to make any new tenants of Minotaur's building ineligible for such permits.

[2] Minotaur brought judicial review proceedings in the High Court. Mallon J granted the application finding that the Council had irrationally failed to consult Minotaur over the changes even though it was directly affected as a landlord.[1] Mallon J directed the Council to reconsider the matter.

[3] The Council appeals.

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1 *Minotaur Custodians Ltd v Wellington City Council* [2016] NZHC 238, [2016] 3 NZLR 92.

Background

[4] Minotaur owns 16 of the 22 apartments in an apartment building at 30 Hanson Street and two adjoining apartments at 203 and 207 Tasman Street. It lets these apartments to tenants. The apartments are situated in the central city fringe suburb of Mount Cook. Two off-street car parks were created when the apartment building was refurbished and these are attached to two of the apartments. Minotaur also holds encroachment licences for three more car parks on the road reserve fronting onto the formed alignment of John Street.

[5] Until 2010 when the Council's new parking permit eligibility policy was implemented, the tenants of Minotaur's apartments were entitled to apply either for a residents' parking permit or a coupon parking scheme exemption permit.

[6] The coupon parking scheme exemption permit is cheaper but carries fewer benefits. A brief explanation of the way coupon parking zones are administered is required. Coupons are aimed at commuters wishing to park in residential areas in the inner city fringe suburbs. Motorists without coupons are free to park in coupon zones provided they comply with the parking time limits — usually 120 minutes. Commuters prepared to buy a parking coupon for around $7.50 per day or $120 per month can exceed these time limits. There is no residential or other qualification to park in a coupon zone. A coupon parking exemption permit exempts the holder from the need to obtain a coupon to exceed the time limits in a coupon zone. Only local residents can obtain these, and they cost $65 per year. There is a great deal of competition for parking spaces in coupon zones (residents must compete with all commuters) and no guarantee that the holder of a coupon parking scheme exemption permit will get a park.

[7] Residents' parking permits are different. They relate to parking zones that are (at least during business hours) reserved for residents' parking permit holders only. No-one else may park in these zones. The pool of competing motorists for these parks is thus much smaller and, in theory at least, there are proportionately many more spaces available for motorists with such permits. Residents' parking permit

holders can also park in coupon zones without obtaining a coupon. Residents' parking permits cost $115 per year.

New policy

[8] The change to parking entitlements the subject of this appeal was introduced as a result of a 2009 review of the Council's 2007 Parking Policy. A report prepared for the Council's Strategy and Policy Committee (the Committee) in that year entitled "Parking Policy Implementation: Review of Resident and Coupon Parking" identified a number of parking demand issues in residential and suburban zoned areas and the options for addressing them. Higher density housing meant there was increased pressure from residents for on-street parking, especially in suburban centre and central area zones where there was also competition from business and commercial traffic. This was, the report noted, in part because in those zones the District Plan did not require apartment owners to provide residents with off-street parking.

[9] Minotaur's apartments are zoned "suburban centre" in the District Plan and, as noted, have only five off-street parks.

[10] The report proposed that the Council reallocate entitlements as a means of controlling parking demand and conflict. Recommendations included:

(a) restricting eligibility for residents' parking permits to people living in areas with residential zoning only;[2]

(b) reducing the maximum allowable number of residents' parking permits from two to one per unit for all multi-unit dwellings in those residential zones; and

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[2] Previously, a small number of streets with mixed zoning were included in the areas eligible for residents' parking. The change meant that those parts of the streets with zoning other than residential were no longer eligible.

(c) ameliorating the effects on residents of these changes by allowing indefinite renewal of all existing permits so long as the permit holders remained at the same address.

[11] The effect of this change for Minotaur was that, although existing residents were protected, any new residents were ineligible for residents' parking permits. The relevant parts of Hanson Street and Tasman Street are, as we have said, zoned suburban centre. Other parts of both streets are zoned residential and those residents therefore still qualified. Minotaur's tenants were therefore left with the less attractive option of purchasing coupon parking scheme exemption permits.

Consultation process

[12] A proposed consultation plan in relation to the recommended changes was contained in Appendix 4 of the 2009 report. It provided:

> The formal consultation process for the proposal is focused on obtaining comments from residents in residential parking areas and surrounding areas, users of coupon parking, and the general public.

[13] The objective of the plan was to communicate clearly the proposed changes and the rationale for those changes to affected residents and to obtain their feedback. The target audience for consultation was:

(a) permit holders in areas directly affected by changes to permit eligibility maps;

(b) all residents of affected streets; and

(c) all residents, businesses, schools and community organisations in permit areas and peripheral areas (including Victoria University of Wellington and Massey University).

[14] According to Appendix 4, those identified to be sent a copy of the proposal included:

(a) all current holders of resident permits and coupon exemption permits;

(b) Federation of Residents and Progressive Associations;

(c) Residents' and Progressive Associations;

(d) Victoria University of Wellington; and

(e) Massey University.

[15] The consultation plan was approved for implementation at a Committee meeting on 20 August 2009.[3]

[16] The consultation period ran for five weeks in September and October 2009. Consultation documents were sent to over 3,500 residents and nearly 500 affected parties. According to the Council's evidence, these "affected parties" included businesses, schools and community organisations. Around 800 further consultation documents were placed on vehicle windscreens in coupon zones around the city. Public notices were published in *The Dominion Post* and *The Wellingtonian*, and consultation documents were also accessible via the "Have Your Say" section of the Council's website and at its libraries and service centre. In all, 427 written submissions were received and 22 oral submissions were heard by the Committee in November 2009.

[17] A report to the Committee summarising the submissions received indicated that 78 per cent of submissions supported restricting residents' parking eligibility to properties in residential zones only, and 56 per cent supported reducing the allowance of residential parking permits to one per dwelling.[4] Based on feedback, the report recommended an exception for heritage listed residential properties.[5] The changes recommended by the report were otherwise largely consistent with the

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3 With two amendments, neither of which are relevant to this appeal.

4 Steve Spence and others *Parking Policy Implementation: Resident and Coupon Parking Schemes* (Wellington City Council Strategy and Policy Committee, Report 3 (1215/52/IM), December 2009).

5 At [5.3]. The wording of the recommendation, adopted by the Committee then the Council, was "Restrict eligibility to the resident parking scheme to properties in residential zones or heritage listed residential buildings". However, the discussion in the text of the report recommended that eligibility for heritage listed properties should be considered "on a case-by-case basis".

original proposal.[6] The Committee adopted the report's recommendations. The Council received those recommendations on 11 December 2009 and duly resolved to adopt them. The new regime came into effect on 1 January 2010.

Minotaur raises concerns

[18] Minotaur did not receive a copy of the consultation documents in the post and was not one of the targets identified (either specifically or generically) for active consultation. Minotaur did not find out about the changes until some time shortly after they were implemented, when one of its new tenants was declined an application for a resident's parking permit.[7]

[19] Minotaur was concerned at the potential impact of these changes and sought a meeting with Council officers. The meeting took place in February 2010. In correspondence that followed, Minotaur alleged a Council officer had described the failure to notify non-resident owners as an "oversight" but, Minotaur said, the officer had added that there were other means by which non-resident owners could have become aware of the proposals, such as newspaper advertisements or via the Council website. The Council denied that it conceded the failure to notify Minotaur was an oversight.

[20] In a letter of 22 March 2010 Minotaur's property manager (writing on behalf of Minotaur and others) accused the Council of "cherry-picking" the properties at 20–30 Hanson Street and 181–207 Tasman Street for discriminatory treatment. The letter recorded the owners' view that they had been severely disadvantaged as a result of the denial of an opportunity to engage in consultation with the Council. It claimed that the practical impact of the parking policy changes would be to require a reduction in rent to compensate for the lack of parking and to "reduce the cohort that will want to live in this area". The owners would be reduced to letting their properties to students who do not have the same parking demands, which would

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6 The other differences between the original proposal and the recommendations in the report are not relevant to this appeal.

7 Minotaur also doubted whether any of its tenants at 30 Hanson Street had received letters in the mail either, because none had contacted Minotaur in relation to the proposed changes, or made their own submissions to the Council. The Council rejected that suggestion. However, nothing was made of the point in argument before us.

"very much affect the character of this residential area". The letter requested the Council to reinstate the old parking entitlements in relation to the properties in question.

[21] The Council's chief transport planner replied in writing saying that the Council was satisfied with the quality of the consultation process and it did not believe it could exempt those properties without compromising the integrity of the policy changes.

[22] Minotaur then wrote to the Council's Chief Executive Officer, Mr Poole. Another meeting took place in June 2010. At that meeting the Council agreed the changes created "unintended hardship" for some residents and property owners who had been given "insufficient time to manage the transition from eligibility to non eligibility". The Council formally advised by letter of 22 June 2010 that it would extend the time for implementation of the changes in relation to certain Hanson Street properties, including that of Minotaur, by two years to 1 July 2012. The letter continued:

> The Council believes that this arrangement will allow you to address any changes required to your premises or your lease agreements to accommodate the new eligibility criteria.

[23] It went on:

> Or alternatively, to prepare an appropriate case for Council's consideration where you may decide to seek exclusion of a particular building from the policy requirements.

[24] Minotaur did not present a case to the Council as invited. Instead, near the end of the transition period, in June 2012, it requested information relating to the change in policy and the process involved. Then, in December 2012, Minotaur advised the Council that it intended to commence proceedings. It did so in March 2015.

High Court judgment

[25] In the High Court Mallon J began by discussing the provisions of the relevant controlling legislation, the Local Government Act 2002 (LGA). In a passage with

which we agree, Mallon J summarised the overall effect of these provisions as follows:[8]

> (a) A local authority is always required to consider the views of persons likely to be affected by or interested in the decision (s 78).
>
> (b) The way it obtains those views is a matter for the Council to decide having regard to the significance of the decision (s 79).
>
> (c) The requirement to obtain community views is not a requirement to consult (s 78(3)), but nevertheless the Council may decide to carry out consultation in order to obtain the views of those who may be affected or interested in a decision.
>
> (d) If the Council is carrying out consultation it must comply with the consultation principles (s 82). This requires the Council to encourage those affected or interested in the decision to present their views, but the Council has a discretion as to how it does that, taking into account what it already knows about the views and preferences of those affected or interested, the significance of the decision, and its impact upon those affected or interested.
>
> (e) In some situations (not the present), the Council is required to comply with the special consultative procedure.

[26] Mallon J also considered that the common law in relation to consultation obligations may supplement statutory provisions, unless by necessary implication the statute must be regarded as providing a comprehensive procedural code.[9] A separate duty to consult may arise even though the statute provides the decision-maker with a discretion whether to consult and with whom. A legitimate expectation arising from a promise or practice may overlap with an existing interest that is considered sufficient to give rise to the duty, or it may arise because the interest at issue is so significant that it demands, as a matter of fairness, that an opportunity to be heard is provided.[10]

[27] Mallon J acknowledged that the Council appropriately decided it should carry out consultation, and that it was appropriate to target those who might be directly affected by the changes.[11] But she considered the crucial flaw in the Council's case was that it offered no logical rationale as to why it targeted residents and businesses in the affected areas but not landlords. In the absence of any explanation (and none

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8 *Minotaur*, above n 1, at [46].
9 At [48].
10 At [50].
11 At [60].

was offered), the Judge found she was entitled to infer that the failure to send consultation documents to landlords was an oversight. This meant that, since the Council had decided to consult widely amongst affected groups, it was irrational not to consult with landlords who were also directly affected.[12] The Council therefore failed to act in accordance with its duty to give consideration to those persons likely to be affected,[13] and failed to encourage those who may be affected by a decision to present their views.[14]

[28] Mallon J considered that Minotaur was entitled to relief, rejecting the Council's argument that it should be denied on the ground of delay. Mallon J directed the Council to consider afresh whether it is appropriate to grant an exception from the criteria for the Minotaur apartments and for that purpose to consult with Minotaur.[15] It was, the Judge accepted, for the Council to consider whether, having heard from Minotaur, it should then consult more widely.

Grounds of appeal

[29] The Council appeals on the grounds that:

(a) the Council owed no statutory duty to consult by virtue of the LGA;

(b) the Council owed no common law duty to consult Minotaur as:

(i) Minotaur had no relevant legitimate expectation and was not in a special position requiring direct communication on parking permit eligibility; and

(ii) the Council was under no common law obligation to follow any particular process or consult in any particular way;

(c) the Council's decision not to post consultation documents directly to Minotaur was not irrational; and

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12 At [61].
13 Per s 78 of the Local Government Act 2002.
14 Per s 82.
15 *Minotaur*, above n 1, at [69].

(d) even if there was an obligation to consult, Mallon J should have declined to grant relief by reason of Minotaur's inordinate delay in bringing the proceedings and the consequential prejudice to the Council.

Consultation under the Local Government Act

[30] It is convenient to begin our analysis by briefly discussing the consultation requirements in the LGA as they stood in August 2009 when the consultation decision was made.

[31] Part 6 of the LGA is headed up "Planning, decision-making, and accountability". Among other things, this part sets out the general statutory obligations of local authorities in relation to all of their decision-making processes including in relation to consultation with interested and affected persons.[16] The relevant sections of pt 6 in this case are ss 76–79 and 82.

[32] Section 76 is the leading provision. It provides:

> **76 Decision-making**
>
> (1) Every decision made by a local authority must be made in accordance with such of the provisions of sections 77, 78, 80, 81, and 82 as are applicable.
>
> (2) Subsection (1) is subject, in relation to compliance with sections 77 and 78, to the judgments made by the local authority under section 79.
>
> (3) A local authority—
>
> (a) must ensure that, subject to subsection (2), its decision-making processes promote compliance with subsection (1); and
>
> (b) in the case of a significant decision, must ensure, before the decision is made, that subsection (1) has been appropriately observed.
>
> …

[16] Local Government Act, s 75(a) and (c).

(6) This section and the sections applied by this section do not limit any duty or obligation imposed on a local authority by any other enactment.

[33] Relevantly for present purposes, subs (1) and (2) provide that consultation decisions must be made in accordance with ss 78 and 82, subject, in the case of compliance with s 78, to the ameliorating effect of s 79. Subsection (3) sets two standards of performance. In respect of "significant decisions", the local authority must ensure that the provisions contained in subs (1) have been "appropriately observed". This is the higher of the two standards. Where the matter is not "significant", the standard is more aspirational: decision-making is only required to "promote compliance" with the provisions referred to in subs (1). Even that lower standard is subject to s 79 as noted. It is common ground that the decision in question in this appeal was not a "significant decision" in terms of the statutory definition. Accordingly, the "promote compliance" standard applied.

[34] Section 78 refers to community views. It provides:

78 Community views in relation to decisions

(1) A local authority must, in the course of its decision-making process in relation to a matter, give consideration to the views and preferences of persons likely to be affected by, or to have an interest in, the matter.

(2) That consideration must be given at—

(a) the stage at which the problems and objectives related to the matter are defined:

(b) the stage at which the options that may be reasonably practicable options of achieving an objective are identified:

(c) the stage at which reasonably practicable options are assessed and proposals developed:

(d) the stage at which proposals of the kind described in paragraph (c) are adopted.

(3) A local authority is not required by this section alone to undertake any consultation process or procedure.

(4) This section is subject to section 79.

[35] Section 78(1) provides that a local authority must, in the course of its decision making, give consideration to the views and preferences of persons likely to be affected by, or have an interest in, the matter. Subsection (2) provides that the views and preferences of affected persons or those who have an interest in the matter must be considered at four stated stages of decision-making.[17]

[36] Note, however, that subs (3) makes it clear that s 78 does not itself generate an obligation to consult or indeed to adopt any particular consultation process or procedure. Rather, consultation is one of a number of options for obtaining information about the views and preferences of those affected or with an interest. Subsection (4) restates that the section is subject to the wide implementation discretion in s 79.

[37] Section 82 sets out the applicable principles of consultation where a council decides to consult. It provides:

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

[17] The subsection was repealed in 2010.

format that is appropriate to the preferences and needs of those persons:

(e) that the views presented to the local authority should be received by the local authority with an open mind and should be given by the local authority, in making a decision, due consideration:

(f) that persons who present views to the local authority should be provided by the local authority with information concerning both the relevant decisions and the reasons for those decisions.

…

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

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

(a) the requirements of section 78; and

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

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

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

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

(5) Where a local authority is authorised or required by this Act or any other enactment to undertake consultation in relation to any decision or matter and the procedure in respect of that consultation is prescribed by this Act or any other enactment, such of the provisions of the principles set out in subsection (1) as are inconsistent with specific requirements of the procedure so prescribed are not to be observed by the local authority in respect of that consultation.

[38] The effect of this provision is that, when a council does choose to consult, certain "principles" apply to the particular forms of consultation the council adopts:

most relevantly, those affected should have access to relevant information in an appropriate format and be encouraged to present their views having been given clear information as to both the purpose of the consultation and the scope of any likely decision. Further, a council must ensure that interested or affected parties have a reasonable opportunity to present their views, and that those views are received by council with an open mind.

[39] In substance, these principles are really basic performance standards. Subsection (3) is the counterweight. This restates (now for the third time) that the "how" of compliance with these guidelines is a matter for the local authority. That proposition is subject to the following further considerations which the local authority must (relevantly) bear in mind:[18]

(a) the terms of s 78 including, presumably, the fact that it is subject to the reservation to the local authority of the decision of how to implement;

(b) whether the views of those affected are already known to the local authority;

(c) the significance of the issue in question for those affected; and

(d) the costs and benefits of consultation.

[40] Finally, s 79, to which (as indicated) s 78 is subject, deals with compliance:

> **79 Compliance with procedures in relation to decisions**
>
> (1) It is the responsibility of a local authority to make, in its discretion, judgments—
>
> (a) about how to achieve compliance with sections 77 and 78 that is largely in proportion to the significance of the matters affected by the decision; and
>
> (b) about, in particular—

[18] Local Government Act, s 82(4).

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

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

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

(iv) the extent and nature of any written record to be kept of the manner in which it has complied with those sections.

(2) In making judgments under subsection (1), a local authority must have regard to the significance of all relevant matters and, in addition, to—

(a) the principles set out in section 14; and

(b) the extent of the local authority's resources; and

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

…

[41] Section 79 begins with the position that it is for the local authority to decide in its discretion how ss 77 and 78 are to be complied with — the fourth such restatement of that principle in pt 6. Importantly, s 79(1)(b)(iv) provides that it is for the local authority to decide the extent and nature of any written record to be kept of the manner in which it has complied with ss 77 and 78. We will return to that provision below.

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

A common law duty to consult?

[43] The rejection in pt 6 of any specific statutory duty to consult led to argument both before Mallon J and in this Court over whether Minotaur could call in aid a separate common law duty to consult, and, if so, whether such obligation might be informed by the general public law principle of fairness. In our view, this argument is beside the point for the reasons that follow.

[44] The Council submitted that the LGA contains a comprehensive statutory regime that excludes the possibility of actionable common law duties in relation to a lack of consultation with Minotaur. Mallon J was wrong to suggest there was a separate common law duty to bring the consultation process to Minotaur's attention by sending consultation material to it. Minotaur, the Council submitted, had no legitimate expectation in that respect. The Council had made no representation to Minotaur or landlords generally about direct consultation and it did not have any past practice to that effect. Nor was Minotaur uniquely or specially affected. Alleged "speculative impact" on a landlord's financial situation is insufficient, the Council submitted, to found an actionable legitimate expectation to be consulted. And while it might be said there was a common law duty to act fairly, this does not go so far as to posit that consultation will be required wherever it would be "fairer". That would be to create the kind of open-ended procedural duty that pt 6 specifically rejects.

[45] Minotaur submitted that a duty to consult did arise at common law once the Council made clear by its actions that it was committed to consulting with those who may be affected. The impact on Minotaur was plain and substantial. Indeed, Minotaur submitted, the staff report to the Council committee referred to another apartment on Hanson Street as an example of unacceptable pressure on street parking in the area. Minotaur submitted it had a plain, direct and existing interest, sufficient alone to give rise to a legitimate expectation of consultation.

[46] Mallon J referred to *Pascoe Properties Ltd v Nelson City Council* as an example of the common law duty to consult arising in the context of a decision under the LGA.[19] There, for reasons relating to the history of the land in question,

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[19] *Pascoe Properties Ltd v Nelson City Council* [2012] NZRMA 232 (HC).

MacKenzie J found the Nelson City Council was obliged to consult with adjoining businesses before deciding to change the use of council-owned land from customer car park to park in the traditional sense.[20] In that case, the adjoining businesses could demonstrate that the Council had, in the past, struck a special rate levied on them alone to fund the Council's purchase of the land for customer parking. The argument for a consultation obligation was a powerful one, notwithstanding ss 82(3) and 79. In our view, that case is best understood as one founded in legitimate expectation arising from its unique facts. We do not consider it is authority for the proposition that directly affected land owners will always be entitled to be consulted in council decision-making. Such proposition contradicts the plain terms of ss 78, 79 and 82(3) of the LGA.

[47] Further, there is no suggestion that the consultation material posted out by the Council was inadequate in terms of its content. Thus, *R (Stirling) v Haringey London Borough Council*,[21] cited by Mallon J as support from the United Kingdom Supreme Court for a common law sourced fairness-based obligation to consult,[22] is not strictly applicable. There, the council distributed consultation material that artificially narrowed the possible range of policy choices available to the council and so failed accurately to present the possible outcomes in relation to the decision in question in that case. Here, similar facts would have breached s 82(1)(c) of the LGA and therefore (arguably) the relevant performance obligation in s 76(3). There would have been no need for recourse to a common law sourced fairness obligation in order to bring the Council to account.[23]

[48] Because the clear intention of pt 6 is to give councils a wide discretion in this field, it will always be difficult to establish a concurrent common law duty to consult except in truly exceptional cases such as *Pascoe*. But there is no need to establish a separate and additional common law duty to consult to bring irrationality principles

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20 At [12].

21 *R (Stirling) v Haringey London Borough Council* [2014] UKSC 56, [2014] 1 WLR 3947.

22 *Minotaur*, above n 1, at [51]–[52].

23 See *R (Stirling)*, above n 22, at [24]–[25] per Lord Wilson (Lord Kerr concurring). Note though that Lord Reed preferred the view that the requirement to consult properly was implicit in the relevant legislation: at [39]. Baroness Hale and Lord Clark considered there was no real difference between the two approaches.

into play in a consultation case, because, as we explain, the requirement to act rationally is inherent in pt 6.

Irrationality

Introduction

[49] We agree with Mallon J that the issue in this case is not whether to consult, or what to consult on, but whom to consult out of the spectrum of those who "will or may be affected by, or have an interest in," the relevant decision. As ss 79 and 82(3) make clear, it is for the local authority to decide that question. But it must do so rationally and in pursuit of the purposes of the LGA generally and those in pt 6 specifically. How far a council goes in consulting affected or interested parties will also be a matter for the local authority in terms of s 82(3), provided it can demonstrate that, per s 76(3)(a), its choice "promote[d] compliance" with the applicable provision of s 78 (which requires the local authority to give consideration to the views of those persons) and the consultation principles and other considerations in s 82.

[50] The only relevant question is whether, having embarked on a programme of consultation, the Council was obliged to extend to Minotaur the benefit of the same treatment it offered other affected parties with whom the Council consulted directly. That is residents, car park users, the two universities, local businesses and community representative organisations. In our view, the answer turns not on the legal source of the obligation to consult but on whether there was a reasonable rationale for the different treatment accorded Minotaur.

Submissions

[51] Before this Court, the Council took the high road in that regard. It submitted that the discretion afforded it by pt 6 was so wide it was not required to offer a reason for the distinction in treatment. It could, the Council ventured, have obtained relevant community views using focus groups, or mailing out to selected addresses it considered to be representative of the community, if it felt that was all it required to

do in order to obtain the views of those affected or with an interest in the issue. In short, the very breadth of the discretion meant consistency was not required.

[52] The Council submitted that it did not attempt to notify every potentially affected person because that would have been impossible. General notice was given through the Council's public notices and advertising. The burden on the Council would be too great were it required to research which properties were owner-occupied and then carry out a direct mail out to those which were not. The danger, the Council submitted, was if there was a positive obligation to consult directly in this case, the whole area of Council consultation would become impossibly procedurally fraught. It would be, the Council submitted, the thin end of the wedge.

[53] Minotaur on the other hand relied on the fact that the Council had expressly accepted and taken on an obligation to consult affected members of the community. Having done so, it had to proceed on a reasoned and principled basis. Leaving Minotaur out, it said, was neither reasoned nor principled. Mallon J was right when she said the Council could point to no legitimate basis for distinguishing between residents and businesses on the one hand and landlords on the other. It was significant, Minotaur submitted, that no explanation has yet been provided beyond the general idea that the Council has discretion.

Analysis

[54] While we readily accept that in pt 6 Parliament moved to protect local authorities' discretion with respect to community engagement, we think the Council's argument goes too far in this case. The fact is the Council did not adopt a sampling or more limited approach. It opted for a wide and inclusive approach. In that choice, as in all others under the LGA, the Council must act rationally. No matter how broadly a statutory discretion is scribed in legislation, it may not be exercised arbitrarily or capriciously.

[55] There is no doubt a public law principle that those exercising statutory discretions must exercise them consistently, treating like-cases alike. This is usually

framed as an aspect of rationality. As Arnold J (writing on behalf of himself and Elias CJ) put it in *Ririnui v Landcorp Farming*:[24]

> Both rule of law considerations and the need for rationality in public decisions mean that consistency of treatment has a role to play in judicial review when issues of arbitrariness or unreasonableness are raised.

[56] Arnold J cited Lord Hoffmann's opinion in *Matadeen v Pointu*.[25] The passage referred to by Arnold J bears repeating:[26]

> Their Lordships do not doubt that … a principle [of equality] is one of the building blocks of democracy and necessarily permeates any democratic constitution. Indeed, their Lordships would go further and say that treating like cases alike and unlike cases differently is a general axiom of rational behaviour. It is, for example, frequently invoked by the courts in proceedings for judicial review as a ground for holding some administrative act to have been irrational …

[57] The authors of leading texts also discuss the subject. For example, *De Smith's Judicial Review*:[27]

> Consistent application of the law also, however, possesses another value in its own right — that of ensuring that all persons similarly situated will be treated equally by those who apply the law.

[58] This requirement of consistent treatment of similarly situated cases is best seen, in our view, as implicit in the way in which statutory discretions are framed rather than a separate common law sourced obligation. Parliament cannot be taken to have granted to its delegate the power to act without reason. There is therefore no need to search for a standalone common law obligation to consult. There is also no need for explicit words in the statute.

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[24] *Ririnui v Landcorp Farming Ltd* [2016] NZSC 62, [2016] 1 NZLR 1056 at [95] (footnote omitted). Glazebrook J concurred on this point: at [147]. See also *Pharmaceutical Management Agency Ltd v Roussel Uclaf Australia Pty Ltd* [1998] NZAR 58 (CA); *R v Inland Revenue Commissioner, Ex p National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 (HL); *R v Inland Revenue Commissioner, Ex parte Preston* [1985] AC 835 (HL); *Sunshine Coast Broadcasters Ltd v Duncan* (1988) 83 ALR 121 (FCA); and *Apotex Inc v Ontario (Attorney-General)* [1984] 11 DLR (4th) 97 (ONCA).

[25] *Matadeen v Pointu* [1999] 1 AC 98 (PC).

[26] At 109.

[27] Harry Woolf and others (eds) *De Smith's Judicial Review* (7th ed, Sweet & Maxwell, London, 2013) at [11-063]. See also HWR Wade and CF Forsyth *Administrative Law* (11th ed, Oxford University Press, Oxford, 2014) at 318 and Matthew Smith *New Zealand Judicial Review Handbook* (2nd ed, Thomson Reuters, Wellington, 2016) at [47.4].

[59] The principle is easily stated, but often very difficult to apply. An assessment of all relevant facts and factors is required with due deference to the breadth of the discretion. A punctilious approach must therefore be avoided. Section 79(1)(b)(iv) of the LGA also reserves to the Council a discretion as to the nature and extent of any written record of the decision under challenge. It may be, as here, that the record does not address the specific issue raised in the proceeding. Appendix 4 from the initial 2009 report and its generic treatment of the subject is all we have.[28] There is no indication there that the situation of non-resident landlords was considered when consultation categories were formulated. That is to be expected. The Council cannot be required to meticulously record reasons for its approach to procedural detail as if it were a court. As s 79(1)(b)(iv) implies, that would create too heavy a burden on a busy council with a finite budget.

[60] We agree that the Judge was right to be concerned about the possibility of irrationally inconsistent treatment of Minotaur, and about the Council's refusal to explain it in evidence. But we are unable to agree that it was therefore necessary to infer that the Council had no good reason in fact to treat Minotaur differently. We consider there is a proper basis upon which a valid reason for different treatment can be inferred on the evidence.

[61] Residents were consulted and they were, of course, directly affected. They alone stood to lose car parks in the change. Residents' associations and community groups represented present and future residents, and it made sense to treat them for consultation purposes as a proxy for those groups. Motorists whose windscreen wipers were provided with consultation documents while parked in affected areas were also obviously directly affected. They demonstrated that they actually used the parks in question. The universities, by contrast, stood to gain car parks for their staff or students. Although presumably the consultation was with the university administration rather than staff and students directly, they can be expected to represent the interests of the wider university community. Thus it can be said the universities were also directly affected.

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[28] See [12]–[14] above.

[62] These consultees were not like non-resident landlords whose interests were, by contrast, indirect. Landlords are not entitled to a resident's parking permit if they do not live on-site. Their interests are purely economic.

[63] The only other group whose position was somewhat similar to that of landlords, but who were still consulted, was local business owners. Their interest is economic too. But the impact on local businesses of additional car parks able to be taken up by their customers is, we venture, more direct and better understood: more car parks equals more customers, and more customers equals more profits.

[64] The impact on landlords was more subtle and less obvious. There was no evidence in this appeal of a fall-off in occupancy — the equivalent in retail service businesses of a fall-off in customers. Rather, there was said to be a reduction in the pool of interested tenants, with a corresponding need to reduce rent, and a change in the nature of the customer prepared to rent Minotaur's property. So, to have specifically decided to consult with landlords, the Council would have had to know:

(a) prior to 2010 Minotaur's tenants were largely professionals with cars;

(b) the parking policy was likely to cause that group to leave for other zones where there was either residents' parking or off-street parking; and

(c) the vacancies would be filled by carless students who demanded more of the landlord's management time but could not afford to pay the rent the professionals had.

[65] If, as Minotaur alleges, the position of landlords was merely overlooked, that is not particularly surprising given the fact that the Council would have had to foresee this less direct relationship between residential car parks and the landlord's economic fortunes.

[66] The Council also argued that the burden of sifting out which properties were owned by non-resident landlords was a matter which should count in favour of the

approach the Council took. While we think this burden can be overstated (we wonder how difficult it would have been to interrogate the ratepayer database using modern analytics software), we agree that producing a reliable list of non-resident landlords for the purpose of consultation would not have been as straightforward an exercise as leafleting houses, cars and businesses in the affected areas. The amount of time and resource to be spent on this exercise was, as ss 79 and 82 make clear, a decision for the Council in light of the significance of the decision.

[67] We therefore consider that Mallon J erred in concluding too readily that, in the absence of an explanation from the Council, one could not be inferred here from the record. There is some evidentiary basis for the adoption of a narrower class of consultee than Minotaur would have preferred. As Baragwanath J put it in *Whakatane District Council v Bay of Plenty Regional Council*, Parliament left the evidence-based judgement call to the local authority:[29]

> By s 79 it is for the local authority to make the discretionary judgment about how to achieve compliance with ss 77–78. A court will not interfere with a discretionary judgment unless it is irrational or made on a wrong legal principle. If not, it is enough to validate such a judgment that there is some evidentiary basis for it.

[68] In the end, Parliament's clear and repeated preference for protecting the Council's right to decide how it wishes to consult must count for something. In this case, it means that if an inference can be drawn that there was a rational basis for different treatment between affected classes within the community, that inference should be drawn. As we have said, we consider that in this case such an inference is available and that is all that is required. Accordingly, we consider Mallon J erred in granting Minotaur's application for judicial review.

Relief

[69] Although it is not strictly necessary to consider the Council's appeal against the grant of relief, we briefly consider it in case we are wrong in our conclusion that Mallon J erred in granting the application for judicial review.

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[29] *Whakatane District Council v Bay of Plenty Regional Council* [2010] NZCA 346, [2010] 3 NZLR 826 at [76].

Introduction

[70] Mallon J granted relief for three reasons.[30] First, although there had been considerable delay in bringing proceedings, Minotaur had not been inactive. It had negotiated with the Council over several months and achieved some success in terms of delaying implementation of the changes. The proceeding itself confirmed that the issue remained important to Minotaur. Second, the Council had shown it was prepared to allow case-by-case exceptions because it had done so for heritage listed buildings, and had agreed to delay implementation for two years for Minotaur's properties. Third, the order sought was procedural only. Minotaur only argued for an opportunity to be heard over the question of whether an exception should be made for its apartments. There was no suggestion that the Court should quash the whole policy and make the Council start again.

[71] Mallon J ordered the Council to "consider afresh whether it is appropriate to grant an exception from the criteria" for 30 Hanson Street, and to consult with Minotaur for that purpose.[31] She considered this was preferable to the opportunity the Council had offered Minotaur, in June 2010, to present its case after the changes had been implemented. The Council had said in its written submissions before the High Court that this offer remained open, but, the Judge noted, this was not Minotaur's understanding. In any case, Minotaur then clarified its position, contending that an exclusion for the benefit of Minotaur alone would not be possible and a review of the whole policy would be necessary. Mallon J rejected the proposition that an exception for Minotaur would necessarily require revisiting the whole policy. She said that, having heard from Minotaur, it was up to the Council to decide whether it should consult more widely.[32]

Submissions

[72] The Council submitted that, even if there was an obligation to consult either under the LGA or as a matter of common law, the Court should not have granted relief in the exercise of its discretion. It had taken Minotaur five years to bring this

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30 *Minotaur*, above n 1, at [67]–[68].
31 At [69].
32 At [69].

matter to court, during which time the scheme complained of has been operational. Overturning the policy now raised practical concerns given the long term stability of the current regime.

[73] While it accepted there had been delay, Minotaur on the other hand submitted that the alleged "administrative difficulties" of a change were more imagined than real. The relief granted by the Judge was simply that the Council consult with Minotaur and only for the purpose of considering whether it is appropriate to grant an exemption in relation to 30 Hanson Street. Given that an exemption had been granted for Abel Smith Street "heritage" buildings, such reconsideration as was directed by the Judge was not likely to destabilise the entire permit parking regime.[33] The relief here, Minotaur submitted, was merely a one-off remedy.

Analysis

[74] Delay in commencing proceedings, particularly when it causes prejudice to the other party, is a primary ground for refusing relief in judicial review proceedings.[34] Mallon J considered that relief should not be declined to Minotaur on the grounds of delay. She further considered that it was not necessarily the case that the whole policy would need revisiting as Minotaur did not seek to have the policy quashed but only sought to be heard on the grant of an exception. The Judge did not refer to the fact that Minotaur had not taken up that opportunity in 2010.

[75] We consider that in so holding Mallon J either acted on a wrong principle or failed to take in account relevant matters. In our view Minotaur's delay in commencing these proceedings was significant, particularly in combination with the further factors we identify. We would have declined to grant relief.

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[33] Minotaur submitted that apart from their heritage label, the character of the Abel Smith Street buildings was indistinguishable in principle from the Minotaur apartments: they were renovated residential properties that could provide no off-street parking and so relied on residential parking permit spaces. Minotaur said that it too had invested in its building to transform it from its dilapidated state. It was restored with its character and heritage properties preserved, in collaboration with the Council, on the basis that further off-street parking could not be provided if the original building was to be retained. This is an argument on the merits of any exemption rather than on the failure to consult with Minotaur. While this argument may have some merit, it is not relevant to an appeal on a failure of consultation. It is an argument on the substantive merits, and must be made to the Council.

[34] *Air Nelson v Minister of Transport* [2008] NZCA 26, [2008] NZAR 139 at [66].

[76] First, after five years, the new rules are well and truly bedded in. Other stakeholders have lived with and become used to the current regime.

[77] Second, it is true, as Mallon J noted, that during the early part of that five year period Minotaur convinced the Council to delay implementation in relation to its apartments for a further 24 months. To that extent we accept that Minotaur did not sit on its hands for all of those five years. But it is important to remember what that delay was intended to enable. It was first to allow time for Minotaur to manage the transition from "eligibility to non-eligibility". In the alternative, the Council in its letter of 22 June 2010 invited Minotaur to take the opportunity to prepare a case to the Council for an exception to be made. Minotaur did not avail itself of that opportunity. Instead it waited out the grace period and then, nearly three years later, issued proceedings.

[78] The third point is related to the second. The relief sought and obtained by Minotaur in the High Court was the opportunity to argue that an exemption should be made for its properties. But the Council had already offered Minotaur that opportunity in June 2010. Minotaur did not explain why it did not take up that opportunity. Although the Council made it clear before Mallon J that the opportunity was no longer open, the point is that it was open at the time, when the rules were new and did not yet apply to Minotaur. It would be unfair to give Minotaur a second chance when it offers no excuse for its failure to take the first one.

[79] Nor can we agree with the Judge's view that the opportunity to present a case to the Council is no substitute for requiring the Council to consider the matter afresh. Implicit in Mallon J's logic is that her order required the Council to consider Minotaur's application as if the policy had not been implemented, with the Judge emphasising that Minotaur had lost the opportunity to be heard prior to the changes being made, whereas the June 2010 offer was an offer to make an exception after implementation. We consider that there was no real difference between these two options. If an exception was justified, it is logically immaterial whether it was made before or after the lead policy was implemented, because by definition a true exception is no threat to that policy. In short, an exception that threatened the

integrity of the policy could never be justified, while an exception that did not threaten the policy would always be justified, no matter when sought.

[80] Finally, and for the sake of completeness, we mention s 80 of the LGA, which provides as follows:

> **80 Identification of inconsistent decisions**
>
> (1) If a decision of a local authority is significantly inconsistent with, or is anticipated to have consequences that will be significantly inconsistent with, any policy adopted by the local authority or any plan required by this Act or any other enactment, the local authority must, when making the decision, clearly identify—
>
> (a) the inconsistency; and
>
> (b) the reasons for the inconsistency; and
>
> (c) any intention of the local authority to amend the policy or plan to accommodate the decision.
>
> (2) Subsection (1) does not derogate from any other provision of this Act or of any other enactment.

[81] This means, whether the matter came before the Council by its own invitation or by order of the Court, the Council would still be required to give careful consideration to the impact of any exception in Minotaur's case on the overall integrity of the policy.

[82] We conclude that although delay alone will seldom justify denial of relief,[35] it is delay in combination with the additional factors set out here that leads us to differ from the High Court Judge and conclude that relief should have been declined in the exercise of the Court's discretion.

Result

[83] For the foregoing reasons we allow the appeal. The decision in the High Court is set aside and the order quashed.

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[35] Graham Taylor *Judicial Review: A New Zealand Perspective* (3rd ed, LexisNexis, Wellington, 2014) at [5.36]. See also *Beach Road Preservation Society v Whangarei District Council* [2001] NZAR 483 (HC) at [51].

[84] The respondent must pay the appellant costs for a standard appeal on a band A basis and usual disbursements.

[85] The award of costs in favour of the respondent in the High Court is set aside. Costs in the High Court are to be dealt with in the High Court in light of this judgment.

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