Brown v Dunedin City Council

High Court Dunedin
1 May 2003
Chisholm J

AP 32/02

Rezoning — Appeal against decision rejecting reference — Consideration of alternative sites — Five errors of law alleged by the appellant — Resource Management Act 1991, ss 5, 9, 32, 79, 171, 271A, 274, 293, 299, Fourth Schedule, cl 1 (b).

In July 1995 the appellant lodged a submission in opposition to the zoning of his land as Rural in the Dunedin city proposed district plan. That submission sought a rezoning from Rural to Residential 1. The submission was rejected by the Dunedin City Council, and the appellant lodged a reference with the Environment Court.

The appellant and the council reached agreement as to the basis on which the land could be rezoned Residential 1. However, before a consent order could be placed before the Environment Court, the Plain Sense (Taieri Plains Environmental Society) Inc and several other parties exercised their rights under ss 271A and 274 of the Resource Management Act 1991 to take part in the hearing of the reference. At the hearing, the Environment Court dismissed the reference, with the proviso that the matter could be revisited by the council or the Court after the current review by the council of options for the development of Mosgiel had been concluded.

The appellant appealed against the Environment Court's decision on a number of grounds, being:

- The Environment Court should not have assessed the appropriate zoning for other sites as well as the appellant's site;
- By considering the potential of alternative sites for Residential ezoning the Court went beyond the scope of the reference;
- The Court failed to determine that the Rural zoning was the most appropriate in terms of s 32 of the Act;
- The Court wrongly had regard to the fact that the respondent intended to carry out a review of the future growth options of Mosgiel; and
- The Court failed to determine that the high-class soils on the site required protection.

Held (allowing the appeal and remitting the case to the Environment Court for reconsideration):

(1) Section 32(1) of the Resource Management Act did not require that determination of a site-specific proposed plan change will involve a comparison with alternative sites. It was also logical that such assessment should be confined to the subject site (see para [16]).

(2) The Environment Court was entitled to take into account the "rolling effect" if the site was zoned Residential 1, including the possibility of fragmented development. Therefore the first ground of appeal was made out to a limited extent (see paras [20], [21]).

(3) The remaining grounds of appeal were not made out (see paras [22] to [37]).

Cases referred to in judgment

GUS Properties Ltd v Marlborough District Council (Environment Court, W75/94, 5 August 1994, Judge Treadwell)

Hodge v Canterbury Agricultural and Pastoral Association (Environment Court, C 1/96, 11 January 1996, Judge Skelton)

Kirkland v Dunedin City Council [2001] NZRMA 97

Petralgas Chemicals NZ Ltd, Re an application by (1981) 8 NZPTA 106

Stark v Auckland Regional Council [1994] 3 NZLR 614

Suburban Estates Ltd v Christchurch City Council (Environment Court, C 217/01, 6 December 2001, Judge Jackson)

Terrace Tower (NZ) Pty Ltd v Queenstown Lakes District Council [2001] NZRMA 23

Appeal

This was an appeal on a question of law pursuant to s 299 of the Resource Management Act 1991 against the decision of the Environment Court rejecting the appellant's reference seeking rezoning of his land.

P J Page for Sydney Bernard Brown

M R Garbett for the Dunedin City Council

T J Shiels for Plain Sense (Taieri Plains Environmental Society) Inc

CHISHOLM J. [1] This is an appeal against a decision of the Environment Court rejecting the appellant's reference seeking the rezoning of his land from Rural to Residential 1. The appellant alleges that the decision reflects five errors of law: first, contrary to s 32 (of the Resource Management Act 1991 the Court considered that its function was to assess the appropriate zoning for other sites as well as the appellant's site; secondly, by considering the potential of alternative sites for Residential zoning the Court went beyond the scope of the reference; thirdly, when ruling that the site was to remain zoned Rural the Court failed to determine that this zoning was the most appropriate zone for the site in terms of s 32(1)(c)(i) of the Act; fourthly, the Court wrongly had regard to the fact that the respondent intends to carry out a review of the future growth options of Mosgiel; and, finally, the Court failed to determine that the high-class soils on the site required protection.

Background

[2] The appellant owns a 10.075 ha property located on the northern edge of Mosgiel which is currently used for grazing and horse training purposes. The site is identified on a district planning map as containing high-class soils. On two sides the surrounding land is zoned Rural and on a third side it is zoned Residential. A road runs along the fourth boundary with the land on that opposite side of the road being zoned residential.

[3] When the Dunedin city proposed district plan was notified in July 1995 the appellant's land was zoned Rural (which represented a continuation of the zoning under the transitional district plan). The appellant lodged a submission in opposition to that zoning and sought a rezoning from Rural to Residential 1 so that the land could be subdivided into residential allotments. His submission was rejected by the council and he lodged a reference with the Environment Court seeking a Residential 1 zoning.

[4] After the reference was lodged discussions between the appellant and the council produced agreement between those parties as to the basis on which the land could be rezoned Residential 1. However, before a consent order could be placed before the Environment Court, Plain Sense (Taieri Plains Environmental Society) Inc ("Plain Sense") and several other parties exercised rights conferred by ss 271A and 274 of the Act to take part in the hearing of the reference.

[5] The Environment Court heard the reference on 6 – 9 May 2002 and on 23 August 2002 delivered its decision which runs into 39 pages. It dismissed the reference on the basis that the land would remain zoned as Rural "for the present" but with the proviso that the matter could be revisited by the council or the Court after the current review by the council of options for the development of Mosgiel had been concluded.

Environment Court decision

[6] The Court considered that the core issue for determination was whether the Brown site should be zoned Rural or Residential. It also identified two subsidiary issues which lay at the heart of the concerns of those opposing the Residential zoning, namely, the protection from residential use of the high-class soils on the Taieri Plains and the significant expenditure that would be involved in providing urban stormwater for the site. The Court considered that the issue of the utilisation of a limited resource, the soil resource, for non-productive uses was squarely before it and proceeded on the basis that it should start from a "blank piece of paper" in the sense that there was no presumption as to the appropriate zone for the site.

[7] Although the decision involves a detailed analysis of the proposed plan and other matters, for present purposes it is only necessary to focus on the final sections of the judgment. Given the grounds of appeal it is convenient to largely reproduce the last three sections of the judgment:

Statutory Tests Section 32

. . .

[137] Although the case has been put to the Court on this basis of which zoning is appropriate for the Brown site, the Court has heard much evidence about the demand for land in this area and the potential for other areas, both to the east and west of Mosgiel, to be developed.

[138] We learned during the course of this hearing that the Council accept there is an urgent need for an evaluation of future growth in Mosgiel and where and how such growth should occur. Some submitters argue that this reference "jumps the gun" because this Court had no other particular sites before it to consider. The assessment for this Court is analysed in terms of which is the appropriate zone rather than whether there are other areas which would be better zoned to cater for the future growth of Mosgiel.

[139] Having heard all the evidence and considered the issue carefully we remain concerned that not all of the alternatives have been put before the Court. Accordingly, the likely benefits and costs of those alternatives have not been able to be assessed.

[140] We can see areas of land on the soil maps between Gladstone Road and Hagart Alexander Drive which do not appear to have high class soil classification but we have no information before us as to the level of infrastructure service available for that land and whether it is otherwise suitable. This Court is not going to speculate in such difficult areas. We must conclude that this is a failing in the presentation of this reference before the Court although not necessarily fatal to its progression.

[141] There is no doubt that there is efficiency and effectiveness to the owner, Mr Brown, in being able to develop this site at a higher level of density. This also enables him to maximise his economic return. We remain concerned however that such action will inevitably lead to other residents nearby seeking analogous plan changes or resource consents to provide for the development of their land in the same way and maximise their economic return also. . . .

[144] . . . What has become clear through discussion of section 32 of the Act is that in determining whether a Rural or Residential zoning is appropriate on this site, we must balance various issues to achieve the single purpose of the Act under section 5 and Part II.

Part II of the Act and Section 5

. . .

[146] Our evaluation in this case recognises the potential of the high class soils on this site and the potential to utilise existing infrastructure for residential development. The sustainability provisions of the plan identify particularly the potential for loss of natural resources (policy 4.3.4) while at the same time policies 4.1.2, 4.2.2, 4.3.2 and 4.3.3 seek to now enable housing to utilise the existing infrastructure.

[147] Policy 4.3.7 and policy 4.3.8 recognise that development should occur in a programmed and considered manner. Policy 4.3.10 recognises that there should be a holistic approach.

[148] This is reflected in the provisions of Part II of the Act particularly section 5 and section 7. Section 7(b) identifies the efficient use and development of natural and physical resources. Section 7(c) identifies the maintenance and enhancement of amenity values and section 7(g) identifies any finite characteristics of natural and physical resources.

[149] For our part, we recognise that there is an existing fragmentation of the high soil resource in this area. If the proposal had been for development of

the land at [sic] a Residential (R6) zoning with a land size stepping up from Residential towards the Rural Residential area on Wingatui Road, we would be minded to consider that a reasonable compromise between preserving the land resource and openness while utilising the urban infrastructure available. An option for R6 zoning was not developed before the Court and as such we have not had an opportunity to consider its ramifications.

Outcome

[150] In considering whether to rezone this land as Residential we believe that there are significant further effects which we have not been able to fully evaluate. We have concluded that it is difficult to accurately balance the high class soil resource and the infrastructure resource in a vacuum. We have concluded that the appropriate method by which this should be undertaken is by a detailed analysis of the options for the future development of Mosgiel. Once the character and amenities of the area as a whole are clear, a plan change may be appropriate.

[151] Having examined the plan we believe that this is a failing in the existing plan and should be rectified by the Council as soon as possible. Decisions need to be made as to where development is to occur, how high class soils are to be protected, and how continuing fragmentation of the lot sizes on the high class soil is to be prevented.

[152] One of our particular concerns in reaching this decision was the potential for further isolated decisions (in respect of resource consents) to subvert such a process and lead to a continuation of the fragmentation which we have sought to avoid. Although it is not possible to preclude applications on the high class soil surrounding Mosgiel until such an assessment has been completed by the Council, we trust that the Council will have reference to this decision when considering any particular applications and the desirability of achieving a uniform and consistent approach to development particularly on the Taieri Plain.

[153] Accordingly, we are unable to conclude at this time whether Rural zoning or Residential zoning is more appropriate on this site. It is possible that a form of transitional zoning of either Residential 6 or Rural Residential could also be appropriate.

[154] On this basis we have concluded this reference should be dismissed and the land zoned as Rural for the present. This preserves options until the review of future growth options is concluded. It does not mean that the land is not suitable for development if the review considers it appropriate after balancing all the factors we have identified. However, it should remain Rural until the alternatives in the area have been considered.

. . .

The decision concluded by indicating that the appeal was refused with the proviso that the matter could be revisited by the council or the Court after the current review of options for Mosgiel development is concluded.

This appeal

[8] This is an appeal on a question of law pursuant to s 299 of the Act. As Blanchard J observed in *Stark v Auckland Regional Council* [1994] 3 NZLR 614:

> . . . the role of this Court is not to delve into questions of planning and resource management policy. That is for the expert Tribunal to determine based on its knowledge gained from its day-to-day experience and its consideration of district and regional plans and submissions made to it in

respect of them. Judges of this Court, whether sitting alone or as a Full Court, have no such expertise, nor have they the necessary background to be able comfortably to deal with issues of policy in an individual case. Much uncertainty and no doubt some anomalies would be created if this Court were to embark upon an investigation of the appropriateness of policies which have been endorsed or laid down by the Tribunal. The role of this Court is to see that the statute, the district plan and the regional plan have been correctly interpreted, ie that their language has been properly understood and applied, to ensure that all relevant, and no irrelevant, matters have been considered, that the decision of the Tribunal is properly based upon the evidence before it and that the decision reached is "reasonable" in the sense that it was one that could be arrived at by rational process in accordance with a proper interpretation of the law and upon the evidence. The weight to be attached to policy questions is for the Tribunal to determine.

In respect of some of the grounds of appeal there is a relatively fine dividing line between questions of planning/resource management policy and matters which are legitimately within the domain of this Court.

[9] Because s 32(1) is raised in relation to both the first and third grounds of appeal it is convenient to reproduce that subsection in full before considering the individual grounds of appeal:

> **32. Duties to consider alternatives, assess benefits and costs, etc** — (1) In achieving the purpose of this Act, before adopting any objective, policy, rule, or other method in relation to any function described in subsection (2), any person described in that subsection shall —
>
> (a) Have regard to —
>
> (i) The extent (if any) to which any such objective, policy, rule, or other method is necessary in achieving the purpose of this Act; and
>
> (ii) Other means in addition to or in place of such objective, policy, rule, or other method which, under this Act or any other enactment, may be used in achieving the purpose of this Act, including the provision of information, services, or incentives, and the levying of charges (including rates); and
>
> (iii) The reasons for and against adopting the proposed objective, policy, rule, or other method and the principal alternative means available, or of taking no action where this Act does not require otherwise; and
>
> (b) Carry out an evaluation, which that person is satisfied is appropriate to the circumstances, of the likely benefits and costs of the principal alternative means including, in the case of any rule or other method, the extent to which it is likely to be effective in achieving the objective or policy and the likely implementation and compliance costs; and
>
> (c) Be satisfied that any such objective, policy, rule, or other method (or any combination thereof) —
>
> (i) Is necessary in achieving the purpose of this Act; and
>
> (ii) Is the most appropriate means of exercising the function, having regard to its efficiency and effectiveness relative to other means.

The underlying purpose of s 32(1) is to achieve better decisions on resource management issues by imposing a three–step discipline upon those involved in the decision-making process. It is not disputed that this

provision applies to the Environment Court: see *Kirkland v Dunedin City Council* [2001] NZRMA 97.

First ground of appeal

[10] The appellant's complaint is that the Environment Court wrongly allowed its decision to be influenced by the potential of alternative sites to accommodate residential expansion. According to the appellant the Court should have confined its attention to the appellant's site and by taking into account the possible use of alternative sites for residential purposes it had not only exceeded the scope of s 32(1) but had also acted inconsistently with earlier decisions of other divisions of the Environment Court. These allegations are supported by the council.

[11] For Plain Sense it is acknowledged that the Court's primary role was to decide whether the zoning of the appellant's land should be Rural or Residential. But Plain Sense claims that the appellant and the council have read more into the Court's decision than is justified. Nowhere does the Court say that the parties have a duty to present evidence on alternative sites. To the contrary, the Court was only responding to the appellant's argument that rezoning of his land was justified by the need for Mosgiel to expand and the Court was entitled to require a more complete evaluation in that regard.

[12] Directly or indirectly the issue whether alternative sites can be considered when determining a site-specific plan change has been addressed by the Environment Court on several occasions: *GUS Properties Ltd v Marlborough District Council* (Environment Court, W 75/94, 5 August 1994, Judge Treadwell), *Hodge v Canterbury Agricultural and Pastoral Association* (C 1/96, 11 January 1996, Judge Skelton), *Terrace Tower (NZ) Pty Ltd v Queenstown Lakes District Council* [2001] NZRMA 23 and *Suburban Estates Ltd v Christchurch City Council* (Environment Court, C 217/01, 6 December 2001, Judge Jackson).

[13] In *GUS Properties Ltd v Marlborough District Council* the Court considered a request for a "private" plan change seeking to rezone a piece of land to create a special zone for a supermarket and complimentary retail activities. With reference to s 32 the Court accepted the submission of counsel for the applicant that:

> This section does not contemplate that the consent authority should compare one site with another nor to compare the existing zone ordinances with those proposed. Rather the section obliges the respondent to consider whether the plan change is necessary for the applicant to be able to carry out the proposed activities, given that the plan at present prevents him from doing so.

The Court considered s 32 to be a "methodology section", rather than a section dealing with the activities themselves. Despite Mr Shiels's submission to the contrary, I do not think that this decision can be distinguished from other site-specific plan changes on the basis that it began as a request for a "private" plan change.

[14] *Hodge v Canterbury Agricultural and Pastoral Association* involved a plan change promoted by the council to provide for the

relocation of the A and P showgrounds and associated activities. Although the council had assessed alternative sites as part of its s 32 analysis, two planning witnesses expressed reservations about the need to do so. Having noted that *GUS Properties Ltd v Marlborough District Council* supported the proposition that assessment of alternative sites was not part of the s 32(1) process, the Court inclined to the view that the planners' reservations had substance. The Court noted the difference in wording between s 32(1)(a)(ii), on the one hand, and s 171(1)(b) and cl 1(b) of the Fourth Schedule, on the other. When considering a requirement territorial authorities are required by s 171(1)(b) to have particular regard to:

> (b) Whether adequate consideration has been given to *alternative sites*, routes, or methods of achieving the public work . . . (Emphasis added).

And cl 1(b) of the Fourth Schedule requires an assessment of effects to include description "of any possible *alternative locations* or methods for undertaking the activity" where it is likely that an activity will result in any significant adverse effect on the environment.

[15] While the issue of alternative sites did not directly arise in *Terrace Tower (NZ) Pty Ltd v Queenstown Lakes District Council*, the approach of the Court to the s 32 process is of interest. At para [49] the Court considered that the process could be reduced to three steps. When discussing the first step the Court noted that the "other means" of achieving the purpose of the Act in terms of s 32(1)(a)(ii) are usually identified by the parties as being:

> (a) the Council's revised plan;
> (b) the referrer's suggestion; or
> (c) somewhere between (a) and (b);
> (d) . . .
> (e) another reasonable possible solution which is outside (a)—(c) and which requires further notification under s 293 of the Act.

In broad terms this was endorsed in *Suburban Estates Ltd v Christchurch City Council*. That approach is consistent with the idea that s 32(1)(a) does not contemplate an assessment of alternative sites.

[16] I am satisfied that the theme running through the Environment Court decisions is legally correct: s 32(1) does not contemplate that determination of a site-specific proposed plan change will involve a comparison with alternative sites. As indicated in *Hodge*, when the wording of s 32(1)(a)(ii) (and, it might be added, the expression "principal alternative means" in s 32(1)(b)) is compared with the wording of s 171(1)(a) and cl 1(b) of the Fourth Schedule it appears that such a comparison was not contemplated by Parliament. It is also logical that the assessment should be confined to the subject site. Other sites would not be before the Court and the Court would not have the ability to control the zoning of those sites. Under those circumstances it would be unrealistic and unfair to expect those supporting a site-specific plan change to undertake the mammoth task of eliminating all other potential alternative sites within the district. In this respect a site-specific plan change can be contrasted with a full district-wide review of a plan pursuant to s 79(2) of

the Act. It might be added that in a situation where for some reason a comparison with alternative sites is unavoidable the Court might have to utilise the powers conferred by s 293 of the Act so that other interested parties have an opportunity to be heard. However, it is unnecessary to determine that point.

[17] It should not be implied from the foregoing that the Court is constrained in its ability to assess the effects of a proposed plan change on other properties, or on the district as a whole, in terms of the Act. Such an assessment involves consideration of effects radiating from the existing or proposed zoning (or something in between) of the subject site. This is, of course, well removed from a comparison of alternative sites.

[18] Returning to the Environment Court decision under consideration, the first issue is whether the Court's decision reveals reasoning based on a comparison of alternative sites. Several comments suggest that the Court was well aware of the need to focus on the subject site. At para [9] it identified the core issue as being "whether the Brown site should properly be zoned Rural or Residential". Then at para [24] the Court noted that it had been accepted by the parties that "the Court's function in this case is to assess which of the two zonings proposed (or possibly a position between) was appropriate for this site". And much later in the decision this significant sentence appears in para [138]:

> The assessment for this Court is analysed in terms of which is the appropriate zone rather than whether there are other areas which would be better zoned to cater for the future growth of Mosgiel.

As I read this sentence it reflects the Court's *own* view of the matter rather than simply recording a submission. Taken together these comments indicate the Court was conscious that it should not become involved in a comparison of alternative sites.

[19] However, that impression is seriously undermined by comments appearing in three later paragraphs which suggest reasoning based on a comparison of alternative sites. First, at para [139] the Court said:

> [139] Having heard all the evidence and considered the issue carefully we remain concerned that *not all of the alternatives* have been put before the Court. Accordingly, the likely benefits and costs of those alternatives have not been able to be assessed. (Emphasis added.)

Secondly, in the next paragraph the Court specifically directs attention to areas of land between Gladstone Road and Hagart Alexander Drive and indicates that it does not have any information about the level of infrastructure service available for that land or whether "it is otherwise suitable" (which I infer means otherwise suitable for residential purposes). Thirdly, in para [154] the Court said that the site should remain Rural "*until the alternatives in the area have been considered*" (emphasis added). These paragraphs indicate that comparison with alternative sites has crept into the reasoning process. In my view that constitutes an error of law.

[20] In fairness to the Environment Court that error needs to be kept in perspective. With the exception of those three paragraphs I cannot find any foundation for the first ground of appeal. On my reading the remainder of the decision is devoted to an assessment of the implications of the zoning of the appellant's site on properties in the vicinity or on the expansion of Mosgiel generally. The Court was entitled to take into account the "rolling effect" if the site was zoned Residential 1, including the possibility of fragmented development. It was also entitled to take into account that such zoning might generally have implications for the future development of Mosgiel.

[21] The first ground of appeal has been made out to the limited extent described in para [19].

Second ground of appeal

[22] It is alleged by the appellant that by considering potential alternative sites for Residential zoning the Court went beyond the scope of the reference, the Court's Minute of 28 March 2002 and the statement of facts and issues agreed upon by the parties. The appellant maintains that those documents ruled out any possibility of the Court considering alternative sites for residential development. Mr Garbett indicated that the council was willing to abide the decision of the Court in relation to this ground of appeal.

[23] The appellant's allegations are rejected by Plain Sense on the basis that the hearing before the Court was a hearing de novo within the scope of the reference; it was for the Court to decide the matters that were relevant and the steps that it should take to discharge its mandatory duties under s 32; at best the appellant might have a natural justice argument that it had been deterred or prevented from putting forward relevant evidence or making relevant submissions, but no such point was raised in the points on appeal; and in any event the joint statement included an issue whether there was a need for Mosgiel to expand and, if so, whether this was the appropriate area.

[24] Although the outcome of the first ground of appeal renders this ground largely academic, I will nevertheless deal briefly with the issues raised. The reference sought a Residential 1 zoning of the appellant's land on the grounds, inter alia, that such rezoning would assist in providing for the demonstrated needs of Mosgiel's expansion and was in accordance with the principles of s 5 of the Act. Leaving aside the issue of alternative sites (which I have already ruled out) the matters considered by the Environment Court were clearly within the scope of the reference. I also note from the statement of facts and issues that the parties agreed that one of the issues was whether the appellant's land should be zoned Rural or Residential 1. It was not for the parties to dictate how the Court went about resolving that issue.

[25] This ground of appeal has not been made out.

Third ground of appeal

[26] Mr Page's argument in support of this ground of appeal can be summarised: when determining the zoning of the appellant's site the Court

was under a mandatory duty to be satisfied in terms of s 32(1)(c) that the chosen zone was "necessary" in achieving the purpose of the Act and was the "most appropriate means" of exercising the function; s 9 is essentially permissive in that it only restricts the use of land to the extent that the use contravenes a rule in a plan; thus in the absence of a determination positively favouring restriction, the Court was obliged to impose the least restrictive method; given that the Court was unable to conclude whether Rural zoning or Residential zoning was more appropriate on this site, it should have imposed the least restrictive method, namely, Residential 1 zoning.

[27] The council abides the decision of the Court on this ground of appeal. For Plain Sense Mr Shiels submitted that the appellant's reasoning was flawed because it failed to take account of the reality that the Court could only deal with the present zoning and could not prejudge what the appropriate zoning might be in the context of a different set of objectives and policies. He said that although the appellant's argument relied on a bias in favour of residential development, the reality was that there is no "objective scale of liberality".

[28] I do not accept that just because the Court was unable to decide whether Rural or Residential zoning was more appropriate it was thereby *obliged* to be "satisfied" in terms of s 32(1)(c) that residential 1 zoning represented the appropriate method. As Mr Shiels pointed out, there is no hierarchy capable of automatically dictating that outcome. Thus it was still necessary for the Environment Court to assess which zoning (or conceivably something in between) was "necessary" and represented "the most appropriate means". This assessment required a weighing and balancing of various factors. Obviously this was within the expertise of the Environment Court and there is no sound basis on which this Court could say that it was not open to the Environment Court to be "satisfied" in terms of s 32(1)(c).

[29] This ground of appeal fails.

Fourth ground of appeal

[30] In para [154] the Environment Court said:

> [154] On this basis we have concluded this reference should be dismissed and the land zoned as Rural for the present. This preserves options *until the review of future growth options [for Mosgiel] is concluded.* It does not mean that the land is not suitable for development if the review considers it appropriate after balancing all factors we have identified. However, it should remain Rural until the alternatives in the area have been considered. (Emphasis added.)

The appellant claims that by "recasting the s 32 assessment" in this way the Court has become involved in a subject which is irrelevant to the determination of the reference. On the authority of *Re an application by Petralgas Chemicals NZ Ltd* (1981) 8 NZPTA 106 the appellant claims that the Court should have confined itself to its judicial role and should not have become involved in the overall planning of Mosgiel which is the council's function. Mr Page said that since 1995 the appellant has been

attempting to have his land rezoned and delaying a substantive outcome until the conclusion of the council's review of the future growth of Mosgiel, with the possibility that a variation may follow from this review, is placing the appellant "back at the starting line again" which is unfair. Moreover, he said, there is no guarantee that the review will be actually completed by the council.

[31] Those submissions are supported by the council. Mr Garbett emphasised that while the council has agreed to review future options for the growth of Mosgiel, there can be no certainty that it would initiate a variation to the proposed plan and he said that any suggestion that a variation is the appropriate forum for finally determining the zoning of the appellant's land carries the problem that the parties would have to be involved in a separate and further public process. Consequently the council supports the appellant's view that the Court has taken into account an irrelevant consideration.

[32] Mr Shiels's response on behalf of Plain Sense was succinct: there is nothing irrelevant and the Court's approach represented a perfectly proper application of the s 32 test.

[33] On my reading of its decision, the Court only wanted to know the outcome of the council's review of the options for the development of Mosgiel and it was not suggesting that the matter should be delayed until a variation (if any) was initiated. Under those circumstances I reject the proposition that the council's review was an irrelevant consideration. It could not have been. The reference had raised the issue of Mosgiel's expansion by advancing as one of the grounds of appeal that rezoning of Mr Brown's land to Residential 1 would assist in providing for the demonstrated needs of Mosgiel's expansion. At the hearing the availability of the residential land to facilitate the expansion of Mosgiel over the next ten years was traversed in Mr Hatfield's evidence. Mr Henderson also mentioned continuing pressure for the expansion of Mosgiel. And it was brought to the attention of the Court that the council was intending to review its options for the development of Mosgiel. Thus the issue of residential expansion was well and truly before the Court and the Court was entitled to seek further information on that subject so that it could gauge the effects of the proposed plan change on the future development of Mosgiel. That did not reflect any error in the s 32(1) process. Nor did it indicate that the Court was exceeding its powers.

[34] I can, of course, sympathise with the appellant's plea that he should be entitled to some finality after all these years. Since it will be necessary for the Court to reconsider the matter with reference to the first ground of appeal, it may wish at the same time to consider whether the wording of its decision should be tightened up so that the Court can revisit the matter if the council's review is unduly delayed or does not eventuate. As I read para [155] the Court is currently only in a position to revisit the matter *after* the review is concluded which might leave a hiatus if the review is unduly delayed or does not eventuate.

Fifth gound of appeal

[35] This comes down to an allegation that although the Court accepted that the site comprised high class soils it failed to make a determination that they needed protection. On this issue the council abides the decision of the Court. Plain Sense contends that this ground is without foundation primarily because this aspect of the Court's decision was open to it on the evidence.

[36] In reaching its decision the Court reviewed evidence indicating that around 85 per cent of the site contained high-class soils which displayed potential for a wide range of productive uses but that that factor alone could not be determinative of the status of the land. The appellant's argument effectively attempts to contradict the Court's conclusion by elevating the soil aspect to a point where it becomes determinative of the status of the land. In any event, I am satisfied that the conclusion reached by the Court was open to it on the evidence.

[37] This ground of appeal also fails.

Outcome

[38] To the extent that the Environment Court's decision reflects reasoning based on consideration of alternative sites, the first ground of appeal has been made out. Other grounds of appeal have not been made out.

[39] I cannot be sure that the outcome would have been the same if the issue of alternative sites had not crept into the Court's reasoning. Under those circumstances the safest course is to allow the appeal and remit the matter back to the Environment Court for reconsideration in light of this judgment, particularly para [19]. No doubt the Court will afford counsel an opportunity to be heard. The Court is also invited to consider whether the matter mentioned in para [34] requires attention.

[40] Memoranda may be submitted by counsel if agreement cannot be reached as to costs.