# Kirkland v Dunedin City Council

Court of Appeal Wellington CA 121/01
8, 29 August 2001
Gault, Thomas, Blanchard, Tipping and McGrath JJ

*Resource management – District plan – Notification of proposed district plan – Submissions to council – Appeal by way of reference to Environment Court on duties under s 32 of the Resource Management Act 1991 – Whether challenge only to be initiated in submissions under First Schedule – Whether challenge to plan could encompass procedural matters – Resource Management Act 1991, ss 32, 290, 293, 299 and 308 and First Schedule*, cls 6, 14 and 15.

*Resource management – Jurisdiction – Challenge to proposed district plan – Whether Environment Court had jurisdiction to determine challenge on procedural ground – Whether possible to challenge outside process for formulation, change or review of plan – Whether challenge limited to merits of proposed plan – Whether Environment Court had jurisdiction to direct council to undertake new and "proper" s 32 analysis – Resource Management Act 1991, ss 32, 290 and 293.*

At the time when the Dunedin City Council (the council) publicly notified its proposed district plan under the First Schedule of the Resource Management Act 1991 (the Act), the Kirklands submitted that the council had failed to comply with its duties under s 32 of the Act. They alleged that the defects in the plan were so fundamental that they could not be cured by the submission process. They sought withdrawal of the whole plan, or, alternatively, one part of it, and compliance with s 32 through the provision of a cost-benefit evaluation of certain proposed developmental controls.

The council rejected the Kirklands' submission, so they appealed by way of reference to the Environment Court. The Environment Court held that its jurisdiction to consider whether the council had complied with its duties under s 32 was barred by s 32(3). On appeal, the High Court upheld that approach. Leave to appeal on the question of jurisdiction was granted by the Court of Appeal under s 308 of the Act.

**Held:** The jurisdiction of the Environment Court was limited to adjudication on the substantive merits of a proposed plan. Although the preliminary procedural steps under s 32(1) were of great importance in formulating a proposed plan, a failure to follow those steps did not invalidate the proposed plan. Any resulting flaw could be addressed in the submission and referral processes. The Environment Court heard a reference de novo and could direct a council to modify the proposed plan in determining the merits of the matter. The Court could not give relief against deficiencies in the council's compliance with s 32 (see paras [17], [23]).

*Appeal dismissed.*

*Observation:* In an extreme case, where a council has made no effort to comply with s 32 or has acted perfunctorily, the remedy for an aggrieved person is to move speedily to seek judicial review. That is not precluded for the antecedent process adopted by a council under s 32. Otherwise there is an appropriate remedy for an aggrieved person since the Environment Court is able to look at the merits of the matter in light of any deficiency in the s 32 process (see para [22]).

**Appeal**

This was an appeal by M G and G H Kirkland by leave of the Court of Appeal granted under s 308 of the Resource Management Act 1991, on 14 May 2001, from the judgment of John Hansen and Chisholm JJ (High Court, Dunedin, AP 194/00, 21 December 2000) dismissing the Kirklands' appeal against the decision of the Environment Court that it had no jurisdiction to direct the Dunedin City Council, the respondent, to carry out an analysis under s 32 of the Resource Management Act in relation to part of a proposed district plan. The full question of law in respect of which leave to appeal was granted is set out at para [15].

*L A Andersen* and *M G Kirkland* for the Kirklands.
*F B Barton* and *M R Garbett* for Dunedin City Council.

*Cur adv vult*

The judgment of the Court was delivered by

**BLANCHARD J. [1]** When the Dunedin City Council (the council) gave public notification of its proposed district plan on 24 July 1995 under cl 5 of the First Schedule to the Resource Management Act 1991 (the Act), the appellants, M G and G H Kirkland, made a submission to the council (under cl 6) in which they said that the council had failed to comply with its duties under s 32 of the Act. Section 32(1) requires a local authority before adopting any objective, policy, rule or other method in relation to the functions of public notification and making a decision on a plan to

(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.

**[2]** Subsections (4) and (5) of s 32 provide:

(4) Every person on whom duties are imposed by subsection (1) shall prepare a record, in such form as that person considers appropriate, of the action taken, and the documentation prepared, by that person in the discharge of those duties.

(5) The record prepared by a local authority under subsection (4) in relation to the discharge by that local authority of the duties imposed on it by subsection (1), in relation to any public notification specified in subsection (2)(c)(i), shall be publicly available in accordance with section 35 as from the time of that public notification.

**[3]** The appellants said in their submission to the council that the defects in the plan were so fundamental that they could not be cured by the submission process. They sought withdrawal of the plan (or alternatively the s 3 rural portion of it) and that the council should comply with its duty under s 32, in particular that it should carry out a cost-benefit evaluation of certain proposed developmental controls.

**[4]** The process of hearing and determining submissions took nearly four years. The council released its decision on 31 August 1999. It rejected the Kirklands' submission, saying that it had undertaken a s 32 analysis.

**[5]** The Kirklands then referred the matter to the Environment Court under cl 14 of the First Schedule:

**14. Reference of decision on submissions and requirements to the Environment Court –** (1) Any person who made a submission on a proposed policy statement or plan may refer to the Environment Court –

(a) Any provision included in the proposed policy statement or plan, or a provision which the decision on submissions proposes to include in the policy statement or plan; or

(b) Any matter excluded from the proposed policy statement or plan, or a provision which the decision on submissions proposes to exclude from the policy statement or plan, –

if that person referred to that provision or matter in that person's submission on the proposed policy statement or plan.

Also relevant was cl 15(1) and (2):

**15. Hearing by the Environment Court –** (1) The Environment Court shall hold a public hearing into any provision or matter referred to it.

(2) Where the Court holds a hearing into any provision of a proposed policy statement or plan (other than a regional coastal plan) that reference is an appeal, and the Court may confirm, or direct the local authority to modify, delete, or insert, any provision which is referred to it.

**[6]** A preliminary point arose, namely whether the Environment Court had jurisdiction to determine a challenge to a plan on the ground of the absence of a s 32 analysis by the council before the plan was notified. The preliminary point concerned the effect of s 32(3), which reads:

(3) A challenge to any objective, policy, rule, or other method, on the ground that subsection (1) of this section has not been complied with, may be made only in a submission made under –

(a) Section 49 or section 50 or either of those sections as applied by section 57; or
(b) The First Schedule.

**[7]** The Environment Court (Christchurch, C 138/2000, 17 August 2000) took the view at para [27](1) that the word "only" in subs (3) "means what it says". Leaving aside the possibility of an application to the High Court for judicial review, about which the Environment Court was equivocal, the only way of challenging what it called a s 32 report by a local authority was in a submission. Non-existence and inadequacy of a s 32 analysis could be remedied by the local authority in its revised plan after hearing submissions. (We were told that there have been substantial amendments to the Dunedin City Council's plan.) If it was not, the Environment Court's decision on a full rehearing of a resulting reference could remedy the defect, "subject to the Court's limitations as to capacity"(para [27](4)). Disallowing references making procedural points would enable the Court to concentrate on issues of substance. "The Court's system should not be clogged up with legalistic formalities" (para [27] (5)). The Court thought it significant that its powers under Part XII of the Act to make declarations (s 310) had been expressly limited in relation to s 32. The Court held that it had no jurisdiction to consider whether the s 32 analysis provided by the council complied with s 32(1); that the inquiry was barred by s 32(3). It therefore adjourned the proceeding for a substantive hearing of the appellants' reference.

**[8]** The appellants appealed to the High Court under s 299 of the Act (High Court, Dunedin, AP 194/00, 21 December 2000, John Hansen and Chisholm JJ). The Court agreed with the Environment Court that the expression in subs (3) "has not been complied with" covered both inadequate compliance and no compliance at all. That must be so. But it considered that subs (3) must be read in conjunction with the provisions of cls 14 and 15 of the First Schedule. Under cl 15(2) a reference is stated to be an appeal and the Environment Court is given power to "confirm, or direct the local authority to modify, delete, or insert, any provision which is referred to it". The High Court referred to ss 290 and 293 of the Act:

> **290. Powers of Court in regard to appeals and inquiries –** (1) The Environment Court has the same power, duty, and discretion in respect of a decision appealed against, or to which an inquiry relates, as the person against whose decision the appeal or inquiry is brought.
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> (2) The Environment Court may confirm, amend, or cancel a decision to which an appeal relates.
>
> (3) The Environment Court may recommend the confirmation, amendment, or cancellation of a decision to which an inquiry relates.
>
> (4) Nothing in this section affects any specific power or duty the Environment Court has under this Act or under any other Act or regulation.
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> **293. Court may order change to policy statements and plans –** (1) On the hearing of any appeal against, or inquiry into, the provisions of any policy statement or plan, the Environment Court may direct that changes be made to the policy statement or plan.
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> (2) If on the hearing of any such appeal or inquiry, the Court considers that a reasonable case has been presented for changing or revoking any provision of a policy statement or plan, and that some opportunity should be given to interested parties to consider the proposed change or revocation, it may adjourn the hearing until such time as interested parties can be heard.

(3) As soon as reasonably practicable after adjourning a hearing under subsection (2), the Court shall –

(a) Indicate the general nature of the change or revocation proposed and specify the persons who may make submissions; and

(b) Indicate the manner in which those who wish to make submissions should do so; and

(c) Require the local authority concerned to give public notice of any change or revocation proposed and of the opportunities being given to make submissions and be heard.

(4) Where the Court finds any inconsistency between any policy statement or plan before it and any other policy statement (whether national, New Zealand coastal, or regional), plan, or water conservation order with which the policy statement or plan may not be inconsistent, the Court may, if it considers the inconsistency is of minor significance and does not affect the general intent and purpose of the policy statement or plan, allow the inconsistency to remain.

**[9]** The High Court agreed with the Environment Court's observation that s 290 required it to consider s 32 "and even to carry out a s 32 analysis".

**[10]** The High Court said that it was unable to read into the statutory framework any jurisdictional impediment to the Environment Court taking the local authority's s 32 analysis into account when considering a reference, provided, of course, that the issue was raised in the submission giving rise to the reference. Its interpretation was that s 32(3) was intended to prevent challenges being mounted outside the plan formulation, change or review process. In other words, once the time for making a submission had expired, challenges based on non-compliance with s 32(1) could not be launched. However, the subsection was not intended to stop a challenge to a s 32 analysis in its tracks as soon as the council had issued its decision.

**[11]** The High Court agreed with the Environment Court that questions about the adequacy of a s 32 analysis could be raised before the Environment Court so long as the answers were directed towards the substantive merits of the plan provisions in question, adding that there did not appear to be any sound basis for drawing a distinction between that type of situation and a situation where the local authority had completely failed to undertake an analysis. A submitter might legitimately seek to bolster his or her attack on the substantive provision by highlighting the failure of the local authority to carry out a s 32 analysis. Therefore, the High Court said that it could not accept that the Environment Court was entitled to refuse to hear argument on the basis that it did not have jurisdiction.

**[12]** On the other hand, the High Court agreed with the Environment Court that it did not have jurisdiction to grant the relief sought in this case, namely withdrawal of the proposed plan (or the relevant section of the plan) or a direction to the Council to complete a "proper" s 32 analysis. The Environment Court did not have a power of review or power to "strike out" a Council decision. Neither cl 15 of the First Schedule nor ss 290 or 293 were wide enough to authorise the Environment Court to provide the relief sought.

**[13]** Later in its judgment the High Court said that it agreed with the Environment Court that the word "only" in s 32(3) does mean what it says, in the sense that any challenge must be initiated in a submission under the First Schedule. But it said that did not prevent the submitter from "carrying the s 32(1) issue into the Environment Court for the purpose of substantively challenging an objective, policy or rule." The Court commented that judicial review might also be available, but that it was unnecessary for it to determine the scope of that remedy.

**[14]** The High Court gave the following summary:

> "**[27]** As part of its determination of the merits of an objective, policy, rule or other method, the Environment Court has jurisdiction to take into account the adequacy or total absence of a s 32 analysis. In undertaking that exercise the Court is entitled to determine the weight to be accorded to that factor. It is undertaking the analysis for substantive, not procedural, reasons.
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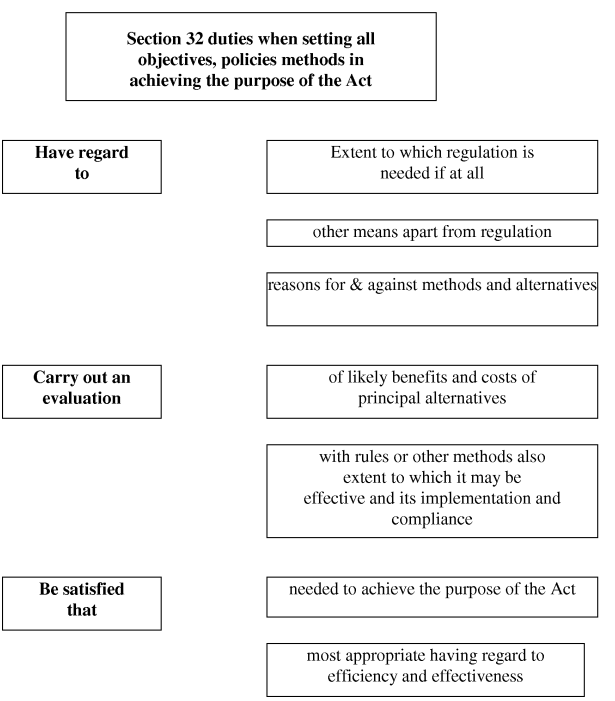
> **[28]** On the other hand, the Environment Court does not have jurisdiction to declare a provision to be void or invalid by virtue of failure of the local authority to comply with s 32(1). Likewise it does not have power to direct a council to withdraw its plan or any part thereof by reason of the inadequacy or absence of a s 32 analysis. Finally, it does not have power to direct a Council to undertake a s 32 analysis.

**[15]** This Court granted leave under s 308 in respect of the following question of law:

> "Does the Environment Court have jurisdiction to direct a Local Authority to carry out a Section 32 analysis in respect of the whole or part of a plan where the referrer has raised the issue of Section 32 in a submission under the First Schedule of the Resource Management Act 1991 and then referred the matter to the Environment Court pursuant to Clause 14 of the First Schedule Resource Management Act 1991?"

**[16]** Section 32(1) contains procedural duties of a preliminary character. The steps required to be taken are nevertheless of great importance in the formulation of a proposed plan. Mr Andersen helpfully set them out in diagrammatic form as follows:

**SECTION 32 DUTIES**



**[17]** If a step, such as the carrying out of a cost-benefit analysis, is omitted or seriously inadequate, the draft plan may be flawed in material respects. Nevertheless it does not appear to us that Parliament was of the view that if a step were omitted it ought to follow that the local authority should be required to begin again. Rather, it would seem that Parliament anticipated that the flaw which results would be corrected by addressing the merits of the plan by means of the submission and referral process. In s 32(3) it was stipulated that someone who had a complaint about the local authority's s 32 process must pursue that complaint "only" by way of submission to the local authority. That is directed, we think, not only to preventing such challenges after a plan has come into force (for example, in the defence of a prosecution for non-compliance) but also while the final form of the plan is being settled. The mandatory use of a submission for this purpose provides an opportunity for the council to reconsider its s 32 processes, before making a decision whether or not to modify the plan. The council will take into account criticisms made by a submitter of its processes.

**[18]** A submitter who is still dissatisfied can refer the matter to the Environment Court where it is heard de novo. The Court holds a public hearing at which it is able to look at all the evidence, including any relevant material generated during the council's s 32 processes. It is empowered (by cl 15) to "confirm, or direct the local authority to modify, delete, or insert, any provision which is referred to it". Theoretically, the Court could create what would amount to an entirely new plan by modifying or re-drawing every single provision in response to a submission or submissions challenging every provision, but it would do so as an exercise of determination of the merits of those provisions, not by way of granting relief against deficiencies in the council's compliance with s 32.

**[19]** The appellants argue that the Court can also act as if it were judicially reviewing the council's decision to notify the plan (or its decision to adopt the plan in its form as modified in response to submissions) and can direct the council to withdraw the plan, or a section of it, recommence the s 32 process and, having done that properly, proceed with renotification and a further hearing of submissions. If that were to be required in respect of an entire plan, or even a section of the plan dealing with a particular geographical area, as the appellant claims to be within the powers of the Environment Court, the council would be left with no proposed plan (either entirely or for the particular area) until renotification (under cl 5). In such event, the planning requirements of the old plan – in this case a transitional plan promulgated many years ago under the former legislation – would again be the only developmental controls available to the council. The further s 32 process might take some months to complete.

**[20]** Under our constitutional arrangements, in the absence of specific legislation conferring power on a statutory Court, judicial review of administrative action is the role of the High Court. It was, however, Mr Andersen's submission for the appellants that, although cl 15 does not confer any such power in express terms, it is to be found in ss 290 and 293. Section 290 gives the Environment Court the same power, duty and discretion in respect of a decision appealed against as the local authority against whose decision the appeal is brought. Section 293 empowers the Court on hearing an appeal against the provisions of a plan to direct that changes be made to it. We do not consider that either of these sections assists the appellants' argument. They authorise the Court itself to interfere with the council's decision and, like cl 15, they enable it to direct that changes be made. But nowhere do any of the

relevant provisions empower the Court to direct the local authority to start again, either wholly or in part. If any such action had been intended, with the wide-ranging consequences for the council and also for the community it represents, Parliament would surely have prescribed in some detail what was then to occur. It follows that Mr Andersen's argument that the right to make a submission to the local authority necessarily includes the right to refer a procedural matter to the Court if the local authority rejects the submission cannot be right.

**[21]** Rejection of the appellants' contention will not leave persons in their position without any appropriate remedy if, on a referral of a council decision, the Environment Court is restricted to consideration of the plan provisions on their merits. In the first place, in looking at merits, which are the true focus, the Court can consider and may be influenced by any absence of a proper s 32(1) analysis or some other deficiency in the way in which the local authority has attempted to comply with that provision. As Mr Barton submitted, the council risks loss of credibility with the Court if it emerges that it is putting forward proposals that have not been properly formulated. The Court is empowered to look completely afresh at the matter. It can, if it sees fit, exercise power (under s 290(1)) to call for an evaluation (or re-evaluation) to assist its consideration of the merits and, as an expert tribunal, can then decide, in the light of what it receives, whether to direct the local authority to modify the plan or delete or insert any provisions.

**[22]** In an extreme case – one which we think is unlikely to arise very often in practice – where a council has made no effort to comply with s 32 or its effort has been perfunctory ("going through the motions"), the remedy for an aggrieved person will be to move speedily to seek judicial review. Section 296 prohibits judicial review where there is a right to appeal against a decision of a local authority to the Environment Court unless that right has been exercised and that Court has made a decision. But in our view a challenge by way of judicial review to the antecedent process adopted by a local authority under s 32 is not precluded by that provision. Section 32(3) goes no further than to preclude the right to appeal to the Environment Court on a process ground (as opposed to a merits ground). It is, however, unlikely in view of the policy of s 32(3) that the High Court would grant relief unless it regarded the process deficiencies as so great that the applicant was substantially disadvantaged in bringing a challenge to the particular provisions of the proposed plan on their merits by way of the submission procedure and, if that failed, by referral to the Environment Court.

**[23]** The conclusion that the Environment Court can adjudicate only upon the substantive merits of the proposed plan is appropriate because to adopt the appellants' approach would be to introduce yet a further potential complication and further delay into what is already a complex and extended exercise which every local authority must regularly undertake. Nor do we detect from the Environment Court's judgment in this case any indication that that specialist body sees any need for the additional power which the appellants would have us supply by implication. We are entirely in agreement with Mr Barton's description of the process of developing a district plan as an evolving process designed to ensure good quality decision making. He said it was a constructive process and he criticised the position taken by the appellants because it would destructively reverse that process by requiring the council to go back to the beginning and start again. As Mr Barton said, that is not the way in which Parliament envisaged a district plan would be developed.

**[24]** Nor do we think that the absence of an ability to bring an appeal from a local authority's decision upon process grounds will act as a disincentive to local authorities to meet their obligations under s 32. We are confident it will not do so because a local authority will not risk being shown to have failed to conduct a proper s 32 analysis, and then to have failed to correct that position before making its decision. It would then struggle to be taken seriously by the Environment Court and would risk a heavy award of costs.

**[25]** For these reasons we answer the question of law in the negative and dismiss the appeal. The appellants are to pay the respondent's costs on the appeal in the sum of $5000 together with its reasonable disbursements, including travel and accommodation expenses of counsel, to be fixed if necessary by the Registrar.

*Appeal dismissed.*

Solicitor for the Kirklands: *Kirkland Lawyers* (Dunedin).
Solicitors for Dunedin City Council: *Anderson Lloyd Caudwell* (Dunedin).

*Reported by:* Briar Gordon, *Barrister*