NZCR

1478 JUDGMENT DISTRIBUTION LIST 3/10

NAME OF PROCEEDING GUS PROPERTIES LTD V MARLBOROUGH DISTRICT COUNCIL, & R G STEWART & FOODSTUFFS (STH IS) LTD:

REGISTRY AND FILE NUMBER AP 230/94 WELLINGTON:

JUDGMENT DATE 12.9.94:

DESCRIPTION AND CATCHPHRASES:
ADMINISTRATIVE LAW - Stay of proceedings under R701 refused as in light of 2nd respondents' undertaking appeal rights of appellant not rendered nugatory unless a stay - prejudice to 2nd respondents if a stay.
CIVIL PROCEDURE - Stay of proceedings under R701 refused as in light of 2nd respondents' undertaking appeal rights of appellant not rendered nugatory unless a stay - prejudice to 2nd respondents if a stay.

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

3/10

AP 230/94

1478

IN THE MATTER of the Resource Management Act 1991

A N D

IN THE MATTER of an appeal pursuant to that Act from Decision No W75/94 of the Planning Tribunal

BETWEEN GUS PROPERTIES LIMITED a duly incorporated company having its registered office at Christchurch

Appellant

A N D MARLBOROUGH DISTRICT COUNCIL a local authority established pursuant to the provisions of the Local Government Act

First Respondent

A N D R G STEWART of Blenheim Developer and FOODSTUFFS (SOUTH ISLAND) LIMITED a duly incorporated company having its registered office at Dunedin

Second Respondents

JUDGMENT OF DOOGUE J

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY AP 230/94

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Second Respondents

Hearing: 12 September 1994

Judgment: 12 September 1994

Counsel: E D Wylie for appellant
M J Hunt for first respondent
P B Churchman for second respondent
J A L Oliver for Planning Tribunal

JUDGMENT OF DOOGUE J

The appellant applies for a stay of proceedings on the decision against which the appeal has been brought by the appellant under R710 of the High Court Rules. It also

applies for an order under s.303 of the Resource Management Act 1991 ("the Act") as to the record to be referred to the Court in respect of the hearing of its appeal.

There is no dispute as to the latter matter. The parties are either agreed or do not object to it being ordered that the Planning Tribunal lodge with the Registrar of the High Court at Wellington a record of the cross-examination, re-examination or other questions of the following eight witnesses, namely, R D Witte, A C Hayward, G Cockerton, D R Anderson, F C Bacon, B P Roberts, M G Tansley and JLS Page. In addition there is agreement or no objection to an order that the Planning Tribunal shall lodge with the Court copies of all submissions either in support or opposition lodged by the various parties together with cross submissions. The appellant accepts that it should meet the reasonable costs of the Planning Tribunal in providing the transcript of the proceedings before the Tribunal relating to the eight witnesses already named. The parties are agreed or do not oppose the proposition that the briefs of evidence of the same eight witnesses should be lodged with the Court but have agreed to a process by which that can be done by consent. Leave is reserved to further apply to the Court in respect of the application under s.303 of the Resource Management Act 1991.

The principal issue between the appellant and the second respondents only relates to whether or not there

should be a stay of the proceedings in respect of the decision of the Planning Tribunal of 5 August 1994 under appeal in these proceedings. I am informed that this is a case where application was made to the first respondent to change its operative district scheme so as to permit the operation of a supermarket from the site the subject matter of the application. The first respondent dealt with that application in terms of the Act. The appellant then appealed from that decision. That appeal has been dismissed subject to certain minor alterations to the decision of the first respondent. The appellant now appeals to this Court upon the basis that the Planning Tribunal is wrong in law in its decision in particular with regard to the appropriate interpretation of s.32 of the Act and its application to the facts of the case. It seeks a stay of the decision of the Planning Tribunal upon the ground, which is common to the parties, that the appeal does not of itself constitute a stay. It submits that, again on a view common to the parties, R710 of the High Court Rules permits a stay in circumstances such as the present. It says that if a stay is not granted and the scheme change becomes operative in terms of the Act then the second respondents will be able to construct a supermarket upon the property the subject matter of the change and should the appeal be successful the second respondents will have been able to defeat that result.

It is submitted for the appellant that should the stay not be granted the first respondent would make the change to

its district scheme operative with the consequence that the second respondents would be able to proceed lawfully in respect of the supermarket development. This, it is said, would have the result that if the appeal succeeds the appellant would then have to commence new proceedings to have the district scheme declared unlawful. However, it is said, the second respondents would be able to take the view that they had had lawful consent to the development at the time that it was built which would give them the opportunity to apply for any appropriate consent under the Act which may then be required if any. Thus the appellant says that unless there is a stay its appeal rights would be rendered nugatory.

The second respondents answer those submissions in various ways. They contest the primary submission of the appellant that its appeal would be rendered nugatory if no stay was granted. They submit that if consideration is given to other matters which have been considered in respect of a stay of execution then there are other bases upon which a stay should not be granted in the present case. The second respondents have through the Property and Development Manager of Foodstuffs (South Island) Limited deposed:

> "11. IF in the event that the appeal is successful and the operation of the supermarket from the site becomes unlawful in terms of the District Plan, Foodstuffs accepts that it would be required to discontinue the use of the premises for a supermarket. Foodstuffs accepts that risk and undertakes not to operate the supermarket unlawfully."

Aside from submitting that in any event the right of appeal cannot be rendered nugatory if no stay is granted, the

second respondents submit that the undertaking by Foodstuffs ensures that in practice the appeal cannot be rendered nugatory by any decision upon it. The second respondents submit that the building in which the supermarket would be housed is one which could be put to a multiplicity of uses permitted under the existing zoning. There is certainly no evidence to the contrary before the Court.

The second respondents further submit that they will be injuriously affected by a stay. They question the bona fides of the appellant as to the prosecution of the appeal. They say there is no novelty or importance in the issues involved and that not only are the second respondents prima facie entitled to have the judgment of the Tribunal given weight and carried into effect but that if a stay is refused the incentive will lie with the appellant to have its appeal disposed of without delay. Understandably the appellant takes issue in one way or another with each of those points.

This is the not unusual case of grocery wholesalers and retailers being locked in a dispute situation because of the underlying economic competition between them.

I start from the point of view that unless there is some good basis upon which a stay should be granted then it should be refused as the appeal of the appellant is from a decision of an experienced Tribunal which should be given effect to unless the appellant will lose the benefit of its

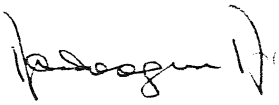
appeal unless a stay is granted. In the present case, having regard to the undertaking of Foodstuffs which can be used by the appellant in any subsequent proceedings relating to the property, I do not consider it can be said that the appeal by the appellant to this Court will be rendered nugatory if a stay is not granted. That is particularly so when there does not appear to be any dispute that the second respondents can build upon the subject site, for the purposes of a supermarket, a building capable of being used in accordance with the existing zoning of the site. I appreciate that there may be certain technical problems for the appellant before any successful appeal in its favour can be give effect to in law. However, for practical purposes there can be no question that if this Court reaches a determination that the appellant's appeal has been appropriately brought, and that the District Scheme change is unlawful for some reason, it can only be a matter of time before the change to the district scheme is set aside. Foodstuffs accept by their undertaking that they do not have the advantage of any steps taken in terms of the present decision of the Planning Tribunal as lawful steps if it subsequently be held that the decision was not a lawful one.

The practical aspect of the matter therefore is that a stay is not necessary to give effect to the appellant's appeal rights. On the other hand it is to the disadvantage of the second respondents should there be a stay, not only in respect of the development of the site, but also in respect

of the incentives for the appellant to have its appeal dealt with. I do not enter into any discussion as to the bona fides of the appellant or the novelty and importance of the issues involved. I have heard insufficient submission and argument for that to properly be the subject matter of comment.

The result will be that the application for a stay by the appellant is declined. Costs reserved. The parties have been required to be in court all morning.

The proceedings are ready for hearing once the record is lodged within this court. The parties request that once the record is lodged within the Court that a hearing be given to it for the first available date either in Wellington or in Blenheim. The parties do not seek a full court.



Solicitors for appellant:
McFadden McMeekin Phillips, Nelson

Solicitors for first respondent:
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Solicitors for second respondent:
Caudwells, Dunedin

Solicitors for Planning Tribunal:
Crown Law Office, Wellington