

Council unreasonable to erect block wall on boundary

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| Legislation | Ombudsmen Act 1975, Town and Country Planning Act 1977 |
| Agency | Local authority |
| Ombudsman | Nadja Tollemache |
| Case number(s) | A2618 |
| Date | 1992 |

City Council granted permission to erect a block wall on a boundary in contravention of Town Planning ordinances – it was unreasonable of Council to grant permission without neighbour’s consent

A complaint was received from the owner of a section, relating to permission given by the Council for the owner of the section adjoining his to erect a block wall on the boundary. It was alleged that the permission was given in contravention of the Town Planning Ordinances and further that it was unreasonable to grant permission without seeking the complainant’s consent.

The neighbour had made an application to build on the boundary and a Council Committee acting under delegated authority granted permission under a Town Planning Ordinance although at least some of the Committee were aware that the complainant had refused to consent.

The Town Planning Ordinance under which the Council Committee gave permission provided that:

Buildings may be built on site boundaries excepting those forming part of a required minimum front yard provided that they comply with the following conditions. (For the purposes of this requirement all buildings proposed to be built within 1.5m of the boundary will be required to comply with the following conditions.

The written consent shall first be obtained from the owners and occupiers of property adjoining the yard which is proposed to be reduced below the minimum requirement and every person the interests of whom in the Council's opinion might be prejudiced by the proposed reduction in the yard requirement unless in the Council's opinion it is unreasonable in the circumstances existing to require consent to be obtained.

The Council reported that (through delegation to the Planning Committee) it *'exercised a discretion available to it not to require neighbour's consent to a yard encroachment up to a boundary. In exercising that discretion the Committee was aware that the neighbour was not favourably disposed to the proposal but because the Committee considered that there was no detrimental effect on the neighbour's property, it resolved that it was unreasonable to require the neighbour's consent as a condition of approval.'*

The Ombudsman received legal advice stating that the ordinance was ultra vires in that it was repugnant to the *Town & Country Planning Act 1977*, which in its principle of protecting the rights of objectors was no different to the 1953 legislation. This opinion was supported in the judgement in *A G V v Mount Roskill Borough Council (1971) NZLR 1030*. The Council cited a number of passages from several cases including the Mount Roskill Borough case, which dealt with consents under section 76 of the *Town & Country Planning Act 1977*. However, this case did not involve any consideration of the question of consent.

The Council claimed that because its District Scheme permitted walls on boundaries subject to certain conditions, its decision was not a dispensation pursuant to section 76 of the *Town & Country Planning Act*. The Ombudsman considered that the Mount Roskill case was relevant in this case because the reasoning leading to. The finding of ultra vires in the context of the *Town & Country Planning Act* seemed to be applicable. The discretion the Council had reserved to itself was to dispense with the consent of a property owner to a neighbour's proposal to build on his boundary, without which consent the neighbour was precluded from building on his boundary. It was not the discretion itself that was objected to but the fact that it meant there was no right of notice, objection or appeal. Neither was the Council's discretion limited to situations falling within section 76(2) of the *Town & Country Planning Act*.

The Ombudsman noted that in McVeagh's *'Local Government Law in New Zealand Vol V'* the notes to section 36 also cite the Mount Roskill case as authority for the proposition that, *'Ordinances which purport to provide for granting of dispensations and waivers, or for exercise of discretions beyond those limits, [i.e. those in section 76(2), 36(4)(b) and (5) respectively], may be ultra vires'*.

If the Ombudsman was wrong on the question of ultra vires, then he needed to consider in terms of section 22(1)(b) of the *Ombudsmen Act* whether the ordinance *'is or may be unreasonable, unjust, oppressive or improperly discriminatory'*. In his view, for the reasons he had given for considering it to be invalid, he also suggested it could be said to be unreasonable. The Council had said that *'it is difficult to expand upon the consent requirements, which seem to be exhaustive'*. The Ombudsman thought that at the least it would be possible to expressly provide that consent shall not be dispensed with except in circumstances where the affected

party whose consent would otherwise be required, had been given notice of the Council's proposal to exercise its powers and an opportunity to be heard.

The Council asked that the Ombudsman's provisional view that its Committee decision was unreasonable be reconsidered. The Council's Chief Executive Officer said he was not aware that complainant had been 'detrimentally affected', but rather that he objected to the fact that the dispensation was given against his view.

Although the Council based its reasons for holding that it was unreasonable *'in the circumstances to require that consent be obtained'*, on a planning report and cited the Pizza Restaurants case (Decision A49179 of the Planning Tribunal) and *Anderson v East Coast Bays City* (1980) 1 NZTPA 123 in support, the point was that the decision was made without giving the complainant the right to be heard. In the Ombudsman's view, that was unreasonable, and was also likely to be sufficient to render the decision void as being in breach of the rule of natural justice.

As a result of these investigations, the Ombudsman was of the opinion that the complaint should be sustained and recommended that the sum of \$4,000.00 be paid to the complainant as compensation for his loss of rights to be notified and heard. After all, the Council had advised the complainant by letter of 11 March 1988 that *'a block wall or building may not be erected closer than 1.5m to a side or rear boundary without that neighbour's permission'*, and had then promptly granted the permit to build on the boundary without requiring such consent four days later.

The Ombudsman was advised by the Chief Executive Officer that the Council had considered the decision and the complainant had been paid \$2,000.00 compensation. Because the Council did not accept or implement the Ombudsman's recommendation completely, and because the matter of discretion to dispense with consent is a matter of some interest to members of the public, the Ombudsman required a summary to be publicly notified according to section 23 of the Ombudsmen Act.

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