

## Council accepts sub-delegation to Area Planner invalid

<b>Legislation</b>	Ombudsmen Act 1975, Town and Country Planning Act 1977
<b>Agency</b>	Local authority
<b>Ombudsman</b>	Nadja Tollemache
<b>Case number(s)</b>	A3051
<b>Date</b>	1992

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### *Unreasonable decision to grant dispensation to neighbour waiving a side yard boundary requirement in the District Scheme*

The complainant's neighbour decided to subdivide his property to create four lifestyle blocks. On one of the proposed blocks, an existing wool shed, was situated very close to the proposed boundary and did not comply with the Council's District Scheme side yard requirements.

In April 1990 the complainant's neighbour wrote to the Council's Area Planner with an application for a dispensation in respect of the side yard requirement. The Area Planner, acting under delegated authority, granted the dispensation.

The complainant then wrote to the Ombudsman advising that she considered herself to be materially affected by the non-complying block adjoining her property and that the Area Planner had acted unreasonably by not consulting her before granting the dispensation.

The first issue in this case was whether the Council was legally able to delegate its authority to its Area Planner to grant the dispensation. Section 88(1) of the *Town & Country Planning Act 1977* gave a Council the authority to delegate to any officer or officers of the Council such of its powers, duties and discretions relating to non-notified applications as the Council considers necessary for the proper operation and administration of its District Scheme. However, section 88(1) did not give the officer or officers who receive delegated authority the power to sub-delegate. Section 169A(2) of the *Town & Country Planning Act* considered sub-delegation and stated that a committee of Council could only sub-delegate to either a sub-committee or a Councillor. The Area Planner was neither of these. Accordingly, it appeared that the sub-

delegation of the Area Planner in this case was ultra vires. If the sub-delegated authority was ultra vires it necessarily followed that the Council had not in fact given any consent to the dispensation.

Notwithstanding that this was the Ombudsman's opinion, she went on to consider the second issue which was (if the sub-delegation had been valid) whether there had been a reasonable exercise of the Area Planner's discretion under section 76 of the Act to grant the dispensation. Section 76(3) provided that the Council could not exercise its powers under that section on a non-notified application unless the written consent of every person whose interests might, in the Council's opinion, be prejudiced by the proposed dispensation, had first been lodged with the Council. The Council had a discretion here in that if, in the Council's opinion, it was unreasonable in the circumstances to require such consent, then the applicant need not obtain it.

The Council submitted in this case that the complainant was not 'prejudiced' by the proposed dispensation and the Council considered that it would have been unreasonable in the circumstances to require the complainant's consent.

There is no doubt that the Council has a discretion pursuant to section 76(3) as to whether a neighbour's consent should be required. However, the Ombudsman's concern here was that where an application (such as this one) is a non-notified application, the Council when exercising its discretion (as to whether a neighbour's consent will be required) should keep in mind that if the Council does dispense with consent, the neighbour not granting consent has no right of objection to the Council and no right of appeal to the Planning Tribunal in respect of that decision.

One of the objectives of the *Town & Country Planning Act* was to protect the rights of objectors. The Council or the individual who has been delegated with Council's authority, when exercising that authority should always bear in mind that where the discretion is exercised in a manner which does not require an affected neighbour's consent, the Council is depriving that neighbour of their right of objection and appeal which they would have had otherwise.

The Council accepted in this case that the sub-delegation to its Area Planner was invalid.

The complaint was sustained and the complainant's neighbour submitted a further scheme plan of subdivision to the Council with a new boundary which did not infringe the requirements of the District Scheme and did not therefore require a dispensation.

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