

## Council should pay for cost of obtaining second legal opinion on straightforward matter raised by complainant

<b>Legislation</b>	Ombudsmen Act 1975, Resource Management Act 1991
<b>Agency</b>	Local authority
<b>Ombudsman</b>	Brian Elwood
<b>Case number(s)</b>	W49641
<b>Date</b>	2003

---

*Property owner disagreed with Council that resource consent was necessary for building house—Council sought external legal advice and billed property owner who refused to pay—Council went to Disputes Tribunal which ordered property owner to pay all legal fees and court costs—property owner complained to Ombudsman who considered legislation and found it to be unambiguous that both the operative and proposed district plans must be complied with—Council agreed issue was straightforward and was aware of legislation and relevant case law—Ombudsman did not consider it necessary for further advice to be obtained on issue—view formed that it was appropriate for Council to exercise discretion under s36(5) of Resource Management Act 1991 and remit charge—in circumstances, Ombudsman also considered it unreasonable for Council not to remit Court and solicitor’s costs payable pursuant to Disputes Tribunal order—recommended all costs be remitted*

A property owner wished to build a house on his section. He was advised by the Council’s planning officer that a resource consent would be necessary because of issues of compliance with the operative District Plan and the proposed District Plan. The property owner was not persuaded that a resource consent was necessary and he sought legal advice. As a result his solicitor wrote to the Council suggesting that the property owner was entitled to have his building consent application considered solely under the provisions of the operative District Plan. The Council then chose to obtain legal advice on the issue from its own consultant, who confirmed that there was a need for a resource consent for the proposed dwelling.

An account for \$85.50, representing the expenses incurred by the Council in obtaining the consultant’s advice, was forwarded to the property owner which he refused to pay. The

Council subsequently sought to enforce payment through the District Court and the case was transferred to the Disputes Tribunal on application from the property owner. After reviewing the matter the Tribunal made an order for the property owner to make a payment to the Council of \$280.80 representing the sum in question plus Court and solicitors' costs.

The property owner complained to the Ombudsman that the Council's decision not to remit an administrative charge imposed for legal advice to the Council was unreasonable.

The Council advised the Ombudsman that its fees for resource consents are set as part of the Annual Plan process at such a level that will enable it to recover the costs incurred, including the actual chargeable time of staff plus mileage, pursuant to the provisions of section 36(4)(a) of the *Resource Management Act 1991* (RMA). The Council said it decided not to exercise its discretion to remit any part of the charge made for the legal advice at issue because the District Planner's original advice was correct, the need for the Council to confirm this advice was caused by the actions of the property owner, and any benefit from the exchange of opinions accrued only to the property owner. Further, in the Council's view there were no extenuating circumstances in this case to warrant any level of remittance. The Council also forwarded to the Ombudsman a copy of its Funding Policy which set the recovery of costs as being 100 percent from the applicant fees.

After considering the Council's report, the Ombudsman observed that the Council's decision to obtain a second opinion on the District Planner's original view would seem to suggest that the Council was uncertain of its legal obligations. If so, it could be argued that the need for that second opinion arose from the Council's uncertainty on a point that was fundamental to the discharge of its obligations under the RMA rather than simply being occasioned by the actions of the property owner.

Given it employs only one District Planner and does not have an in-house solicitor, the Council considered it was safe practice to obtain independent advice when it received the response from the property owner's solicitor. The Ombudsman observed that such a practice would not be subject to challenge if the issue being raised was complex or if the Council had reasonable doubts about the appropriate course of action. However, the issue was straightforward and the Council had acknowledged that it already held a previous consultant's advice on the matter and was aware of the case law on which it could rely when responding to the property owner's solicitor.

The Ombudsman also noted that section 104(1) of the RMA provides:

- (1) *Subject to Part 2, when considering an application for a resource consent and any submissions received, the consent authority shall have regard to –*
  - (f) *Any relevant objectives, policies, rules or other provisions of a plan or proposed district plan; and...*
    - (i) *Any other matters the consent authority considers relevant and reasonably necessary to determine the application.'*

It seemed to the Ombudsman that the legislation was unambiguous. The Ombudsman also noted that while the exchange of opinions would have benefited the property owner, it would

also have been of significant benefit to the Council when processing other applications in the future, as the same question of whether both Plans were applicable could still arise. However, the Council reiterated that confirmation by the consultant that the Council's prevailing practice was correct did not confer any benefit on the Council as its decisions before and after that advice followed the same process.

Given that the issue was straightforward, the legislation unambiguous, and the Council already held a previous consultant's advice on the matter and was aware of the case law on which it could rely when responding to the property owner's solicitor, the Ombudsman did not consider it was necessary for the Council to obtain a second opinion on the issue. The Council already had sufficient advice at hand on which it could safely rely. As a result, the Ombudsman formed the view that it would have been appropriate for the Council to exercise its discretion pursuant to section 36(5) of the RMA and remit the \$85.80 charge levied on the property owner. The Ombudsman also considered it was unreasonable for the Council not to remit the Court and solicitor's costs which were payable to the Council by the property owner pursuant to the order of the Disputes Tribunal.

The Ombudsman therefore recommended that the Council remit to the property owner the \$85.80 charge and the \$195 Court and solicitor costs.

After considering the recommendation, the Chief Executive advised the Ombudsman that the Council had agreed to remit the full sum in accordance with his recommendation but was opposed to this action in principle. He said the only reason the Council accepted the Ombudsman's recommendation was because of the small amount of remittance involved. Doing so was simply a cost avoidance measure.

*This case note is published under the authority of the [Ombudsmen Rules 1989](#). It sets out an Ombudsman's view on the facts of a particular case. It should not be taken as establishing any legal precedent that would bind an Ombudsman in future.*