

Councils required to add to LIM matters on neighbouring property if relevant

Legislation	Ombudsmen Act 1975, the Building Act 1991
Agency	Local authority
Ombudsman	Mel Smith
Case number(s)	C7463
Date	2003

Purchaser requested LIM from Council on property he was considering buying—LIM received and property purchased—after purchaser gained possession he discovered neighbour had building consent to drain storm water into his drain—building consent not referred to in LIM report—purchaser sought removal of drain and records about drain, and reimbursement of legal costs—Council advised its practice was to note consents only on applicant’s file - Ombudsman held Council’s actions unreasonable—Council agreed to pay compensation

A man entered into a contract to buy a property. The contract was subject to various conditions including a satisfactory Land Information Memorandum (LIM). The Council provided the man with a LIM and extensive investigations were then made by the man about the drainage situation. These included an onsite meeting with a geologist and discussions with relevant council officials and a survey firm. Based on the information he had on the property as a result of his investigations and the LIM, the man agreed to buy the property.

Several months later, the man (now the owner of the property) discovered that there was a storm water pipe on the rear of his section which drained into a large open drain on his property. He made enquiries of the Council and it was eventually determined that the previous owner had granted consent to a neighbour to allow him to run storm water from his garage into the concrete drain. The man said he had not been told about this at the time of the purchase and the Council’s LIM did not contain any information about this. Had he known, he would have, at the very least, renegotiated the contract.

The man complained to the Ombudsman that he relied on the Council’s LIM and on the information it contained when making the decision to purchase the property. The Council was clearly aware of the consent to discharge the water into the concrete drain, but it did not

provide any information about the consent on the LIM. If this information had been included, the man said he would have been able to evaluate the effects of the drainage and his decision to purchase the property would have been different, or at least would have proceeded under different conditions. However, as it did not, the man said he incurred costs and a loss of value in his property. He said there was also a risk that if the concrete drain did not cope with the water from the hill (which it is designed to catch) and the neighbour's drainage, or became blocked in any manner, his home could be flooded. The man therefore wanted the Council to remove the easement and reimburse him for the legal costs he had incurred.

The Ombudsman investigated the matter and asked the Council to comment on the allegation it had unreasonably failed to note a statutory easement on the LIM obtained by the man prior to purchasing the property at issue. The Council advised that, according to its records, a building consent was issued in late 1999, prior to the man purchasing the property. It was unclear as to when the drain was actually installed. In these circumstances it was necessary for the Ombudsman to clarify the relevant timeline in respect of the drain's installation. If the drain had been installed after the man gained possession of the property, he was entitled to remove the drain as he had not agreed to this work. As a result of his enquiries, the Ombudsman found there to be a conflict of evidence as to the timing of the installation of the drain which he could not resolve.

The Council also explained in its report to the Ombudsman that building consents for common drains were traditionally only recorded on the property of the applicant, even if they impacted on the neighbouring property, because the building consent only applied to the applicant's property. It said it had been unaware of the implications of not recording such a consent on both property files. In this particular case, while the LIM did state that the property was serviced by both sewer and storm water drains which were shared, it did not specifically refer to the common drain agreement.

Further, the Council advised that it could not order removal of the connection to the drain as it was installed subject to a valid building permit. Nor could it remove information about the dispute over the drain from their records despite the fact that the man considers it may prejudice any future sale of the property. The Council referred to its statutory duties under section 27(2) of the *Building Act 1991*, which required the Council to retain information relating to building consents for the life of the buildings to which they relate. Further, section 44A(2)(b) of the *Local Government Official Information and Meetings Act 1987* in effect required the Council to retain information relating to private and public storm water drains as shown on its records.

The Ombudsman went to the man's property to gain an appreciation of the topography of the area and to discuss his concerns. It was clear from these discussions that the drainage issue was of considerable importance to the man in view of the siting of his house, and that he had gone to considerable lengths to investigate this issue and its possible implications on the property prior to purchase.

The Ombudsman then met with Council officials to discuss the complaint. The Council agreed that it had failed to include information about the drain on the LIM and acknowledged that its

general processes in respect of the LIM were defective. However, it did not consider that it had acted negligently but rather that it was remiss in not noting the drain on the LIM.

The Ombudsman advised that he had no means of resolving the conflict of evidence as to the timing of the installation of the drain which runs into the man's property. This was essentially a matter which the man would need to pursue with his neighbour. However, it was the Ombudsman's view that the Council's actions in not noting information about the drain on the LIM were unreasonable as the drain clearly affected the property which is now owned by the man. In order to address the complaint, the Council agreed to pay the man monetary compensation together with a reasonable contribution towards his legal costs.

The Council also advised that it had taken steps to ensure that matters such as those arising in this case would be noted on LIMs in the future.

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