

Local Authority not unreasonable to hold that right of way issue is a civil matter

Legislation	Ombudsmen Act 1975, Local Government Official Information and Meetings Act 1987
Agency	Local Authority
Ombudsman	Dame Beverley Wakem
Case number(s)	365653
Date	April 2015

Whether the Council was unreasonable to suggest that a right of way dispute between neighbours was a civil matter—Ombudsman found Council’s advice to have been reasonable

The complainant was concerned about the Council’s response to concerns raised about a right of way between his property and an adjoining property. The Council advised the complainant that it was a civil matter between the property owners but the complainant considered that the dispute was caused by an error made by the former Council, and that the current Council failed to properly review the situation or take appropriate action to address it. The complainant noted that while the new consents meant that he was now compliant with Council rules, he did not consider that this compensated for the loss of use or the value of the land that the car park was on, which the complainant believed he still owned. He also considered that he had suffered unnecessary direct financial loss by having to defend himself in court, and paying part of another person’s court costs. The complainant sought compensation for losses and wanted the Council to move the right of way back five metres so that the car parks and right of way could coexist.

The complaint revolved around the effects of a right of way shared by the complainant and a neighbour, which had the effect of precluding the complainant from parking on the right of way.

It was noted that when the then adjoining owner agreed in 1985 that it would be practical and desirable for there to be a six metre wide right of way down the common boundary the question of parking was not raised and was not an issue when the complainant bought the property. However, the creation of the right of way extinguished the right to park on the land subject to it. Effectively, land that had provided parking space earlier ceased to be available for that purpose. When the complainant applied for and was granted a planning consent by the then Council to operate a business and a residential unit on the first floor and dispensation for

2 car parking spaces, the approval was subject to conditions that included providing a visitor parking space as marked on the plans submitted.

The Council did not believe it had made an error in issuing the planning permit because planning consent, (now resource consents) are consents, without which, the relevant use of the land would be unlawful. In other words, it is necessary to obtain such a consent and it should be granted if there are no planning grounds to deny the proposed use. However, as the Council pointed out, this does not relieve the grantee from compliance with other legal obligations – in this case compliance with the obligations imposed by the right of way. The Ombudsman noted that given the existence of the right of way, it was still necessary for the complainant to ensure that he was legally entitled to park on the land. This required the complainant to have reached an agreement with the adjoining owner of the easement either to extinguish, or to modify the right of way in a manner that allowed for the car parks. At the time of purchase and consent, there is an obligation on the purchaser and applicant to properly identify the legal characteristics of a property title, and the implications for any future use of the property. The right of way existed prior to the complainant purchasing the property, and should have been identified by his agent, irrespective of existing parking arrangements. It was always open to the complainant to seek consent of his neighbour to locate and continue using the parking spaces. Beyond this, the original building consent and registration of the right of way dated back 30 years. The Ombudsman considered that investigation of such a dated matter was impractical, susceptible to error, and unlikely to achieve an outcome.

In the circumstances, the Ombudsman did not consider that the Council could be held responsible for any 'losses' claimed by the complainant. Overriding everything was that to park on the right of way, the complainant must have an agreement with the other owner of the easement. No such agreement had been reached and it was not the Council's role to broker such an agreement between the two parties. On this basis, the Ombudsman found that the Council's advice that this was a civil matter, was not unreasonable. The complaint was not sustained.

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