Ombudsman
Fairness for all

Case note

Council ameliorates non-notified development plan where neighbours adversely affected

Legislation	Ombudsmen Act 1975, Resource Management Act 1991
Agency	Local authority
Ombudsman	Sir Brian Elwood
Case number(s)	C5073
Date	1998

Local Authority did not notify application for subdivision consent but neighbours claimed they were affected by it and following Ombudsman's inquiries, Council agreed to ameliorate offending features of development—the complaint was therefore resolved to complainants' satisfaction

A complaint was received from a group of residents that a District Council had granted consent to a developer to provide access to a new subdivision through a vacant section in their quiet cul-de-sac. The Council had processed the application for consent under section 94 of the *Resource Management Act 1991* as one not requiring notification. While the application was still under consideration, the Council had become aware of the concerns the residents had about the proposed access to the subdivision. Notwithstanding those concerns, it had continued to process the application under section 94 and consent had been granted. As a consequence the residents had no right of objection or appeal against the decision to grant consent.

In reporting on the complaint, the Council advised that it had received legal advice to the effect that it had met its legal requirements. However, it appeared that this advice had been based on the assumption that the Council had, in fact, specifically addressed the question of whether or not the application should be dealt with under section 94 of the Act. The Council's records and correspondence suggested that if any consideration at all had been given to this question, it had only been cursory.

The Council's position was that it had had no option but to grant consent for the subdivision because of the provisions of section 105(1)(a) of the *Resource Management Act* and had the power only to determine conditions, if appropriate. This view appeared to overlook a number of

relevant procedural points. First, the Council had not, in fact, specifically addressed the question of whether the application should have been dealt with on a non-notified basis. Section 94(1)(a) provided that *'A subdivision consent need not be notified in accordance with section 93, if the subdivision is a controlled activity'*. The section was, therefore discretionary. Second, the Council's view overlooked the provisions of section 94(5) which enabled *'a consent authority to consider special circumstances which may require the application to be notified in accordance with section 93, even if a relevant plan expressly provides that it need not be so notified'*. Third, the Council did not appear to have taken account of the observations of Elias J in *Murray v Whakatane District Council* [1999] 3 NZLR 276. That case, which concerned the validity of a decision not to notify an application for a subdivision consent, appeared to be of direct relevance to the complainants' situation.

The Council took further legal advice on its actions and, after discussions between the Council, the complainants and the developer, it developed a package of measures to address what the complainants considered to be the worst effects of the new subdivision on the adjacent cul-de-sac. The cost of implementing the agreed measures was met in part by the Council and in part by the developers.

In the circumstances, while the Council's actions in granting the consent on a non-notified basis appeared to be contrary to law as well as unreasonable, the investigation was discontinued on the grounds that the remedial steps taken by the Council had resolved the matter to the complainants' satisfaction. In addition, the Council undertook to review its procedures for assessing applications for resource consents in order to avoid a repetition of the problems which had been highlighted in this case.

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