

Council staff failed to enforce district plan regarding rights for roadside sales

Legislation	Ombudsmen Act 1975
Agency	Local authority
Ombudsman	John Robertson
Case number(s)	C1053
Date	1992

District scheme provisions—selling of bought-in produce from roadside stalls—existing use rights

Oranges do not grow well in Canterbury and bananas do not grow there at all, except for a few dedicated gardeners who are prepared to operate hothouses. When oranges and bananas appeared for sale on a roadside stall whose conditions of operation, he believed, were limited to the sale of produce grown on the premises, the complainant (a market gardener who did have the right to sell bought-in produce from his stall) complained to the District Council about the breach of conditions. He was not satisfied with the Council's response and asked the Ombudsman to investigate a complaint that the Council had failed to enforce its district scheme provisions on roadside selling places.

The complainant had owned and operated his market garden for a very long time, long before the Council's first district scheme became operative in 1965. Before 1965, there were no restrictions on roadside selling places, and a number of local produce growers sold fruit and vegetables from boxes, barrows and stalls by the road or from their houses. Trade tended to be seasonal, but a few growers, of whom the complainant was one, bought in produce from elsewhere and maintained a stall throughout the year.

The first district scheme made the sale of produce from properties in the area a conditional use, and when consents were granted there was invariably a condition attached that sales should be limited to produce grown on the premises. In about 1980 there was a change to the operative district scheme and rural roadside selling places became a predominant use in most

of the area. Buying in was still prohibited but stallholders could sell produce grown on the property or on other land owned or leased in the district.

There were problems with the enforcement of the restrictions from at least 1980. Successive Council inspectors policed the area with varying degrees of success. An attempt to prosecute one of the more persistent offenders encountered legal difficulties and had to be abandoned. By the time the complaint came to the Ombudsman, there seemed to be large scale disregard of the restrictions on sales. A brief inspection of the area revealed a large number of roadside selling places, some almost of supermarket proportions, selling a range of fruit and vegetables that could not possibly have been grown in the area. The complainant told me that he believed he and one other grower were the only people legitimately entitled to sell bought-in produce but that the practice was so widespread that his business was threatened by what he perceived as unfair and illegal competition.

Enquiries of the Council showed that the situation was rather more complex than the complainant understood. For one thing, it transpired that he held the mistaken belief that existing use rights attached to the property owner rather than the property. For another, quite a number of the stallholders in the area claimed existing use rights in respect of their stalls. The Council had records of the stalls that existed in 1965, but there was some doubt as to whether these were complete and in any event they did not record the type of produce sold by stalls.

As an existing use right will continue so long as the use is not discontinued for a period exceeding six months and so long as the use does not change in 'character, intensity or scale' (Town and Country Planning Act, section 90), there was plenty of room for argument. In particular there was no guidance in the case law to indicate whether a change from selling home grown produce to include bought-in produce would be a change in character, intensity or scale.

The Council had obtained a comprehensive opinion from its solicitor who pointed out that the chances of a successful prosecution were not good, particularly as the burden of proof as to the absence of existing use rights would be on the Council.

As a result of initial enquiries, the district planner reported in some detail to the Council, emphasising the unsatisfactory position and recommending that the Council should either make some reasonable efforts to enforce the provisions of the district scheme or alternatively consider further alterations to the scheme so that the matters complained of were no longer an offence.

The Council decided to confirm its present rural selling places policy and to instruct its staff to take the necessary action to ensure compliance with the district scheme.

At this point, the Ombudsman felt that a satisfactory outcome had been achieved and the investigation was discontinued. Over the next ten months, however, the complainant telephoned or wrote to the Council on at least eight occasions complaining that no effective action was being taken by Council staff to enforce the provisions of the district scheme. Enquiries were made by Ombudsmen staff, and these seemed to show that some progress was being made, albeit rather slowly. However when almost a year had passed from the date of the Council's resolution and the complainant was of the opinion that the situation was as bad as

ever, the Ombudsman felt obliged to reopen his investigation. He found that in the interim period, Council staff had conducted a survey of stalls and had identified eight stallholders as having substantial sales of bought-in produce. Prosecution was considered but some eight months after the Council's recommendation, Council staff decided it would be unfair to take action against the worst offenders only and a circular letter was sent to all stallholders reminding of their responsibilities. No further action appeared to have been taken except in response to specific complaints.

Shortly before the Ombudsman decided to take the matter up again the district planner had reported to the Council's town planning committee on the progress on the current district scheme review, noting that the question of roadside selling place enforcement remained a problem and would require further consideration. The committee decided to recommend the appointment of a subcommittee to assist the Council in its deliberations and the Council accepted that recommendation. The subcommittee was to consist of three Councillors and three outside persons with relevant experience. It seems to have been understood by all concerned that enforcement action would be suspended while the subcommittee deliberated.

The Ombudsman was surprised to find that one of the appointments to the subcommittee was of a market gardener who had been one of the eight identified as having substantial sales of bought-in produce.

Having studied all the material provided by the Council and the complainant, the Ombudsman concluded that although the Council faced considerable difficulties in the way of any attempt to enforce its district scheme by way of prosecution, it was open to the Council to increase the activity of its inspectors. The Ombudsman considered that at least for the previous two years there had been a successful challenge to the Council's planning authority, crowned by the appointment of a person who had been one of the major challengers to the subcommittee set up to advise the Council on future action, and that the Council could not walk away from the challenge.

On this basis, the Ombudsman formed the view that the complaint could be sustained and that Council staff had failed to take steps to enforce the district scheme in accordance with the Council's resolution. The Ombudsman recommended that his report be referred to the Council with a view to a decision either to affirm the district scheme provisions or to amend them. He further recommended that if the Council was unable to reach an immediate decision or decided to affirm the provisions then it should have regard to its statutory duties and take enforcement action as speedily as possible.

The Council accepted the recommendations. It also disbanded the Subcommittee and directed that further action should be taken through its town planning committee.

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.