

Council's processes regarding consent application not unreasonable, but inadequate response to complainant's inquiries

Legislation	Ombudsmen Act 1975, Town and Country Planning Act 1977
Agency	Local authority
Ombudsman	John Robertson
Case number(s)	C2078
Date	1992

Planning application—dispensation under s 76(3) of the Town and Country Planning Act 1977—complainant overseas, not notified of outcome of application

The complainant owned a property in New Zealand, but resided overseas. A neighbouring property owner applied to the Council for planning approval to construct an extension to his house and the Council advised him to obtain the consent of the complainant, as the planned extension did not conform to the Council's side-yard requirements as contained in the district scheme. A dispensation under section 76(3) of the *Town and Country Planning Act* would therefore be required.

The neighbour wrote to the complainant overseas and requested his consent. The complainant replied advising that he was unable to consent to a construction that would in any way reduce the natural light reaching his property. The complainant stated that no further correspondence was received following his reply from either the Council or the neighbour regarding the application, but on a return visit to New Zealand he discovered that the application had been approved.

The complainant then wrote to the Council and requested information about the circumstances in which the planning approval had been granted as he had believed that the application should not have proceeded without his approval. The Council replied enclosing copies of the Town Planning Officer's report and the Town Planning Committee minutes. The minutes stated that the committee had resolved that the consent should be granted to the application, because firstly, there would be no detrimental effect on the neighbours and

secondly, the proposal was a logical extension of the dwelling. The complainant wrote again to the Council on receiving this reply as he did not believe the Council had adequately addressed his concerns regarding the detrimental effect on his property. He then requested that the Ombudsman investigate his complaints that the Council had unreasonably approved a planning application without notifying him and that they had also failed to adequately answer his queries regarding this application.

The report received from the Council stated that the application had been approved pursuant to the requirements set down in section 76(3) of the *Town and Country Planning Act* in respect of an application which was not supported by the consent of the adjoining neighbours. The Council stated that their policy regarding these applications was that the site was visited by members of the Town Planning Committee in order to gain a practical view of the proposal. A report was then received from the Town Planning Officer and the Committee made their decision whether to grant the application on the basis of the report and the site visit.

During the course of the investigation the Ombudsman questioned the Council as to whether they had considered dealing with the matter by way of a notified application, as it appeared that the Council had considered the complainant's interests may have been prejudiced when they advised his neighbour to seek his consent. The Council replied that they had not considered this course of action as the committee considered there would be no prejudice to the complainant's property after considering the relevant information.

One of the Ombudsman's investigating officers arranged a site visit and legal clarification of the interpretation of section 76(3) of the *Town and Country Planning Act* was obtained. Based on this legal advice the Ombudsman concluded that the decision as to whether the complainant was prejudiced was a decision vested in the Council by section 76(3). If the Council had determined that no one could be prejudiced they could determine the application without the necessity of obtaining anyone's consent and without having to notify the application. If, however, the Council had determined that the complainant's interest might be prejudiced then his consent would need to be obtained, unless it was considered unreasonable in the circumstances to do so. An authority on planning law had stated that the test of unreasonableness applied to the obtaining of consent, not to whether the consent was unreasonably withheld.

The Ombudsman formed the opinion that the Council had not acted unreasonably in granting the dispensation. After visiting the site, the Ombudsman's staff member was advised by members of the committee that they had visited the site on at least two occasions prior to approving the application, to determine if there would be any prejudice to the complainant's property. They had also considered the relevant recession planes and sun elevation and the Town Planning Officer's report before approving the application.

In regard to the second complaint, the Ombudsman formed the opinion that the Council had failed to adequately answer the complainant's queries. The complainant was at some disadvantage in residing overseas and his only means of communication was by letter. He had also expressed his interest and concern regarding the application. The Ombudsman recommended that the Council formally apologise to the complainant for their oversight and this recommendation was taken up by the Council.

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