

Report
Full investigation - *Ombudsman Act 1972*

Complainants	[Complainants]
Council	City of Mitcham
Ombudsman reference	2014/04938
Council reference	14.138411
Date complaint received	12 June 2014
Issues	Whether the council should have informed the complainants of their rights under section 86(1)(f) of the <i>Development Act</i>, to challenge the category of a development

Jurisdiction

The complaint is within the jurisdiction of the Ombudsman under the *Ombudsman Act 1972*.

Investigation

My investigation has involved:

- assessing the information provided by the complainants
- seeking more particulars from the complainants
- obtaining a response from the council
- considering section 86(1)(f) of the *Development Act 1993 (SA)*, and the *Development Regulations 2008*
- providing the council and the complainant with my provisional report for comment, and considering their responses
- preparing this report.

Standard of proof

The standard of proof I have applied in my investigation and report is on the balance of probabilities. However, in determining whether that standard has been met, in accordance with the High Court's decision in *Briginshaw v Briginshaw* (1938) 60 CLR 336, I have considered the nature of the assertions made and the consequences if they were to be upheld. That decision recognises that greater care is needed in considering the evidence in some cases.¹ It is best summed up in the decision as follows:

The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding, are

¹ This decision was applied more recently in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 110 ALR 449 at pp449-450, per Mason CJ, Brennan, Deane and Gaudron JJ.

considerations which must affect the answer to the question whether the issue has been proved

...²

Response to my provisional report

In response to my provisional report the council responded by email dated 23 September 2014. It stated that it was supportive of introducing an amended procedure which informs parties of their rights under section 86(1)(f) of the Development Act despite there being no legislative obligation to do so.

The complainant commented that they hoped, as a result of our investigation that the council would alter its procedures.

Background

1. The complainants live on [address], adjacent to the [tennis club]. The [tennis club] sought approval from the City of Mitcham (**the council**) to install eight light poles (each 8 metres in height) with lights and six light poles (12 metres in height) with lights to illuminate the six tennis courts (**the proposal**). The complainants are concerned about light spillage from the towers and the noise from extended hours of tennis playing.
2. The proposal was publicly notified as a category 2 development on 11 July 2013. The complainants were informed of this by letter also dated 11 July 2013. At the foot of the letter the following appeared:

Your attention is drawn to the fact that no right of appeal against the Council's decision on a CATEGORY 2 DEVELOPMENT exists to the Environment, Resources and Development Court

3. As the council is the landlord of the subject land, it has commenced a community consultation process. The complainants have made submissions to the council with respect to this.
4. On 24 July 2013 the complainants lodged a representation opposing the proposal by [tennis club]. They visited the development officer in the council's planning department in October 2013; wrote to their ward councillors; and emailed the mayor of the council in November 2013.
5. Pursuant to their representation, the complainants attended the council's Development Assessment Panel (**CDAP**) meeting on 5 December 2013 where they made submissions against the proposal. On the accompanying documentation sent to the complainants by the council in November 2013, the following was written:

CAN I CHALLENGE THE DECISION MADE?

There are no third party appeal rights available to you where Category 2 notifications are involved (or for Category 1 developments where Council informally notified adjoining owners). The applicant can appeal against the Panel's decision in both cases (unless it is a non-complying development).

6. On 12 December 2013 the council granted development plan consent to the proposal. At the foot of the letter from the council informing the complainants that development plan consent had been granted, it stated:

² *Briginshaw v Briginshaw* at pp361-362, per Dixon J.

You are reminded that the Development Act, 1993 does not provide third parties (ie those persons who have lodged written representation as a result of the public notification process) with a right of appeal to the Environment, Resources and Development Court against a decision involving a CATEGORY 2 DEVELOPMENT.

7. Development approval of the proposal was granted in February 2014.
8. In early April 2014, the complainants sought assistance from Jensen Planning to ask for advice about their options. The planning process was explained to the complainants, and they were informed that the categorisation of the development proposal may be challenged. On the basis of this information the complainants contacted a solicitor.
9. The complainants' solicitor was of the view that because the additional lighting to the tennis courts would enable further coaching and playing after dark, it constituted a change of use of the tennis courts; and it could be argued that the proposal was a category 3 development instead of a category 2 development.
10. The complainants' solicitor then contacted the council and sought an undertaking that it would not proceed to public consultation given the erroneous categorisation of the development.
11. The public consultation process was notified in the local paper on 16 April 2014, with the deadline for submissions being 23 May 2014. I understand that the public consultation process has not been finalised as landlord approval was not granted to the [tennis club] at the full council meeting on 26 August 2014.
12. In May 2014 the complainants' applied to the Environment Resources and Development Court (**ERD Court**) for permission to extend the time within which to institute an application for review of the council's decision to categorise the proposal as a category 2 development. The council opposed the application for an extension of time. The ERD Court refused the application because of the length of the delay in the complainant's application (seven and a half months).
13. On 12 June 2014 the complainants made their complaint to my office. The complainants alleged that at no time had the council informed them that the category of the proposed development could be challenged.
14. On 18 July 2014 I wrote to the council asking for a response to the complaint. After seeking an extension to provide its reply, the council provided my office with information on 21 August 2014. In its response, the council explained that it did not inform the complainants that they could challenge the category of proposed development because it is not required to. The council stated:
 - it does not provide information about the rights contained in section 86(1)(f) of the Development Act to any notified persons or applicants
 - the council is always certain of the category of development prior to public notification because several internal checks are conducted
 - the council had previously obtained legal advice as to the categorisation of the tennis court light poles, and was therefore comfortable in assessing this as a category 2 development
 - the council wants to provide a balance in the provision of information to ensure that it doesn't over complicate matters by putting parties through expensive appeal processes that are unlikely to impact on the council's assessment of the matter
 - the council believes that if it informed applicants of the rights contained in section 86(1)(f) of the Development Act, it would make the council's letters long, bureaucratic and potentially confusing.

15. Despite the explanation that it has given in support of its actions, the council has advised me that it is currently giving ‘further consideration to the inclusion of advice to applicants and potential representors of there being rights of appeal available in relation to the categorisation and the nature of development. This advice may be to suggest that they seek separate professional advice from either a Planning Consultant or a Planning Lawyer.’

Legislation

16. Section 86(1)(f) of the Development Act provides:

Division 2—Disputes and appeals

86—General right to apply to Court

(1) The following applications may be made to the Court—

...

- (f) a person who can demonstrate an interest in a matter that is relevant to the determination of an application for a development authorisation by a relevant authority under this Act by virtue of being an owner or occupier of land constituting the site of the proposed development, or an owner or occupier of a piece of adjacent land, may apply to the Court for a review of the matter with respect to—
- (i) a decision under the Act as to the nature of the development, including any decision that is relevant to the operation of section 35;
 - (ii) a decision under section 38 as to the category of the development.

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17. Section 86(1)(f)(ii) of the Development Act allows an interested party to make an application to the ERD Court for a review of any decision made under section 38 as to the category of a development. Section 38 sets out the public notice and consultation which must be undertaken in relation to the various categories of development.
18. During its communication with the complainants (both oral and written) I find that the council did not advise them that there existed a right of review in relation to the assigned category of development in section 86(1)(f)(ii) of the Development Act. In the council’s response to my office, it wrote:

Further to the above statements it is noted that Council doesn’t advise applicants or notified persons of this right directly as it is trying to provide a balance in the provision of appropriate information to ensure that the matter of the development is not lost or over complicated by putting relevant parties through a costly appeal processes (sic) that are unlikely to impact on the assessment of the matter. It is noted that there are a number of different appeal options for applicants and potential representors and to advise of all of these rights in a notification letter or acknowledgement of lodgement letter would make it overly lengthy, bureaucratic and potentially confusing to all advised.

19. In response, I comment that it is up to members of the public to determine whether to appeal the council’s categorisation of development. All the council ought to be concerned with is whether it has sound administrative processes in place.
20. Whilst there is no legislative obligation on the council to make members of the public aware that the categorisation of a development proposal by the council can be challenged, in my view, it is good administrative practice to do so.

21. This is particularly the case when it is clear that a party is opposed to a development and disputes the council's categorisation of a development.
22. Members of the public might be made aware of appeal rights as the case arises, or as part of the general information provided by the council to those involved in the development process.

Opinion

In light of the above, I consider that the council acted in a manner that was wrong within the meaning of section 25(1)(g) of the Ombudsman Act.

To remedy this error, I recommend under section 25(2) of the Ombudsman Act that the council adopt a procedure for making residents aware of their rights under section 86(1)(f) of the Development Act.

Final comment

In accordance with section 25(4) of the Ombudsman Act the council should report to the Ombudsman by **3 November 2014** on what steps have been taken to give effect to the recommendation above; including:

- details of the actions that have been commenced or completed
- relevant dates of the actions taken to implement the recommendation.

In the event that no action has been taken, please provide reason(s) for the inaction.



Megan Philpot
ACTING SA OMBUDSMAN

1 October 2014