

**Complaint reference:**  
16 006 770

**Complaint against:**  
East Devon District Council

## **The Ombudsman's final decision**

Summary: Mr N complains about the Council's decision not to take any enforcement action over damage to a protected tree. The Ombudsman will not investigate this complaint as she has not seen enough evidence of fault with the Council's decision to criticise it.

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## **The complaint**

1. The complainant, who I shall call Mr N, says the Council should take action about damage to a protected tree caused by the erection of a fence. He says as a result the tree is obviously damaged and is dying. Mr N would like the fence to be removed, compensation for the aggravation and upset he has suffered and for the Council to acknowledge the damage has been done unlawfully.

## **The Ombudsman's role and powers**

2. The Ombudsman investigates complaints of injustice caused by maladministration and service failure. I have used the word fault to refer to these.
3. The Ombudsman cannot question whether a council's decision is right or wrong simply because the complainant disagrees with it. She must consider whether there was fault in the way the decision was reached. (*Local Government Act 1974, section 34(3)*)
4. The Ombudsman cannot investigate late complaints unless she decides there are good reasons. Late complaints are when someone takes more than 12 months to complain to the Ombudsman about something a council has done. (*Local Government Act 1974, sections 26B and 34D*)

## **How I considered this complaint**

5. I have considered the information Mr N sent to us, the Council's replies to his complaint to it and the officer's report on the damage caused to the tree. Mr N has had the opportunity to comment on an earlier version of my final view.

## **What I found**

6. In 2004 at Mr N's request the Council made a Tree Protection Order on an oak tree in his property. In 2005 the Planning Inspector upheld an appeal for a development next door to Mr N's property. Conditions on the development said the tree roots should be protected from damage during construction and no fencing was allowed under the tree. In 2007 the Council gave permission for a modified scheme, with similar conditions.

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7. In 2008 Mr N's neighbour built a fence under the tree canopy. The Council inspected this and was decided the fence had been built in the right position.
  8. Earlier this year part of the fence blew down. Mr N's neighbour replaced it, using concrete posts instead of the wooden ones they had used before.
  9. Mr N complained to the Council, saying the oak tree had been damaged. One of the Council's Arboriculture Officers visited the next day and inspected the site. They discussed the situation with a Planning Enforcement Officer and decided there was no clear evidence the tree had been damaged.
  10. Mr N asked a visit by officers to discuss the situation. A Planning Enforcement Officer visited Mr N six working days after he had contacted the Council. Two weeks later an Arboriculture Officer and a Planning Enforcement Officer visited Mr N. In both cases they inspected the site and decided no action needed to be taken.
  11. The officers wrote a report on the breach of planning conditions and submitted it to the relevant Councillor for approval. The officers accepted the erection of the fence had the potential to damage the protected oak tree and the use of concrete posts was not best practice. They decided replacing the concrete posts would create more damage; the observed level of damage to the roots appeared minor and affected less than 1% of the total root area of the tree. For these reasons the officers did not recommend any enforcement action and the Councillor agreed.
  12. Mr N was dissatisfied with the Council's conclusion. He complained to the Council and then to the Ombudsman.
  13. Any complaint about Council's grant of permission for the erection of the original fence under the protected tree is late, as Mr N knew about this at the time. I have not seen any good reason why I should use my discretion look at the Council's 2008 decision.
  14. Mr N says the Council's decision not to take action over the replacement fence breached its supplementary planning guidance concerning trees. It is clear this guidance relates only to new developments. Replacing a fence on its existing line is not new development. It is permitted development, for which no planning permission is required, and so the supplementary planning guidance is not relevant.
  15. Mr N says he was not allowed to go to the meeting where the Councillor considered the officer's recommendation. This was not a public meeting and Mr N has no right to attend.
  16. I can understand why Mr N is not happy with his neighbour's actions. The Council has visited the site and come to a conclusion based on the facts. While Mr N does not agree with the conclusion I cannot say there is enough evidence of fault in the Council's decision making for me to criticise the decision.

### **Final decision**

17. I will not investigate Mr N's complaint about the Council not taking action after fencing work was done under a protected tree. I have not seen enough evidence of fault in the Council's decision making for me to be able to criticise its decision.

### **Investigator's decision on behalf of the Ombudsman**