

**Redacted Final Report**  
**Full investigation - *Ombudsman Act 1972***

<b>Complainants</b>	<b>Mr Jeremy and Mrs Genelle Young</b>
<b>Agency</b>	<b>City of Mount Gambier</b>
<b>Ombudsman reference</b>	<b>2017/03984</b>
<b>Agency reference</b>	<b>AR17/15677</b>
<b>Date complaint received</b>	<b>13 April 2017</b>
<b>Issues</b>	<ol style="list-style-type: none"><li><b>1. Whether the agency erred by failing to ensure that a Certificate of Occupancy had been issued</b></li><li><b>2. Whether the agency erred by failing to take action regarding unreturned Essential Safety Provision (ESP) Forms</b></li><li><b>3. Whether the agency erred in granting a Change of Use application without verifying the existence of a Certificate of Occupancy</b></li><li><b>4. Whether the agency failed to comply with its records management obligations</b></li></ol>

### **Jurisdiction**

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

On 28 June 2017 the complainants consented to the release of their name for the purposes of my investigation.

Under the *Ombudsman Act 1972*, I must not investigate complaints made after 12 months from the day on which the complainant first had notice of the matters alleged in the complaint.<sup>1</sup> While a number of the administrative acts which form the basis of the complaint date back as far as 2010, I am satisfied that the complainant did not have notice of the administrative errors until March 2017.

### **Investigation**

My investigation has involved:

- assessing the information provided by the complainants
- seeking more particulars from the complainants

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<sup>1</sup> *Ombudsman Act 1972* (SA) section 16(1).

- seeking a number of responses from the agency
- considering the following:
  - the *Development Act 1993* (SA)
  - the *Development Regulations 2008* (SA)
  - the City of Mount Gambier's Administrative Procedure - Essential Safety Provisions Form 3 (**the ESP Procedure**)
  - the City of Mount Gambier's *Development Information Leaflet - Change of Use (Information Leaflet)*
  - the Planning SA 'Advisory Notice: Building - 33/03 - Administration: Essential Safety Provisions' (**the Planning SA Advisory Notice**)
  - the City of Mount Gambier's *Complaint Policy*
  - the City of Mount Gambier's *Records Management Policy*
  - the City of Mount Gambier's *Records Management Procedure*
- preparing a provisional report
- considering the complainants' and the agency's responses to my provisional report
- 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.<sup>2</sup> 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 considerations which must affect the answer to the question whether the issue has been proved...<sup>3</sup>

### Responses to my Provisional Report

By letter dated 2 August 2017 I provided the complainants and the agency with my provisional views. I requested they provide me with comments by 22 August 2017.

The complainants responded to my provisional report by email dated 21 August 2017, providing clarification on some factual matters. Their comments have been incorporated into this report.

The agency responded to my provisional report by way of letter from the Chief Executive dated 22 August 2017. The agency accepted my findings and acknowledged that I had identified some areas for improvement. The agency also indicated that this investigation has already resulted in some improvements to the agency's processes, and indicated a willingness to accept and implement my recommendations. The agency also provided copies of documents indicating that it has already begun to implement the recommendations.

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<sup>2</sup> This decision was applied more recently in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 110 ALR 449 at pp 449-450, per Mason CJ, Brennan, Deane and Gaudron JJ.

<sup>3</sup> *Briginshaw v Briginshaw* at pp 361-362, per Dixon J.

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## Background

### *The complaint*

1. In early 2016 the complainants entered into a lease agreement with the owner of [address] for use of the building as a commercial property.
2. Under the Development Act, it is unlawful to occupy premises unless a Certificate of Occupancy has been issued.<sup>4</sup> Unbeknownst to the complainants, no Certificate of Occupancy had been issued to [address].
3. On 31 March 2016 the complainants lodged an application for Change of Use with the City of Mount Gambier (**the council**). The council approved the application on 20 April 2016. At no stage of this process did the council verify whether a Certificate of Occupancy had been issued.
4. The complainants commenced their business and occupation of [address] in May 2016. The business entailed the repair of motor vehicles.
5. The complainants experienced a number of difficulties with the building. I have received inconsistent information as to when the complainants first complained to the council about potential non-compliance issues, a matter which I shall return to later in this report.
6. On 8 March 2017 the council received a Property Search request from Herbert Real Estate. I understand that the complainants asked Herbert Real Estate to request the Property Search. In response to the Property Search, it came to the attention of the council that no Certificate of Occupancy had been issued. In effect, this means that it was unlawful for [address] to be occupied.
7. In early April 2017, due to the lack of a Certificate of Occupancy during the period that the complainants had been occupying the premises, the complainant's insurers cancelled the insurance policy for their business, resulting in a lack of coverage for Work Cover, Royal Automobile Association (**RAA**) or Motor Trade Association (**MTA**). This resulted in the forced closure of the business at financial disadvantage to the complainants.

### *History of [address]*

8. On 30 June 2010 development approval was granted by the District Council of Grant for the construction of a Class 7B&6 Warehouse and Showroom located at [address].
9. On 1 July 2010 the council boundaries were adjusted. As a consequence, [address] was transferred to the City of Mount Gambier.
10. Over the period of July 2010 to December 2011, the District Council of Grant provided hard copy files to the council pertaining to development applications which had originated with the District Council of Grant but now fell within the ambit of the council.
11. Under the Development Regulations, when a development is completed, a Statement of Compliance must be signed by the licensed building work contractor responsible for carrying out the building work.<sup>5</sup> The Statement of Compliance must also be signed by

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<sup>4</sup> *Development Act 1993 (SA)* section 67(1).

<sup>5</sup> *Development Regulations 2008 (SA)* regulation 83AB(8)(a).

the owner of the property,<sup>6</sup> and must be forwarded to the council within 10 business days after a notice of completion of the building work is given.<sup>7</sup>

12. After a council receives a completed Statement of Compliance, it will then issue a Certificate of Occupancy.
13. I accept that there was some confusion during this period, as the council was now responsible for a number of developments which had originated with the District Council of Grant. The council indicates that it sent follow up letters to applicants for outstanding Statements of Compliance as it became aware that they were outstanding.
14. In addition to submitting a Statement of Compliance immediately following the completion of a building, the owner of a commercial building may have ongoing annual obligations to provide an Essential Safety Provisions Form 3 (**ESP Form 3**) to the council. As the building at [address] is over 500 metres squared and of a commercial nature, the owner is required to submit an annual ESP Form 3 to the council.
15. It appears that during June 2011 the council became aware that it had no Statement of Compliance for [address]. On 27 June 2011 Mr Marc van Riet, Building Officer, sent a letter to the owner of [address] requesting a copy of the Statement of Compliance and a completed ESP Form 3.
16. It appears that the council received no response to this letter and no further action was taken by the council for approximately three years. Therefore during this time period, the council had sighted no Statement of Compliance and had not issued a Certificate of Occupancy. In addition, the owner did not complete their annual ESP Form 3. The council took no action in response to any of these issues.
17. The council has provided the following information as explanation:

Given the approved [development application] file originated within [the District Council of] Grant, communications were not 'tracked' in City of Mount Gambier Authority system with no automated reminder system for such files. Numerous examples of these letters were sent during this time.

The resignation of Marc van Riet as the officer actively pursuing this particular file complicated the follow-up of outstanding matters for [address]...When Mr van Riet resigned from Council, [Employee 1] was the sole building officer and assumed the entire workload, including the management of all ESP requirements. Given the DC Grant DA files were not digitised in their entirety, some certificates remained outstanding.

The files were hard copied over a period of 12-18 months under an agreement between the former CEO's of both Councils at the time. A decision was made by Council senior management that only Decision Notification Forms from each file were to be digitised and added to Council's record system. An electronic database (register) was established to manage the files, however, a decision was made not to add these files to the property management system (Authority) to initiate automatic reminders due to the magnitude of work required and possible implications with regards to Council's statistical reporting.

In the absence (at the time) of a 'procedure' for handling outstanding ESP Forms...Council followed up on a number of outstanding buildings requiring Form 3's to be returned and continues this process today. This remains a large and time consuming task, however, based on its relatively low risk profile has not provided a strong focus of Council resources. Ultimately the onus is on the property owner to comply with the legislation and the conditions of their development approval.

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<sup>6</sup> *Development Regulations 2008* (SA) regulation 83AB(8)(b).

<sup>7</sup> *Development Regulations 2008* (SA) regulation 83AB(4).

18. In response to further enquiries, the council provided the following additional information:

Following the Council boundary adjustment in 2010 over 300 DC Grant [development application] files were transferred to the City of Mount Gambier. A recent search of those files has identified 4 files (one of which is [address]) that did not have a current Certificate of Occupancy. One file has been closed as a result of our investigation, [and] two others have been followed up...The last one in question is the subject of this preliminary investigation. The City of Mount Gambier anticipates the two outstanding files will be resolved in the coming weeks.

19. In my provisional report, I commented that it was unclear how the outstanding two files would be resolved and invited the council to provide further information on whether Certificates of Occupancy have now been issued and, if applicable, whether these buildings have been inspected for potential non-compliance.
20. In its response to my provisional report, the council indicated that both properties have now had a Certificate of Occupancy issued. The first property required the council to follow up with relevant contractor. The council subsequently inspected the building and identified minor non-compliance issues which are currently being addressed. It was considered by the council that the second property should have had a Certificate of Occupancy issued by the District Council of Grant as the works were completed while the property was situated in that council area. However, as the District Council of Grant was unwilling to provide a Certificate of Occupancy, the council has now inspected the premises and issued a Certificate of Occupancy.
21. On the available evidence, I am satisfied that the issue of additional properties which did not have Certificates of Occupancy has now been actioned by the council.
22. On 30 April 2014 the council sent a letter to the owner of [address] as part of a new automated process for annually seeking ESP Forms. Another letter was sent on 6 May 2014 with the same request. It does not appear that this was an attempt by the council to follow up on an unreturned form; the council indicated that it sent a blank ESP Form 3 on a new council letterhead. The owner did not respond to either of the council's letters.
23. On 6 January 2015 the council sent an annual request to supply an ESP Form 3 to the owner of [address]. The owner returned a completed ESP Form 3 to the council on 14 January 2015. However, this form was dated 13 August 2014.
24. On 14 January 2016 the council sent an annual request to supply an ESP Form 3 to the owner of [address]. On 11 March 2016, the owner provided to council a Fire Services Certificate of Inspection and an unsigned ESP Form on the letterhead of the District Council of Grant.
25. In summary, between 2010 and 2016 the owner of [address] had a legal obligation to supply a completed ESP Form 3 to the council each year. During those six years, the owner provided only one ESP Form 3 to the council. During the five years in which no ESP Form 3 was supplied, no follow up action was taken by the council.
26. The council has provided the following information regarding its current practices in the event that an ESP Form 3 is not returned:

In accordance with Planning SA 'Advisory Notice: Building - 33/03 - Administration: Essential Safety Provisions' Councils should have administrative systems that:

- Identify buildings in their area that require annual certificates to be provided by the owners
- Identify if such certificates have been received

- Initiate follow up action in accordance with a policy

ESP Form 3's are subject to Council's 'Essential Safety Provisions Administrative Procedure' which determines:

- The content of the Forms provided to the owners
- What to do with them when they are received by Council
- The process for issuing the annual reminders.

At the start of each calendar year, an annual mail out (reminder) is sent to all property owners requiring Form 3's to be submitted to Council in accordance with their development approval. When these are received by Council they are registered in Council's Records Management system and the outstanding 'tracking' in Authority (Property Management system) is closed.

In an instance where a Form 3 is not provided to Council by the owner, Council has the power to revoke the Certificate of Occupancy under Regulation 83(10) however this is extremely rare. Council is currently reviewing the wording of the annual reminder letter in an attempt to improve return rates and make clear Council's power to revoke Certificates of Occupancy should Form 3's not be returned.

27. On 31 March 2016 the complainants lodged a development application for Change of Use. The council approved the application on 20 April 2016. The council has provided the following relevant information:

No Building Rules Consent [was] required due to plans provided for Change of Use by [the complainants] were as per the original [development application]. Council was not informed as to any internal modifications existing on site.
28. On 20 April 2016, [Employee 2], attended [address] for the purpose of delivering the approval documents to the complainants in person.
29. There are inconsistent accounts of what transpired at this site visit and which matters were brought to [Employee 2's] attention. The council states that the complainants asked [Employee 2] to look at potential illegal building work at the property next door at [adjacent address]. The complainants state that they were informed by [Employee 2] that there was still work to be done on the property (including fencing, car parking and landscaping) to bring it up to the standard of building approval. The complainants also state that [Employee 2] informed them that he was having difficulty making contact with the owner.
30. I am inclined to accept that the complainants brought potential illegal building work at [adjacent address] to the attention of [Employee 2]. The council has indicated that a letter was sent from [Employee 2] to the owner of [adjacent address] dated 6 May 2016 regarding the illegal building work. On the available evidence, I am unable to conclusively state whether any further matters were brought to [Employee 2's] attention.
31. On 3 January 2017 the council sent an annual request to supply an ESP Form 3 to the owner of [address]. It appears that, to date, this ESP Form has not been returned to the council by the owner and is still outstanding.
32. On 8 March 2017 in response to a Property Search request from Herbert Real Estate, the council realised that a Statement of Compliance relating to the development application was not on its records and that no Certificate of Occupancy had been issued. In effect, this means that between 2010 and 2017, it was unlawful for [address] to be occupied.

33. On 9 March 2017 Mr Daryl Sexton, Director of Operational Services, called the owner of [address] and requested a copy of the Statement of Compliance. This was the first time the council had made this request since 2011.
34. The owner emailed Mr Sexton on 9 March 2017 indicating that he believed he had previously supplied the Statement of Compliance. However, Mr Sexton was unable to find any record of a Statement of Compliance being previously supplied. Later that same day, the owner provided a Statement of Compliance dated 30 June 2011.
35. On 14 March 2017 the council provided a Certificate of Occupancy dated 30 March 2017. At this point it became legal to occupy the property.
36. On 20 April 2017 [Employee 1] inspected [address] for non-compliant building work and noted a number of issues which required action. In their response to my provisional report, the complainants stated that [Employee 1] was rude and dismissive of their concerns.
37. On 1 May 2017 the council sent a letter to the owners of [address]. During May 2017, the owners provided a number of responses to the council.
38. During this investigation, the council indicated that it believed the compliance issues would be fully addressed by the owners by the end of June 2017. I understand the council completed an on-site inspection during July 2017. The council has confirmed that the compliance issues have now been fully resolved.<sup>8</sup>

#### *Complaints to the council*

39. The council states that [Employee 2's] diary records indicate that there were phone discussions between [Employee 2] and the complainants on 24 March 2016, 29 March 2016 and 4 April 2016.
40. There are inconsistent accounts of what was discussed in the phone calls to [Employee 2]. The council states that these phone conversations regarded the possible relocation of the complainants' business to Lawrence Street. The complainants state that they alerted [Employee 2] of potential non-compliance issues. In support of this point, the complainants indicated in their response to my provisional report that:

...we did not speak with [Employee 2] on this occasion in regards to a property at Lawrence Street as this property was ruled out prior to us commencing at [address] as it is classed as storage and could not be considered for anything else...the enquiries were in regards to the non compliant (sic) issues.
41. The council has advised that [Employee 1] discussed potential compliance issues with the complainants, at which time they were referred to SafeWork SA and Legal Aid for advice. The council has not been able to advise precisely when this conversation happened and there is no record of this conversation. In response to an enquiry about why there were no records of the conversation, [Employee 1] responded that he did not diarise the conversation because he did not think it was anything more than a casual conversation.
42. In response to further enquiries, the council provided the following additional information:

[Employee 1] can recall receiving three phone calls from the complainant during late 2016 and early 2017. The first two calls were regarding drainage issues and the number of

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<sup>8</sup> Email to my Office dated 23 August 2017.

downpipes required on the building. The complainant was looking at buying the building and was advised by [Employee 1] to have a building report completed for the building. This was deemed an issue between the complainant (as tenant) and the landlord, hence formal notes were not recorded. The third phone call included both complainants and included concerns with the safety of the building i.e. electrical wiring. Again, as an issue between the complainants and landlord, the complainants were referred to SafeWork and Legal Aid for advice.

In accordance with Council's Complaint Policy, Council did not deem the initial phone call(s) with the complainants to be a 'complaint' as it deemed the nature of the conversation to be an issue between a 'tenant' and a 'landlord' and not with a 'product or service delivered by the Council'.

43. The available evidence on this matter is limited as the council made no written record of these phone calls, a point which I shall return to later in this report. I note that the complainants have consistently reported to me that they first raised the issue of non-compliance with [Employee 2], and then later with [Employee 1]. I am prepared to accept that, on the balance of probabilities, the complainants first made enquiries in relation to potential non-compliance in discussions with [Employee 2] in 2016.
44. On 13 April 2017 the council received a report from a Commercial Building Maintenance company. The report was commissioned by the complainants and outlined matters of non-compliance that had been identified by the company during an inspection of the site.
45. The report raises the following relevant issues:
  - some of the conditions of the original development approval had not been met
  - although the general construction was carried out in accordance with the approved drawings, there were serious deviations which have resulted in non-compliance and in several instances the occupant safety had been put at risk
  - the report made the following recommendations:
    - close down the building until all risks have been eliminated
    - engage a licenced electrician to completely investigate the entire electrical system and repair/replace as required, including emergency exit signage
    - replace the security system to comply with Australian standards
    - remove and replace mechanical systems which have broken down
    - remove all existing fencing and reinstall fence posts to a suitable depth
    - remove all temporary hand-railing and stairs for mezzanine and replace
    - seek retrospective council approval for unapproved internal fit-out
    - complete disabled amenities
    - provide suitable site drainage
    - replace roof guttering and install additional stormwater relief.
46. The council has indicated to my Office that it considered the report to be 'information only' regarding their current investigation. This is a peculiar response by the council. On the available evidence, the council had not yet opened an investigation into possible non-compliance at [address]. As indicated by [Employee 1], when the complainants reported their concerns about the building, he did not interpret it to be within the council's responsibility and made no record of their complaint. It appears that [Employee 1] took no action in January 2017 and did not inspect the property until 20 April 2017 so it is unclear why the council indicated that the independent report was 'information only' for an ongoing investigation.
47. On 13 April 2017 the complainants brought their complaint to my Office. The complainants alleged that there were numerous defects in the building at [address], some of which were allegedly caused as a result of illegal building work done by the owner.



## Relevant law

### 48. The Development Act prescribes at section 67:

- (1) A person must not–
  - (a) occupy a building on which building work is carried out after the commencement of this section unless an appropriate certificate of occupancy has been issued for the building, or the building is of a type excluded by the regulations from the requirements as to certificates of occupancy; or
  - (b) occupy a building in contravention of a certificate of occupancy.  
Maximum penalty: \$10 000.
- (2) A certificate of occupancy will be issued by a council.
- (3) An application for a certificate of occupancy must–
  - (a) include any information required by the council; and
  - (b) be accompanied by such certificates, reports or other documentation as the regulations may require; and
  - (c) be accompanied by the appropriate fee.
- ...
- (12) A certificate of occupancy may apply to the whole or part of a building.
- (13) A council may, in accordance with the regulations, revoke a certificate of occupancy in prescribed circumstances.

### 49. The Development Regulations prescribe at regulation 83:

- (2) Pursuant to section 67(3)(b) of the Act, the following documentation is required:
  - (a) a copy of a Statement of Compliance, duly completed in accordance with the requirements of Schedule 19A, that relates to any relevant building work, together with any documentation required under regulation 42(7)(a)(ii);
  - (b) unless already provided—a copy of any certificate of compliance under regulation 76(5) (if relevant);
  - (c) if the development has been approved subject to conditions, such evidence as the council may reasonably require to show that the conditions have been satisfied;
- ...
- (9) Pursuant to section 67(13) of the Act, a council may revoke a certificate of occupancy–
  - (a) if–
    - (i) there is a change in the use of the building; or
    - (ii) the classification of the building changes; or
 and the council considers that in the circumstances the certificate should be revoked and a new certificate sought; or
  - (b) if the council considers that the building is no longer suitable for occupation because of building work undertaken, or being undertaken, on the building, or because of some other circumstance; or
  - (c) if a schedule of essential safety provisions has been issued in relation to the building and the owner of the building has failed to comply with the requirements of regulation 76(7); or
  - (d) if the council considers–
    - (i) that a condition attached to a relevant development authorisation has not been met, or has been contravened, and that, in the circumstances, the certificate should be revoked; or
    - (ii) that a condition attached to the certificate of occupancy has not been met, or has been contravened, or is no longer appropriate.

### 50. The Development Regulations prescribe at regulation 76:

- (1) This regulation applies in relation to a building in which essential safety provisions are installed or required to be installed or to be inspected, tested or maintained under the *Building Code* or any former regulations under the *Building Act 1971*.

...

- (4) A relevant authority or council must—
  - (a) on granting a building rules consent in relation to the construction of a building to which this regulation applies; or
  - (b) on the assignment of a change in the classification of a building to which this regulation applies in a case where there is no building work; or
  - (c) on application by the owner of a building to which this regulation applies and payment of the appropriate fee set out in Schedule 6; or
  - (d) on issuing any other certification with respect to building work complying with the Building Rules in a case where this regulation applies, issue a schedule in the appropriate form under Schedule 16 that specifies—
    - (e) the essential safety provisions for the building; and
    - (f) the standards or other requirements for maintenance and testing in respect of each of those essential safety provisions as set out in *Minister's Specification SA 76*.
- (5) The owner of a building in which essential safety provisions must be installed must, within a reasonable time after installation of those provisions, provide to the council a certificate of compliance for each essential safety provision, in the appropriate form under Schedule 16, signed by the installer of the safety provision or, if the installer is a company, signed by the manager responsible for the installation work.
- (6) The owner must not use or permit the use of a building to which this regulation applies unless maintenance and testing have been carried out in respect of each essential safety provision of the building in accordance with *Minister's Specification SA 76* as in force at the time of the consent in respect of the building work in the course of which the essential safety provision was installed or, in the case of a building in which essential safety provisions were required under any former regulations under the *Building Act 1971*, in accordance with the requirements that applied to that building under those regulations.
- (7) The owner of a building in relation to which a schedule of essential safety provisions has been issued must, as soon as practicable after the end of each calendar year, provide to the council adequate proof of the carrying out of maintenance and testing in respect of those safety provisions for that calendar year as required under sub-regulation (6).
- (8) An owner complies with sub-regulation (7) if a certificate in the appropriate form under Schedule 16 and signed by the owner or the manager of the building is lodged with the council certifying that maintenance and testing have been carried out in respect of the essential safety provisions of the building for the relevant calendar year as required under sub-regulation (6).

#### **Whether the agency erred by failing to ensure that a Certificate of Occupancy had been issued**

51. From 1 July 2010 the council was the agency responsible for overseeing the development at [address].
52. The Development Act generally creates an onus on the owner of a development to ensure that the development is compliant and that relevant certification is supplied to the council. Under Regulation 83AB, responsibility lies with the owner of the development to ensure that the council is supplied with the Statement of Compliance within 10 business days after the building work is complete.
53. However, I note that on 27 June 2011 the council sent a letter to the owners requesting a copy of the Statement of Compliance. The Statement of Compliance received by the council on 9 March 2017 was dated 30 June 2011. It appears likely that the owners obtained the Statement of Compliance in response to the council's letter. However on the available evidence the Statement of Compliance was, for an unknown reason, not received by the council in 2011.

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54. Consequently, as no Statement of Compliance was received, the council did not issue a Certificate of Occupancy. Thus, [address] was unlawfully occupied by the complainants from May 2016 until March 2017, an offence for which the occupier is liable to be penalised up to \$10,000.
  55. The council has indicated that the reason it took approximately six years to resolve the matter was a result of the decision not to digitise the files which originated with the District Council of Grant, combined with the resignation of Mr van Riet.
  56. The consequences of this were significant for the complainants. Through no fault of their own, they found themselves without any insurance for either their employees or their stock for their business, and had no option but to close the business.
  57. It is clear that the Development Act intends that the council is the relevant overseeing body, with the power to both issue and revoke Certificates of Occupancy. In order for the council to meaningfully take any action in situations where an owner has not submitted a Statement of Compliance and is unlawfully occupying a building, it is evident that the council must be aware of whether or not it has issued a Certificate of Occupancy for the building.
  58. It is of concern that the council had ongoing involvement with [address] through annual ESP Forms, complaints about the building, and a Change of Use application, and yet at no stage did the council take any action to remedy the fact that a Certificate of Occupancy had not been issued. It is clear that the council was aware that the building was being occupied. The council also either knew, or ought to have known, that it had not issued a Certificate of Occupancy, as evidenced by the fact that during 2011 the council requested a copy of the Statement of Compliance.
  59. I consider that the council had a responsibility, once it had notice that the building was being occupied and no Certificate of Occupancy had been issued, to take appropriate action to follow up and resolve the matter. It is evident that the council had notice on or before 27 June 2011.
  60. It appears that the primary reason the council failed to take action to ensure it had a Statement of Compliance on record and had issued a Certificate of Occupancy was the decision by council management to not digitise the files from the District Council of Grant. While I acknowledge that taking over these files from the District Council of Grant placed an administrative burden on the council, in my view that is not an excuse for failing to ensure that the Development Act is complied with. The high penalties for unlawfully occupying a building reflect the risk to personal safety that arises if there is occupation of an unsafe non-compliant building which has not been approved for lawful occupation by the council.
  61. I consider that by failing to have appropriate administrative procedures in place to follow up on outstanding Statements of Compliance, the council acted in a way that was wrong.
  62. In my provisional report, I foreshadowed making a recommendation that the council review its practices regarding Certificates of Occupancy, with consideration of using an alert on the Authority system to inform users when a Certificate of Occupancy has not yet been issued.
  63. In its response to my provisional report, the council stated that it accepted my recommendation and has confirmed that its Authority system can be set up to incorporate an alert for outstanding Certificates of Occupancy. The council indicated that it has begun the process of implementing this.

## Opinion

In light of the above, my view is 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 review its practices regarding Certificates of Occupancy, with consideration of using an alert on the Authority system to inform users when a Certificate of Occupancy has not yet been issued.

### Whether the agency erred by failing to take action regarding unreturned Essential Safety Provision (ESP) Forms

64. Owners of buildings which require essential safety provisions as a condition of their development approval have an obligation to provide the council with a completed ESP Form 3 “as soon as practicable after the end of each calendar year”.<sup>9</sup>
65. The purpose of an ESP Form 3 is to ensure that adequate testing and maintenance is carried out, in order to verify that the building remains safe to occupy and, further, to ensure that the council can be satisfied that such testing and maintenance has been carried out. If an ESP Form 3 is not returned to the council annually, the council has the power to revoke the Certificate of Occupancy.<sup>10</sup>
66. In 2003, Planning SA issued an Advisory Notice in order to assist councils in the interpretation of the Development Act. The Planning SA Advisory Notice relevantly states:

The building owner has a responsibility... not to use a building unless all of the designated essential safety provisions are being properly maintained and tested. To verify this the building owner has an obligation...to provide annual certification to the council that the necessary essential safety provisions are being tested and maintained in accordance with the requirements identified in the Form 1 Schedule of essential safety provisions issued for the building.

The consequences of not providing this certification are that the council has grounds for revoking the Certificate of Occupancy...that is, the building cannot be used.

The absence of annual certificates could cause the council to have concerns regarding the adequacy of fire safety provisions in a building and it could refer the matter to the Building Fire Safety Committee...

Through the provisions for essential safety provisions and Building Fire Safety Committees, there is a clear intent in the *Development Act and the Regulations* for councils to pursue issues of fire safety in existing buildings.

Accordingly it is suggested that councils should have administrative systems that:

- Identify all the buildings in their area that are required to have annual certificates of maintenance provided by the owners
- Identify if such certificates have been received
- Initiate follow-up action in accordance with a policy that is based on a risk management assessment of the possible consequences and that identifies the circumstances when council will utilize the provisions of Regulation 83(10)<sup>11</sup> to revoke the Certificate of Occupancy.

<sup>9</sup> *Development Regulations 2008* (SA) r 76(7).

<sup>10</sup> *Development Regulations 2008* (SA) r 83(9)(c).

<sup>11</sup> I note that the Development Regulations have been amended since 2003 and the relevant provision is now regulation 83(9).

67. The council has advised that ESP Form 3's are subject to the ESP Procedure. However, I note that the ESP Procedure was only adopted in January 2017. Therefore between 2003 and 2017 the council should have been aware that in order to fulfil its obligations under the Development Act, it was required to have an effective administrative procedure in place to ensure the timely provision of ESP Form 3's, but did not implement any such procedure.
68. I have considered whether, notwithstanding the lack of a formal policy or procedure, the council has been meeting its obligations under the Development Act. The council has indicated that as of 2014, it introduced an automated process for seeking ESP forms annually. However, the information provided by the council clearly indicates that at present, the council takes no action in the event that an ESP Form 3 is not submitted to the council and there is no response to their reminder notice.<sup>12</sup>
69. Between 2014 and January 2017 when the ESP Procedure was implemented, it appears that the council adopted the practice of sending an annual reminder to property owners, prompting them to submit their annual ESP Form 3.
70. The annual reminder presently uses the following wording:
- Re: Essential Safety Provisions Form Three
- With respect to the fire safety equipment installation and maintenance, Council's records indicate that we have not received the annual Form 3 Notice (regarding Essential Safety Provisions) for the above premises.
- As the site contains a building with a floor area exceeding 500m<sup>2</sup> you are required to provide a statement to Council (Essential Safety Provisions Form 3 Notice) on an annual basis at the start of each calendar year in regards to the testing and maintenance on all fire safety equipment. The building owner/s must carry out maintenance on all fire safety equipment and systems...
- The Essential Safety Provisions Form 3 must be signed by the owner or manager of the building and should be returned to Council by 31<sup>st</sup> January...
71. It is my view that the wording of this reminder is presently inadequate. The use of words such as "should" rather than "must" is, in my view, insufficient to communicate to owners that they have a legal obligation to return the ESP Form. There is no mention of a possible consequence of a failure to return the ESP Form. This, combined with the fact that the council presently takes no follow up action at all if the ESP Form 3 is not returned, has resulted in approximately 30% of ESP Forms not being returned to the council annually.<sup>13</sup>
72. It is evident that in the case of [address], the council took no follow up action. It is particularly concerning that issues regarding [address] came to light only when the complainants experienced unsafe conditions within the building and commissioned an independent report.
73. In its response to my provisional report, the council has provided my Office with a copy of a first reminder letter and a second reminder letter to be implemented in 2018, with more appropriate wording in an attempt to improve return rates.
74. I have considered the ESP Procedure that the council adopted in January 2017. The Procedure appears to be purely administrative in nature, with advice on how to

<sup>12</sup> I have taken into account conversations between my Officers and [Employee 3], in addition to the written responses provided by the council.

<sup>13</sup> Conversation with [Employee 3], on 17 July 2017.

correctly use the council's computer system to track and record information on ESP Forms.

75. The ESP Procedure contains subheadings relating to the following:
- What to do if a council employee receives a development application that requires an ESP Form 3
  - What to do if a council employee receives an ESP Form 3 that has been signed and returned to the council
  - The process for the ESP Form 3 annual mail out.
76. The ESP Procedure appears to essentially record the process that the council is presently following, with specific information to assist employees.
77. In my view, both the current process and the Procedure are insufficient. The Planning SA Advisory Notice imports an obligation upon councils to initiate follow up action in accordance with a policy that identifies the circumstances in which the council will take the formal step of revoking a Certificate of Occupancy. While it is expected that this would be a last resort, it is my view that the ESP Procedure should clearly outline the follow up action that should occur in the instance an ESP Form is not returned by a certain date as well as the criteria that must be in place for the council to proceed to revoke the Certificate of Occupancy.
78. In my provisional report, I foreshadowed making a recommendation that the council review its ESP Procedure to address the circumstances in which follow up action should be taken, and what such follow up action should entail, in the event that an ESP Form 3 is not returned to the council annually.
79. In its response to my provisional report, the council stated that it had scheduled a review of its ESP Procedure in January 2018 but had brought forward the review. The council indicated that it had altered its ESP Procedure to include a 'Failure to Provide ESP Form 3' action.

### Opinion

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

While my provisional report indicated that I intended to make a recommendation in relation to this matter, given the council's amendments to the ESP Procedure I do not consider it necessary to make a recommendation in my report.

### Whether the agency erred in granting a Change of Use application without verifying the existence of a Certificate of Occupancy

80. The complainants submit that the council should have checked whether a Certificate of Occupancy had been issued before granting their Change of Use application. Had the council done so, the error would have been identified before the complainants commenced their occupation of the premises at [address].
81. The complainants also allege that the council informed them in January 2017, after they complained about the safety of the building, that extensive internal building work had not been approved by the council, including the showroom, mezzanine, offices, kitchenette, toilets and other storage spaces. The complainants allege that the owner of [address] completed these works himself or employed unqualified contractors,

resulting in the works being completed to a low standard and rendering the building unsafe for use.

82. The council has indicated that the information submitted with the Change of Use application showed plans of the building that matched the plans that were submitted with the original development application. Therefore the council was not informed that any internal modifications had been made to the building.
83. The council's Information Leaflet provides that the Change of Use application form must be accompanied by a site plan showing, among other things, 'the positions and dimensions of all building and their relationship to the boundaries'. It is not clear from the Information Leaflet that a Change of Use application must show all of the internal features of the building.
84. However, I note that the Change of Use application process is identical to the application process for any other type of development. Therefore it would be expected that the information provided by an applicant would include existing internal floor layout plans. The responsibility lies with the applicant to ensure that the information provided to the council is correct.
85. On the information before me, I am unable to form the view that, at the time the Change of Use application was lodged by the complainants, the council should have been aware of unapproved internal modifications to the building.
86. I have considered whether the council process for assessing a Change of Use application could reasonably be expected to require steps to be taken to ensure that the council has on record a Statement of Compliance, and has issued a Certificate of Occupancy.
87. I am of the view that if the council has appropriate policies and practices in place to ensure that all buildings have supplied a Statement of Compliance at the outset, and that a Certificate of Occupancy has been issued prior to any occupation of the building, it would not then be necessary to verify that a Certificate of Occupancy had been issued as part of the assessment of a Change of Use application.

## **Opinion**

In light of the above, my view is that council did not act in a manner that was unlawful, unreasonable or wrong within the meaning of section 25(1) of the Ombudsman Act.

## **Whether the agency failed to comply with its records management obligations**

88. It appears that the council has no formal written records of communication with the complainants regarding [address]. The complainants allege that they brought concerns to [Employee 2] and [Employee 1].
89. The council has advised that there are records of the dates of phone conversations between [Employee 2] and the complainants during 2016, but not records of the content of the conversations.
90. The council has acknowledged that there were three conversations between [Employee 1] and the complainants in late 2016 and early 2017. There are inconsistencies in the accounts of the council and the complainants as to what was discussed.

91. The complainants allege that they raised issues of potential non-compliance and were advised by [Employee 1] that a number of internal modifications had not been approved by the council.
92. The council alleges that the calls concerned drainage issues and electrical issues. [Employee 1] determined that these were not matters which fell within the council's jurisdiction and therefore referred the complainants to SafeWork SA and to Legal Aid to get legal advice.
93. It is my view that it would be reasonable to expect that any concerns regarding the safety of a building would be documented by the council employee who receives them. If nothing else, the combination of documented safety concerns and the failure of the owner to return ESP Forms should have put the council on notice. In fact, as the council has now acknowledged, there were issues of non-compliance at [address] which required action. It appears that the building works at [address] had been non-compliant for a number of years, if the works had been compliant at all since the development was approved in 2010.
94. The council's *Records Management Policy* relevantly provides:

The Policy applies to all Council business including activities undertaken using electronic files and communication. It concerns records which are created, collected, processed, used, sentenced, stored and disposed of in the conduct of Council's official business...Business activities include decisions made, actions taken and interaction with clients...

It is the responsibility of all Council staff and Elected Members to adhere to this Policy and associated Administrative Procedure...All Council staff and Elected Members need to be aware of and comply with recordkeeping requirements related to the performance and execution of their duties and functions which include...creating records that adequately reflect the business they conduct including, where relevant, decisions made and actions taken...

95. The *Records Management Policy* defines council business to include the provision of services, delivery of programs, development of policies, making of decisions, performance of Council functions and other similar types of transactions.
96. An exception to the obligation to retain records applies if the record is ephemeral or transitory in nature. The *Records Management Policy* explains that a record of ephemeral if it is of little or no continuing value to the council and only needs to be kept for a limited or short period of time. An example would be a draft of a document.
97. The council's *Records Management Procedure* provides direction to council staff members on their record management obligations. It relevantly provides:

[A record] is an official record when:

- The information relates to the business of Council
- It provides evidence to support the business and accountability of Council
- It identifies issues or crisis, or possible issue or crisis for Council
- It adds value to an existing record.

It is not an official record when it is:

- Personal material e.g. lunch arrangements
- Reference material not required for the ongoing support of Council business
- A duplicate with no additional information
- Telephone messages (that do not support or add meaning to other information)
- Informal communication with no continuing value.



Diaries...are generally used to record appointments but may be used for messages and notes which may be routine in nature or significant to the conduct of Council business.

### Telephone and Other Verbal Conversations

Conversations involving the relay of information or matters of significance to the conduct of Council business should be documented in an appropriate format (e.g. a file note or note placed on a record in RM).

Simple or routine conversations, such as issuing or receiving of basic instructions or information don't need to be documented and any documentation in regards to them may be destroyed when reference to it ceases...

98. On my consideration of the *Records Management Policy*, I am not persuaded by the council's submission that [Employee 1] did not make a record of the phone calls because he did not deem the calls to be a 'complaint'.
99. Under the council's *Complaint Policy*, a complaint is defined as:
 

An expression of dissatisfaction with a product or service delivered by the Council or its representatives that has failed to reach the standard stated, implied or expected. This includes complaints about a service that has been, or should have, been delivered.
100. It appears the January 2017 conversation with the complainants was a complaint to the council about potential non-compliance issues. It does not appear to me that it was a complaint, at that time, about a service delivered by the council. The conversation could, however, have been considered a Request for Service. As the council proceeded to inspect the property in April 2017, the council seems to have processed the communication, albeit belatedly, as a request for a service.
101. The council does not appear to have a policy on Requests for Service.
102. Taking into account the relevant policy documents and the council's recordkeeping obligations, I am of the view that the phone conversations between the complainants and [Employee 1] should have been recorded in the council's record management system. I consider that it should have been considered an official record pertaining to the business of the council and therefore an obligation arose to keep a written record.
103. In my provisional report, I foreshadowed making a recommendation that the council implement a 'Requests for Service' policy.
104. In its response to my provisional report, the council stated that it had drafted a 'Requests for Service' policy and would be presenting the policy to Council in September 2017 for endorsement.

### Opinion

In light of the above, my view is that the council acted in a manner that was wrong within the meaning of section 25(1)(b) of the Ombudsman Act.

To remedy this error, I recommend under section 25(2) of the Ombudsman Act that the council implement a Requests for Service Policy which includes guidance for employees on communications that must be recorded.

## Summary of Opinions and Recommendations

In light of the above, my final view is that:

1. by failing to ensure that a Certificate of Occupancy had been issued to [address], the council acted in a manner that was wrong within the meaning of section 25(1)(g) of the Ombudsman Act
2. by failing to take action regarding unreturned ESP Form 3's, the council acted in a manner that was wrong within the meaning of section 25(1)(g) of the Ombudsman Act
3. in granting the Change of Use application without verifying the existence of a Certificate of Occupancy, the council did not act in a manner that was unlawful, unreasonable or wrong within the meaning of section 25(1) of the Ombudsman Act
4. by failing to create and retain written records of the complainant's dialogue with council staff members regarding [address], the council acted in a manner that was wrong within the meaning of section 25(1)(g) of the Ombudsman Act.

I have made recommendations under section 25(2) of the Ombudsman Act that:

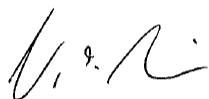
1. the council review its practices regarding Certificates of Occupancy, with consideration of using an alert on the Authority system to inform users when a Certificate of Occupancy has not yet been issued
2. the council implement a Requests for Service policy which gives guidance for employees on communications that must be recorded.

## Final Comment

In accordance with section 25(4) of the Ombudsman Act, the department should report to the Ombudsman by **20 November 2017** on what steps have been taken to give effect to the recommendations 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, reason(s) for the inaction should be provided to the Ombudsman.



Wayne Lines  
SA OMBUDSMAN

12 September 2017