OmbudsmanSA

Report

Preliminary investigation - *Ombudsman Act 1972*

Complainant	**[The complainant]**
Council	**City of Mount Gambier**
Ombudsman reference	**2016/09529**
Council reference	**AF11/941: AR15/605**
Date complaint received	**2 December 2016**
Issues	**1. Whether the council's failure to take action in regard to the installation of a reflective metal roof was reasonable** **2. Whether the council appropriately conducted an internal review**

Jurisdiction

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

Although the complaint to my Office was not made within the 12 month statutory time frame prescribed by the *Ombudsman Act*,[1] I am of the view that in all the circumstances of the case it is proper to entertain the complaint.

On 22 May 2017 the complainant provided consent for me to publish her name in my report.

Investigation

My investigation has involved:

- assessing the information provided by the complainant
- seeking a response from the council
- seeking clarification of the council's response
- considering the *Ombudsman Act 1972,* the *Local Government Act 1999*, the *Mount Gambier (City) Development Plan - consolidated 21 April 2016*, the *Development Act 1993*, and the *Development Regulations 2008*
- preparing a provisional report and seeking further submissions in response from the interested parties
- preparing this final report.

[1] *Ombudsman Act 1972*, section 16(1).

Level 9
55 Currie Street
Adelaide SA 5000

PO Box 3651
Rundle Mall SA 5000

Telephone 08 8226 8699
Facsimile 08 8226 8602
Toll free 1800 182 150

ombudsman@ombudsman.sa.gov.au
www.ombudsman.sa.gov.au

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.[2] 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 … .[3]

Response to my provisional report

1. The complainant made a number of submissions in response to my provisional report. While I have considered those submissions, they do not affect my reasoning in relation to the issues addressed in my provisional report. I have summarised and responded to the complainant's submissions individually below.

2. The first submission is that I failed to address the impact of glass roofing installed in an alfresco area attached to the property. The complainant submitted that unlike the metal roofing, glass would remain reflective indefinitely as it does not fade.

3. I have viewed the complainant's initial complaint to the council, her subsequent responses to the council's assessment of her complaint, and her complaint to my Office. It does not appear that the complainant raised concerns about the glass in the alfresco area with either the council or my Office prior to the response to my provisional report.

4. The complainant's written complaints and supporting photographs appear to concern the metal roofing only. The council also appeared to address the complainant's complaint on the basis that she was concerned with the installation of a Zincalume® roof, with reference to the fading of that specific material, and at no point did the complainant appear to take issue with the alfresco area.

5. My officer contacted the council to confirm whether the complainant had previously complained about the use of glass in the alfresco area, and two council employees who were familiar with the matter confirmed that it was the first they had been alerted to this issue.[4]

6. On that basis, I do not consider it is appropriate for me to entertain this issue, as I am of the view that it is a separate and distinct complaint that has not been raised with the council.

7. The complainant also submitted that she disagreed with my views in relation to the kerbside inspection that was conducted by the council, and provided various reasons as to why this was inadequate. However, my view remains that the council was not required to conduct any physical inspection of the property, and therefore I am not persuaded by the complainant's submissions on this issue.

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2 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.

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

4 Telephone call to Mr Simon Wiseman, Senior Planning Officer and Mr Michael McCarthy, Governance Officer, on 14 November 2017.

8. The complainant further submitted that she was prevented from contacting an elected council member to discuss her complaint, as Mr McShane's internal review letter dated 11 November 2015 stated that:

> …I reserve the opportunity for you to articulate any further concerns directly to myself following receipt and consideration of my review findings.

9. I have considered that letter, and I am of the view that it appears Mr McShane merely offered the complainant the opportunity to respond to his internal review and raise further concerns with him directly. I do not consider this statement in any way precluded the complainant from contacting elected council members. It would appear that the complainant was aware that she was not precluded from contacting an external party, as evidenced by the fact that she then directed her complaint to my Office. As such, I am not persuaded that this statement impacted on the complainant's right to procedural fairness or a robust review process, and my views on this issue remain unaffected.

10. In addition to the submissions outlined above, the complainant repeated her concerns about the physical and emotional impacts caused by the alterations to the property.

11. I acknowledge the complainant's concerns in that regard. However, as noted in my provisional report, I am of the view that the council considered the complainant's concerns about the enjoyment and use of their property, and attempted to find a possible solution to address those concerns. As such, the complainant's submissions have not affected my views.

12. The council did not provide submissions in response to my provisional report.

Background

13. [The complainant], and her husband live at [the adjacent property], Mount Gambier.

14. In February 2015 the owners of the neighbouring property at [the property] lodged a development application for dwelling additions and alterations.

15. The additions and alterations to the property were considered by the council to be 'Category 1' development under the City of Mount Gambier Development Plan (**the Development Plan**).[5]

16. According to the council, the complainant was not notified of the proposed development, on the basis that the *Development Act 1993* states that the relevant authority, i.e. the council, 'must not, on its own initiative, seek the views of the owners or occupiers of adjacent or other land' in relation to Category 1 developments.[6]

17. Amongst the proposed additions and alterations to the property, the development application included the provision that the existing tiled roof was to be replaced with:

> 'BASALT' COLOURED COLORBOND CUSTOM ORB ROOF SHEETING OR SIMILAR

18. The development application was ultimately approved by the council on 7 April 2015.

19. Upon completion of the additions and alterations to the property, the complainant had concerns with the change to the roofing material of the property. According to the complainant, she and her husband experienced significant glare and heat exposure as a result of the change, which consequently caused increases to the temperature within

[5] City of Mount Gambier Development Plan consolidated 21 April 2016.
[6] *Development Act 1993*, section 38(3)(a).

their house, various health issues, and an overall decline in the value and enjoyment of their property.

20. As a result, the complainant wrote a letter dated 16 October 2015 to the council, outlining her concerns. In response to that letter, the council's Director of Operational Services, Mr Daryl Sexton, responded as follows:

> …Thank you for your letter and photo's [sic] received on the 16th October 2015.
>
> The proposed dwelling additions which included a change in roof material was approved by Council in April 2015.
>
> The construction of dwelling additions under the Development Regulations 2008 does not require Council to notify neighbouring properties.
>
> Natural light/glare will vary throughout the years depending the months. It is understood that the roof material used is a nationwide building product and will dull off in time.

21. Dissatisfied with the response from Mr Sexton, the complainant wrote a further letter dated 23 October 2015 to the Chief Executive Officer of the council, Mr Mark McShane, seeking a review of Mr Sexton's reply, and expressing the view that his response had been 'glib' and failed to adequately address her concerns.

22. In response, Mr McShane advised the complainant by letter dated 26 October 2015 that he would conduct an internal review of the complaint within 21 days in accordance with section 270 of the *Local Government Act 1999* (**the Local Government Act**) and the Council's Internal Review of Council's Decisions Policy C290 (**the complaints policy**).

23. Subsequent to that letter, Mr McShane advised the complainant of the outcome of his review of the complaint by letter dated 11 November 2015. In particular, I note that Mr McShane identified that:

> …Having reviewed the content of your initial letter and the response letter from Daryl Sexton I find that that the response letter, whilst affirming the approval status and notification requirements for the development concerned, did not adequately respond to your specific queries.

24. However, Mr McShane ultimately determined that there had been no error in regard to the council's decision to grant development approval. The relevant excerpts of Mr McShane's response are set out below:

> ….My internal review process has involved:
>
> - a review of correspondence between yourself and Council, namely:
>   - letter to Council dated 16 October 2015
>   - letter from Mr Daryl Sexton dated 20 October 2015
>   - request for internal review dated 23 October 2015,
> - consideration to [sic] Development Application file DA381/047/2015 for extension of a detached dwelling located at [the property],
> - consideration to [sic] development assessment principles in-general[sic].
> - discussions with Council's Director Operational Services, Mr Daryl Sexton
> - discussions with Council's Senior Planning Officer, Mr Simon Wiseman.

- further review and oversight by Council's Manager - Governance & Property[7]

….The works recently undertaken at [the property] were the subject of a development application (DA381/047/2015) primarily for planning/building approval of an extension to an existing dwelling. Associated works included (but were not limited to) the replacement of the roofing material.

A development assessment application is accompanied by detailed plans and specifications of the works to be undertaken including materials, roof pitches, proximity to retaining walls, energy efficiency rating of the subject building, and a range of other relevant information. Together these plans and specifications are the basis upon which a development is assessed.

It is important to note that replacement of roofing material (in the absences of any other development activity) does not typically require Council/development approval.

In the case of [the property] the primary building activity (dwelling extension) did require approval and assessment against the principles in the City of Mount Gambier Development Plan, the Development Act and Regulations, and the Building Code of Australia.

Development principles cannot always be applied equally to all development site[s]. Each site and each proposal presents its own set of circumstances. In the case of [the property] several features and constraints are inherent in it and surrounding properties, namely existing dwellings, naturally occurring slope, and heritage considerations.

A development application [is] assessed on it's[sic] own merit and circumstances as a whole, and on balance, against the many relevant principles applicable to the type [and] category of development. No single development principle carries such weight as to offset or counter other aspects of a development proposal, or to warrant its refusal or imposition of unreasonable or invalid conditions.

In this context, I now address your queries in turn:

i. Assessment of (independently designed/specified) retaining walls takes account of proximity to boundaries, engineering, standards/requirements and (structural) impact on any existing built form. Movement of the sun is not a direct consideration with respect to retaining walls.

   Similarly (independently assessed) energy ratings take into account building design and specification/materials, including, as you suggest, the movement of the sun, roof orientation/pitch and materials, and the resulting reflectivity/absorption of heat. These considerations relate specifically to the development site, not to adjoining sites.

ii. Council does give consideration to elevations, building heights (drop/slope), sun movement, and roof orientation/pitch and materials associated with development applications where a site presents conditions where impacts from solar angles, slopes, heights etc would be anticipated.

iii. The development at [the property] causing no overshadowing, having no change in building height, no impact on north facing properties (predominate sun direction/angle) and consisting of standard construction design, methods and materials, are not conditions where light or solar impacts on adjoining properties (in any direction) would ordinarily be prevalent.

   There being no basis upon which to anticipate any extraordinary light or solar impacts it would be unreasonable for Council to expect any further information to be provided for consideration.

iv. Based upon an assessment of the site conditions and application details Council did not anticipate any significant light or glare issues arising from the development and

[7] Letter from Mr Mark McShane dated 11 November 2015.

could not reasonably require any further information to be provided or consider such matters further.

v. Being a consent/category 1 development there are no requirements for any notification to neighbours with respect to any detail or specifications of the proposed development, including the type of the roofing and any unidentified/unanticipated impacts of the development.

vi. The development system application in South Australia is intended to provide broad protection to the whole community against inappropriate development, whilst providing timely, efficient and cost effective and not overly onerous assessment processes for applicants. This system does not afford protections to individual/occupiers and notification and appeal rights to adjoining owners/occupiers apply only in very limited circumstances.

With respect to the development process in this instance, I am satisfied that the consent development was appropriately assessed having regard to the City of Mount Gambier Development Plan and the Development Act/Regulations and with relevant (heritage) referrals, and (appropriately) without notification to neighbouring property owners.

Summary
In summary of all the above:

- I confirm the result of my internal review that the response (dated 20th October 2015) to your letter of 16th October 2015 did not adequately respond to your enquiries.

- As a remedy I have provided an alternative response to addressing your specific queries

- I am satisfied that the development assessment process associated with the subject works was sound based upon principles of development assessment.

Council is not able to offer you any solution in relation to your stated concerns about the impact of your neighbour's extension on the enjoyment and use of your own property.

I have requested that Council's Senior Planning Officer, Mr Simon Wiseman liaise with your neighbour and their builder for them to consider whether any solution (such as a paint or other treatment applied to the roof material) might be able to address your concern.

You should note that the application of any such roof treatment would be solely at your neighbour's discretion with Council having no part to act further in the matter.

25. In light of the outcome of her complaint and subsequent internal review by the council, the complainant contacted my Office on 2 December 2016.

26. Following initial enquiries by my Office, I formally requested information from the council by letter dated 18 January 2017, for the purpose of determining whether I should conduct an investigation of the matter.

27. Upon receipt of further information from the council by way of letter dated 6 February 2017, I decided to commence an investigation. The council was then notified of this decision, and was asked to provide further documents and information by letter dated 20 January 2017.

28. Mr McShane responded to those enquiries on behalf of the council, and provided extensive documentation in relation to the history of the complaint, and the corresponding development application, by letter dated 10 March 2017.

29. The letter explained why the council did not consult with the complainant prior to approving the development plans, and why the council considered that development approval had been appropriately assessed, as follows:

> …Prior to the receipt of this correspondence [[the complainant's] letter dated 16 October 2015] [the complainant's husband] of [the adjacent property] attended the Council office and spoke to Simon Wiseman. This meeting occurred on 27 July 2016 at about 4:45pm. Simon Wiseman has indicated that this discussion centred on the reasons why there was no notification of the proposed works being undertaken at [the property] to the adjoining property owners. The reason given was that the works were not classified as Category 2 pursuant to the Development Act 1993 and there was no provision for notification.
>
> It should be further noted that the City of Mount Gambier Development Plan identifies Dwellings as a Category 1 form of development within the Residential Zone Schedule 9 of the Development Act[sic] also identified a detached dwelling and any alteration of, or addition to, a building so as to preserve the building or convert it to (a Detached Dwelling) as a category 1 Development.
> Section 38(3) of the Development Act specifies that "where a person applies for a consent in respect of the Development Plan for a Category 1 Development (a) the relevant authority must not, on its own initiative, seek the views of the owners or occupiers of adjacent or other land in relation to the granting or refusal of development plan consent."
>
> Simon Wiseman has noted that he was absent from the Council office on (Friday) 16 October 2015 when the letter from [the complainant] was hand delivered. Simon had a recollection that he reviewed the plans for [the property] to see whether additions should have been notified to neighbours or if there was any significant change between the plans and what was constructed.
>
> His conclusions being that the development was Category 1 and that a change had occurred with the corrugated roofing material being Zincalume® finish rather than Colorbond®. Simon further recalls that the dwelling at [the adjacent property] appeared to have north facing windows with minimal shading to shield any pre-existing light/glare and he only anticipated a minimal impact to existing conditions from the changes.
>
> Subsequent to Mr Daryl Sextons[sic] response letter dated 20 October 2015 (and as a consequence of the resulting Internal Review conducted on that response) Simon Wiseman conducted a kerbside inspection of the property at [the property] on 12 November 2015 to again familiarise himself with the development in question and consider the impact on the adjacent property owned and occupied by [the complainant's].
>
> Simon Wiseman met with the owner of [the property] [the owner] on 13 November 2015 to discuss the issue that had been raised by their neighbours. [The owner] agreed to look into methods by which he could minimise any impact of the roof on his neighbours to the south.
>
> Simon Wiseman met with [the owner] again on the 3 February 2016 for an update on whether any actions could be taken. [The owner] suggested that without painting or removing the whole roof there was nothing more he could do. He also believed that the roof would fade and that it didn't affect the running of the business at the rear of the neighbouring property. [The owner] also suggested that the neighbours didn't get along.

30. In regard to whether the council considered the change in roofing material was consistent with the development approval granted on 7 April 2015, Mr McShane stated that:

> …Basalt coloured roof (or similar) as originally proposed is a steel corrugated roofing material, the difference being that the "as installed" roof is not coated within a coloured/paint finish.
>
> On the basis of the notation on the approved plans Council respectfully suggests that the applicant had not fully decided on the final colour/finish at the time of seeking Development Approval and Council is of the view that the change from a coloured

(Colorbond®) finished to an uncoloured (Zincalume®) finish is still consistent with the approved plans.

Simon Wiseman has indicated that he did not seek a variation to the plans to show the change in roof material colour/finish from colorbond® to zincalume® and did not document this decision.

31. Of particular significance, I note that although Mr McShane stated that he considered the owners of the property had obtained development approval for the roof alterations, he also stated that he did not consider that the replacement of the pre-existing tiled roof with corrugated steel constituted development. In support of that view, Mr McShane cited schedule 3, clause 4(2) of the Regulations, which sets out:

> **Acts and activities that are not development**
>
> **4—Sundry minor operations**
>
> …
>
> (2) Other than in respect of a local heritage place, the repair, maintenance or internal alteration of a building— [my emphasis added]
>
> (a) that does not involve demolition of any part of the building (other than the removal of fixtures, fittings or non load-bearing partitions); and
> (b) that will not adversely affect the structural soundness of the building or the health or safety of any person occupying or using it; and
> (c) that is not inconsistent with any other provision of this Schedule.

32. Mr McShane also stated that:

> Council does not deem the replacement of a tiled roof with a corrugated steel roofing to be "development" because:
>
> - The replacement of roofing material with a less dense material (eg replacing heavy tiles with lighter corrugated steel) is not viewed as demolishing a building - it is replacing a cladding system only;
> - The structural soundness of the building is not compromised (in fact it is improved with less weight on the structural components;
>
> This activity is not inconsistent with any other provisions of the schedule.

33. At the time of Mr McShane's letter dated 10 March 2017, the council had not sought legal advice in relation to the matter. Mr McShane noted, however, that:

> …the information already provided to the Ombudsman….was oversighted by three officers (in addition to the CEO and Manager Governance and Property) who collectively have in excess of 60 years combined experiment in Local Government planning and development matters.

34. In light of the response from council that it did not consider that the roof alterations constituted development, with reference to schedule 3, clause 4(2) of the Regulations, my Office sought to clarify whether the council had turned its mind to the wording of the Regulations. Specifically, my Office enquired as to whether the council had excluded the possibility of the property being a 'local heritage place' (as it had been identified as being within a Historic Conservation Area) and whether it considered the replacement of a tiled roof with a steel roof as comprising the repair, maintenance or internal alterations of a building.

35. In response to those specific enquiries, the council provided the following submissions by letter dated 23 August 2017:

> …No, Council does not consider the property….to be a 'local heritage place' for the purpose of Clause 4(2) of the regulations.
>
> Table MtG(C)/5 Schedule of Local Heritage Places within the City of Mount Gambier Development Plan dated 21st April, 2016, identified those places which are a 'Local Heritage Place' and contains the Descriptions and/or Extent of the Listed Place. The Schedule does not identify [the property] as either a Local Heritage Place or a Contributory Item, but it is located within a Historic Conservation Area.
>
> …Yes, Council does consider that the replacement of a tiled roof with a corrugated steel roof can be considered as 'the repair, maintenance or internal alterations of a building'. However, this only applied where such activity meets the sundry minor operations provisions of Schedule 3 of the Development Regulations, being a replacement:
>
> (a) that does not involve demolition of any part of the building (other than the removal of fixtures, fittings or non load-bearing partitions); and
> (b) that will not adversely affect the structural soundness of the building or the health or safety of any person occupying or using it; and
> (c) that is not inconsistent with any other provision of this Schedule.
>
> Council's earlier letter dated 10 March 2017 provided reasoning for the replacement of a tiled roof with a corrugated steel roof being consistent with the abovementioned points (i.e being 'the repair, maintenance or internal alterations of a building' and not development), as follows:
>
> - The replacement of roofing material with a less dense material (eg replacing heavy tiles with lighter corrugated steel) is not viewed as demolishing a building - it is replacing a cladding system only;
> - The structural soundness of the building is not compromised (in fact it is improved with less weight on the structural components);
> - This activity is not inconsistent with any other provisions in the schedule.
>
> Such reasoning would not apply to all instances of roof (cladding) replacement. This was acknowledged in Parts 5 and 7 of Council's letter dated 10 March 2017 identifying that only part of the roofing associated with the works undertaken at [the property] was considered as development.
>
> I also add that Council employs four qualified planners, two registered members of the PIA, and qualified/accredited building officers. In the review of this matter since receipt of initial correspondence from [the complainant] on 16 October 2015 none of those experienced officers have identified any defensible grounds that would justify, on balance, withholding approval or otherwise pursuing the owner of [the property] in relation to their roofing material/finish….

36. The response from the council above failed to distinguish as to whether the replacement of a tiled roof with a corrugated steel roof was considered to be the repair, maintenance or internal alterations of a building. As such, my Office again requested the council to clarify this issue.

37. The council responded with a comprehensive reply, having sought legal advice on the issue, as follows:

> …You will be aware from earlier communications regarding this matter that Council has not previously considered it necessary to obtain legal advice regarding Development Application DA381/047/2015 or the subsequent complaint, internal review and involvement of your office in this matter.
>
> Following your most recent clarification request, the specific question asked (and copies of earlier communications with your office) has been referred to Council's development lawyers for general advice relating to Development Application DA381/047/2015 and specific advice relating to the following question:

…Legal opinion obtained on the specific question of whether replacing a tiled roof with a corrugated steel roof can be considered as the repair, maintenance or internal alterations of a building is summarised as follows :

1. The replacement of the tiled roof on the existing building with corrugated iron roofing is not the maintenance or internal alterations of a building for the purposes of Schedule 3, clause 4(2) of the Regulations;

2. The replacement of the tiled roof on the existing building with corrugated iron roofing is unlikely to constitute the repair of a building for the purposes of Schedule 3, clause 4(2) of the Regulations; and

3. In any event, in our opinion it is open to conclude that the replacement of an existing roofing material with another roofing material, in circumstance where the roof form and pitch are to remain the same, does not constitute development.

Council now clarifies that based on legal opinion dated 29 August 2017 recently obtained by Council the replacement of a tiled roof with a corrugated steel roof is not considered to be maintenance or internal alterations, and is unlikely to constitute the repair of a building, for the purposes of Schedule 2 clause 4(2) of the Regulations.
Council does note however that that opinion obtained also provides (for the reasons given in the letter of advice) that:

- the replacement of the tiled roof can be considered separate and distinct from the development application, and
- in this instance the replacement of an existing roofing material with another roofing material, in circumstance where the roof form and pitch are to remain the same, does not constitute development and therefore does not require development approval.

38. The legal advice obtained by the council from Mellor Olsson Lawyers further expounded on why the replacement of the roof would not constitute development. That advice can be summarised below as follows:

- replacing roofing material does not fall within the definition of development under the Development Act
- the reasoning for that view is that the most relevant definition of 'building work' under section 4 of the Development Act is the construction of a building, and based on the definition of a 'building' for the purpose of defining development under the Development Act, in conjunction with case law, it is open for the council to determine that the alterations did not constitute building work.

Relevant law

39. Section 4 of the *Development Act 1993* (**the Development Act**) provides the relevant definitions for activities referred to in this report:

4—Interpretation

(1) In this Act, unless the contrary intention appears—

…

building means a building or structure or a portion of a building or structure (including any fixtures or fittings which are subject to the provisions of the Building Code of Australia), whether temporary or permanent, moveable or immovable, and includes a boat or pontoon permanently moored or fixed to land, or a caravan permanently fixed to land;

building work means work or activity in the nature of—

(a) the construction, demolition or removal of a building (including any incidental excavation or filling of land); or
(c) any other prescribed work or activity,

but does not include any work or activity that is excluded by regulation from the ambit of this definition;

construct in relation to a building, includes–

(a) to build, rebuild, erect or re-erect the building;
(b) to repair the building;
(c) to make alterations to the building;
(d) to enlarge or extend the building;
(e) to underpin the building;
(f) to place or relocate the building on land;

development means–

(a) building work; or
(b) a change in the use of land; or
(c) the division of an allotment; or
(d) the construction or alteration (except by the Crown, a council or other public authority (but so as not to derogate from the operation of paragraph (e))) of a road, street or thoroughfare on land (including excavation or other preliminary or associated work); or
(da) the creation of fortifications; or
(e) in relation to a State heritage place–the demolition, removal, conversion, alteration or painting of, or addition to, the place, or any other work that could materially affect the heritage value of the place; or
(f) in relation to a local heritage place–the demolition, removal, conversion, alteration or external painting of, or addition to, the place, or any other work (not including internal painting but including, in the case of a tree, any tree-damaging activity) that could materially affect the heritage value of the place; or
(faa) the external painting of a building within an area prescribed by the regulations for the purposes of this paragraph; or
(fa) in relation to a regulated tree–any tree-damaging activity; or
(g) prescribed mining operations on land; or
(ga) prescribed earthworks (to the extent that any such work or activity is not within the ambit of a preceding paragraph); or
(h) an act or activity in relation to land (other than an act or activity that constitutes the continuation of an existing use of land) declared by regulation to constitute development,

(including development on or under water) but does not include an act or activity that is excluded by regulation from the ambit of this definition;

40. Schedule 3, clause 4(2) of the Development Regulations 2008 (**the Regulations**) sets out:

Acts and activities that are not development

4–Sundry minor operations

…

(2) Other than in respect of a local heritage place, the repair, maintenance or internal alteration of a building–

(a) that does not involve demolition of any part of the building (other than the removal of fixtures, fittings or non load-bearing partitions); and
(b) that will not adversely affect the structural soundness of the building or the health or safety of any person occupying or using it; and
(c) that is not inconsistent with any other provision of this Schedule.

Whether the council's failure to take action in regard to the installation of a reflective metal roof was reasonable

41. In order to address whether the decision by the council to not take action in regard to the installation of a reflective metal roof was unreasonable, I must firstly consider whether the alterations were an authorised development for the purposes of the Development Act.

42. If the installation of the roof was not unauthorised development, the council had no particular obligation or powers under the Development Act to address it. If, however, the installation of the roof was unauthorised development, the council should have considered whether it was appropriate to exercise its discretion to issue a notice pursuant to section 84 of the Development Act or make an application to the Court under section 85 of the Development Act. That said, I note that there could have been possible circumstances where the council still could have exercised its discretion to not take further action.

43. In considering whether the alterations were authorised developments, I have considered the following questions:

    - Was the activity development?
    - Was development approval for the roof alterations given?
    - Was the installation of a Zincalume® roof consistent with the approved development plans?

Was the activity 'development'?

44. The approved development application included the provision that the existing tiled roof was to be replaced with:

    'BASALT' COLOURED COLORBOND CUSTOM ORB ROOF SHEETING OR SIMILAR

45. Ultimately, what was installed was a steel (Zincalume®) roof, which is a different product to the Colorbond® product suggested in the approved plans.

46. The council initially held the position that the roof alterations were consistent with the development plans that were approved on 7 April 2015. However, the council then presented a conflicting submission on 10 March 2017 that it did not consider such work constituted development, and that the alterations to the roof were separate to the rest of the development, as was highlighted by Mr McShane's submissions above that it fell under the category of 'sundry minor operations' under schedule 3, clause 4(2) of the Regulations. The council later provided a copy of legal advice which suggested that it was open to the council to determine that change to the roof was not 'building work' and on that basis, not development.

47. By way of comment, I consider that the council's conflicting submissions that the activity was approved development, whilst also claiming it was not development, is highly inconsistent and has caused considerable confusion. This is compounded by the fact that the council did not seek legal advice before claiming that the activity fell under the category of 'sundry minor operations', and therefore having to later concede that this position was erroneous as it is clearly not the repair, maintenance or internal alteration of a building.

48. That said, I must now consider the council's revised submission that such work does not constitute development on the ground that it does not meet the definition of 'building work' under the Development Act.

49. Section 4 of the Development Act provides that 'various listed activities will constitute 'development'. In my view, the most relevant activity in the present circumstances is 'building work'.

50. 'Building work' is defined by the Development Act as:

> …work or activity in the nature of–
>
> (a) the construction, demolition or removal of a building (including any incidental excavation or filling of land); or [my emphasis]
> (c) any other prescribed work or activity,
> but does not include any work or activity that is excluded by regulation from the ambit of this definition;

51. 'Construct' in relation to a building is defined to include the following activities:

> (a) to build, rebuild, erect or re-erect the building;
> (b) to repair the building;
> (c) to make alterations to the building; [my emphasis]
> (d) to enlarge or extend the building;
> (e) to underpin the building;
> (f) to place or relocate the building on land;

52. I consider that alterations to a roof arguably constitute 'the construction, demolition or removal of a building', as I am of the view that a change to the roof is an alteration made to the building, being the house itself.

53. With reference to the case of *Billing v Peel*, *Ford v City of Burnside* confirms that a house, and by extension a roof, could be considered a 'building' for the purpose of assessing what would constitute development as follows:

> ….First, the commonest fixture is a house. A house is built into the land, so the house, in law, is regarded as part of the land; the house and land are one thing. Anything which is an integral part of the house, such as, for example, lead pipes, will also be a fixture and will be attached to and form part of the land….[8]

54. In light of the above, I consider that changes to a roof are arguably an alteration to a building. Therefore, I am also of the view that the alterations are arguably 'building work', and on that basis, 'development'.

55. Therefore, I consider that the replacement of the tiled roof with corrugated steel arguably constituted development that required approval by the council.

Was development approval for the roof alterations given?

56. I consider that the council effectively approved the alterations, as is evident by the approved plans which state that the tiled roof would be replaced with:

> 'BASALT' COLOURED COLORBOND CUSTOM ORB ROOF SHEETING OR SIMILAR

57. Although the council submitted that the alterations to the roof could be treated as separate to the rest of the developments, it does not appear that the council treated the alterations as separate to the rest of the development.

58. It is also apparent that the council specifically turned its mind to the roof in its assessment of the development plans, as the council had discussions with their

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[8] *Billing v Peel* (1954) 1 QB 70, 75.

heritage advisor, Mr Richard Woods, who raised concerns about this aspect of the proposed development.

59. Due to the property being located within the Local Heritage Policy Area under the Development Plan, the application was informally referred to Mr Woods. Mr Woods advised the council by email dated 17 February 2017 that:

> While I support the proposal in principle, I have concerns with the following matters and request that a consultation with the applicant and drafter be arranged on my next visit:
>
> 1. Demolition of chimney
> 2. Front verandah
> 3. **Roof form** [my emphasis added]
> 4. External colours and materials.

60. Mr Jeremy Vaughan, Draftsman, provided a response to Mr Woods' concerns about the roof on behalf of the owners of the property by letter dated 20 March 2015 stating that:

> MAIN ROOF STYLE AND CONSTRUCTION
> *Richard suggested that the existing roof style with a hip and valley line to the South West corner of the residence could be retained by including a skillion roof line over the proposed WIR and Ensuite and also suggested the existing roof tiles be retained if possible.*
>
> [T]he owners considered these comments and have had pricing provided by the builder on the option of maintaining the tiled roof and repairing it together with installing tiles to the rear extensions as it is their wish to keep the extension the same construction as the existing building.
>
> This has proven cost prohibitive due to the extra roof structure required for the tiled roof and the extent of damage to the existing tiles and for this reason they will be continuing with the colorbond roof sheeting throughout existing and new residences and prefer WIR & ensuite to be the same ceiling height as the Bedroom so will also maintain the hip roof extension here.
>
> The colour for the colorbond roof will be 'Basalt'.[9]

61. In light of the above, I am of the view that the roof was considered in the council's assessment of the development plans, and approval for alterations to the roof was granted.

62. I must now consider whether the installation of a Zincalume® roof is consistent with the approved plans.

Was the installation of a Zincalume® roof consistent with the approved development plans?

63. The council has submitted that it considers that the installation of a Zincalume® roof was consistent with the development approval that was granted.

64. In support of that view, the council submitted that the owners of the property had not yet decided on final colour or finish of the roof at the time they sought development approval, hence the reference to 'or similar' in the approved plans, and that ultimately it considers that Zincalume® and Colorbond® are similar products.

65. It is necessary to note that although Mr Vaughan's letter dated 20 March 2015 above specifically refers to the use of Colorbond® roofing material, the approved plans dated 7 April 2015 do not state with certainty that this was the product that would be used.

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[9] Letter from Mr Jeremy Vaughan, dated 20 March 2015.

Therefore, I must consider whether it was reasonably open for the council to determine that Zincalume® and Colorbond® are similar products.

66. Whilst both products (Colorbond® and Zincalume®) clearly carry some differences, I am of the view that it was reasonably open for the council to take the view that they are sufficiently similar for the purpose of the approved plans.

67. There is significant commentary available online which considers the differences between Zincalume® and Colorbond®. These comparisons suggest that there are both similarities and differences between the two, with the most obvious difference being that Colourbond® is painted, whilst Zincalume® is not.[10] The most significant difference between the products is that Zincalume® is a highly reflective material, which is also the main concern raised by the complainant.

68. The council has submitted that the issue of reflectiveness is one that will decrease in severity over time, as Zincalume® has a tendency to dull. This is consistent with the complainant's own research of the product, as noted in her letter to the council dated 16 October 2015 which stated:

> …We have read and heard that depending on the type of metal it usually takes 3 to 4 years for the roof to weather and the glare to diminish. This is not an acceptable option for us.

69. Whilst the reflectiveness of Zincalume® is a significant difference to the Colorbond® product, I am mindful of the fact that it is not a permanent feature.

70. Overall, I consider that colour is a relatively minor dissimilarity, and that compared to other products such as tiles, bricks or wood, Zincalume® and Colorbond® could be considered similar in appearance and both are ultimately a type of metal roofing.

71. Therefore I am persuaded, on balance, that Zincalume® could be considered a 'similar' product, and that it was open for the council to determine that it was. As such, it is arguably open to view the alterations as authorised development.

Was it unreasonable for the council to not take action in regard to the installation of the Zincalume® roof?

72. As the alterations to the roof were arguably authorised development, the council has no obligation or power under the Development Act to require the owners of the property to make changes to it. On that basis, I consider that it was reasonably open to the council to take the approach that it did.

73. It is also necessary to note I do not have the power to cancel or vary a planning decision made by the council or direct the council to do so. The council cannot revisit a decision it has made, unless the decision has been referred back to it by the court in the course of legal proceedings.

74. That said, as noted in the council's letter dated 6 February 2017, the council took steps to assess the complainant's concerns about the property. Those steps included a kerbside inspection by Mr Wiseman, who also met with the owners of the property in order to discuss options for minimising glare, and a review of the council's development assessment.

75. In all of the circumstances, I do not consider that the council acted unreasonably by failing to require a change to the roof once it was added to the house.

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[10] http://www.theroofingprofessionalseastside.com.au/blog/difference-colorbond-zincalume/.

76. By way of comment, although I do not consider that the council's decision to not take action in regard to the installation of a reflective metal roof was unreasonable, I do consider that the council's actions in granting development approval for non-specified roofing material raises concerns. I query whether the lack of specificity in the approved plans would withstand judicial scrutiny.

Opinion

In light of the above, I do not consider that the council's failure to take action in regard to the installation of the reflective metal roof was unreasonable.

Therefore, I consider that 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.

Whether the council appropriately conducted an internal review

77. The complainant has also raised concerns with how her complaint was reviewed by the council.

78. I do not consider it necessary to set out the complainant's concerns in full, however, they can be summarised as follows:

- the council should have consulted with neighbouring property owners in order to seek their views on the proposed development
- the council failed to consider the principles of the Development Plan, Principles 7 in particular, when considering the development application
- the council has failed to consider and address the negative impacts that the installation of the roof has caused
- the council failed to attend her property in order to assess the impacts the installation of the roof has caused.

79. As noted above, the complainant submitted her initial complaint to the council on 16 October 2015. The council responded by letter dated 20 October 2015, however, the complainant was not satisfied by that response and requested a review.

80. Pursuant to section 270 of the Local Government Act, the council's principal officer, Mr McShane, reviewed the initial response to the complainant's concerns. Whilst he concluded that the council's initial response had been inadequate, he ultimately determined that there had been no error in the council's decision to not take any action in regard to the property.

81. In general, I am of the view that the council followed its Complaint/Compliment Policy (**the complaints policy**), which sets out general principles and aims for council staff to consider when reviewing complaints. I am also satisfied that the council followed its Internal Review of Council's Decisions Policy and Procedure (**the internal review policy**).

82. That said, it is necessary for me to consider each of the issues raised by the complainant, whether the council addressed that issue, and whether the way the council addressed that issue was reasonably open to the council.

Consultation

83. In his letter dated 11 November 2015, Mr McShane advised the complainant that:

> It should be further noted that the City of Mount Gambier Development Plan identifies Dwellings as a Category 1 form of development within the Residential Zone Schedule 9 of the Development Act[sic] also identified a detached dwelling and any alteration of, or addition to, a building so as to preserve the building or convert it to (a Detached Dwelling) as a category 1 Development.
>
> Section 38(3) of the Development Act specifies that "where a person applies for a consent in respect of the Development Plan for a Category 1 Development (a) the relevant authority must not, on its own initiative, seek the views of the owners or occupiers of adjacent or other land in relation to the granting or refusal of development plan consent."

84. I confirm that under the Development Plan[11] and the Development Regulations,[12] it appears that the property meets the criteria to be considered a Category 1 development. As such, I accept that the council was prohibited by the Development Act from seeking the views of neighbouring properties.[13]

85. Therefore, I consider the council's response to this aspect of the complainant's complaint was appropriate in the circumstances.

Consideration of the Development Plan

86. Although Mr McShane did not specifically refer to Principle 7 in his internal review of the complainant's complaint, he did state that:

> Based upon an assessment of the site conditions and application details Council did not anticipate any significant light or glare issues arising from the development and council not reasonably require any further information to be provided or consider such matters further.

87. The letter dated 10 April 2015 to the owners of the property also states that:

> …The approved development is considered not to be at serious variance with Council's Development Plan.

88. It appears the council did have regard to Principle 7 in its assessment against the Development Plan, and that the council determined that glare and reflectiveness were not in issue at the time. However, it appears that the council likely had a non-reflective material in mind when it considered Principle 7.

89. It is unfortunate that the wording of the approved plans effectively allowed for a reflective roofing material to be installed, however, for the reasons stated above in my report, I do not consider the council has an obligation or the power to address this.

90. Further, I do not consider the council's response to this issue was inadequate as the council sufficiently explained to the complainant that Principle 7 had been a relevant consideration in its assessment of the development application, despite the fact that the council did not appear to have a reflective material in mind when it did so.

91. As such, I consider the council's response in regard to Principle 7 was adequate as it explained that Principle 7 had been considered by the council, and the council could not provide any further practical solution to the complainant as it did not have the power to reconsider Development Plan Consent in relation to its decision to grant development approval.

Failure to consider and address the negative impacts of the roof

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11 City of Mount Gambier Development Plan consolidated 21 April 2016, RESIDENTIAL ZONE, page 83.
12 *Development Regulations 2008*, sch 9, part 1, clause 2(b).
13 *Development Act 1993*, section 38(3)(a).

92. The letter from Mr McShane to the complainant states:

> …
> - I am satisfied that the development assessment process associated with the subject works was sound based upon principles of development assessment.
>
> Council is not able to offer you any solution in relation to your stated concerns about the impact of your neighbour's extension on the enjoyment and use of your own property.

93. Although the council has not expressly stated the reasons why it could not offer any practical solution, I agree that the council did not have the power to take further action in order to address the complainant's concerns for the reasons I have set out below.

94. As the council submitted to my Office by letter dated 6 February 2017:

> …By the applicant's own closing paragraph in their letter requesting an internal review they were not seeking to (and could not) vary or revoke the development approval. The review was directed at the internal processes and letter of response received from Mr Daryl Sexton.

95. The development application was assessed by the council in accordance with the Development Act, the Regulations, and the Development Plan, and ultimately a decision was made to grant development approval against various legislative and policy criteria. As noted above, consultation with neighbouring property owners was not a relevant consideration for the property in question.

96. For the reasons set out above in my report, I do not consider that the council was required to take action against the owners of the property as the alterations were not unauthorised development.

97. Regardless, it appears the council considered the complainant's concerns about the enjoyment and use of their property, and attempted to find a possible solution to address those concerns. On that basis, I consider the council's response to the complainant's concerns was appropriate.

Failure to attend the property

98. In response to enquiries as to why the council did not attend the complainant's property in order to assess the effects of the neighbouring roof, the council submitted to my Office by letter dated 6 February 2017, that:

> …At the time of the internal review the complainant's partner/husband and co-owner of [the adjacent property], [the complainant's partner/husband] was an employee of the Council reporting ultimately to Mr Daryl Sexton (the subject of the internal review request). [The complainant's partner/husband] was the subject of work, health and safety assessment and review relating to several incidents of property damage that subsequently led to the cessation of his employment with Council in April 2016.
>
> My instructions at the time to officers assisting me with the internal review process (Mr Michael McCarthy and Mr Simon Wiseman) were to liaise with the adjoining owner of [the property] to identify and suggest any potential solutions to the alleged glare issue, and to avoid any direct engagement with either of the complainants (i.e. [the complainant's]).
>
> This necessarily prevented Council officers from inspecting the alleged glare issue from within the property and dwelling at [the adjacent property].
>
> I do not consider that an officer's attendance or otherwise at the complainants property to view and make a subjective assessment with respect to the alleged glare would have provided any valuable contribution or bearing on the internal review and outcome.

> By the applicant's own closing paragraph in their letter requesting an internal review they were not seeking to (and could not) vary or revoke the development approval. The review was directed at the internal processes and letter of response received from Mr Daryl Sexton.
>
> Taking into account all the relevant circumstances I consider the review process (including my instruction not to engage with the complainant/s) to have been entirely appropriate.

99. In addition to considering the council's response to my Office, I also note that the council advised the complainant in its internal review that:

> ….Subsequent to Mr Daryl Sextons[sic] response letter dated 20 October 2015 (and as a consequence of the resulting Internal Review conducted on that response) Simon Wiseman conducted a kerbside inspection of the property at [the property] on 12 November 2015 to again familiarise himself with the development in question and consider the impact on the adjacent property owned and occupied by [the complainant's].
>
> Simon Wiseman met with the owner of [the property] [the owner] on 13 November 2015 to discuss the issue that had been raised by their neighbours. [The owner] agreed to look into methods by which he could minimise any impact of the roof on his neighbours to the south.
>
> Simon Wisemen met with [the owner] again on the 3 February 2016 for an update on whether any actions could be taken. [The owner] suggested that without painting or removing the whole roof there was nothing more he could do. He also believed that the roof would fade and that it didn't affect the running of the business at the rear of the neighbouring property. [The owner] also suggested that the neighbours didn't get along.

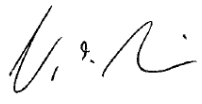
100. While it may have assisted the council's assessment of the complaint, I do not consider there was requirement for the council to attend the complainant's property in order to respond to her complaint.

101. As such, I consider that the actions taken by the council in reviewing its decision in relation to the development by reviewing the existing material, in addition to the kerbside inspection, was sufficient for the purpose of reviewing the complaint.

102. In light of the above, I do not consider that the council's assessment of the complainant's complaint was unlawful, unreasonable or wrong for the purpose of section 25(1) of the Ombudsman Act.

Opinion

In light of the above, I do not consider the council's actions in conducting an internal review of the complaint was unlawful, unreasonable or wrong within the meaning of section 25(1) of the Ombudsman Act.



Wayne Lines
SA OMBUDSMAN

16 November 2017