OmbudsmanSA

Final Report

Preliminary investigation - *Ombudsman Act 1972*

Complainant	**Mr Brian Blackburn and Ms Lyn Blackburn**
Agency	**City of Mitcham**
Ombudsman reference	**2015/04839**
Date complaint received	**22 June 2015**
Issues	**Whether the council unreasonably failed to take action in relation to non-compliance with an emergency order**

Jurisdiction

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

I note that under section 85 of the *Development Act 1993* (**the Development Act**) any person may apply to the Environment, Resources and Development Court for an order to remedy or restrain a breach of the Development Act. The council has also noted that the complainants have the option of privately prosecuting the offence in section 69(12) of the Development Act and seeking consequential orders under section 106 of the Development Act. In the circumstances, however, I do not consider it reasonable to expect that the complainants should resort to either of those remedies at this stage and on that basis have investigated the matter accordingly.

Investigation

My investigation has involved:

- assessing the information provided by the complainant
- seeking a response from agency
- considering the Ombudsman Act and the Development Act
- providing the complainant and the agency with my provisional report for comment, and considering their responses
- preparing this report.

Standard of proof

The standard of proof I have applied in my investigation and report is on the balance of probabilities. However, in determining whether that standard has been met, in accordance with the High Court's decision in *Briginshaw v Briginshaw* (1938) 60 CLR 336, I have considered the nature of the assertions made and the consequences if they were to be

upheld. That decision recognises that greater care is needed in considering the evidence in some cases.[1] It is best summed up in the decision as follows:

> The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding, are considerations which must affect the answer to the question whether the issue has been proved … .[2]

Response to my provisional report

1. The complainants responded to my provisional report:
   - inviting me to visit their property to gain 'first hand' knowledge of the magnitude of the problem
   - noting:
     - that there had been three landslips within 20 years
     - the continuing urgency and danger of further land collapses to their property within 10 – 20 years
     - that it was the council's inaction that forced the complainants to initiate the civil action within the court's timeframes
     - that the complainants are unable to construct a wall on the Logos property to return support to their land
     - with continuing expenses, the complainants may be forced to sell their property.
   - providing a copy of the geotechnical assessment by Aurechon commissioned by SA Water in April 2014.

2. The complainants also provided detailed comments on certain specific paragraphs of my provisional report. I have considered those comments and addressed them where appropriate in the body of this report. The complainants' comments include:
   - We are not asking Mitcham Council to undertake the responsibility and cost of constructing the required engineered retaining wall to return support to our property. We are asking them to enforce the order they made to place responsibility, and cost rightfully on the owner of [the Logos property], namely Logos/Ellina Christi, to return support to our land.

3. The council responded to my provisional report:
   - clarifying that the February 2011 order was not withdrawn 'as a result of the appeal' but rather upon receipt of legal advice which resulted in a fresh order being issued
   - noting its view that 'the civil action was and remains a relevant consideration in any complaint against the council that alleges it has unreasonably failed to take action'
   - noting that the complainants' submission on the Draft Business Plan was acknowledged and considered by council, and the outcome conveyed to the complainants in subsequent meetings
   - noting that the property valuation prepared for the complainants has not been provided to the council and therefore the council is unable to comment on any assumptions made in that valuation, the basis on which it has been prepared or its reasonableness
   - clarifying that the council accepts that the complainants have, in a technical sense, 'lost' the use and enjoyment of a small and limited area of land that is fenced, noting that the area is of a relatively steep grade and heavily vegetated and of limited recreational value because of its physical attributes

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

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

- clarifying that the council's statement relating to the rarity of a council exercising step in powers should not be interpreted as indicating a degree of inflexibility; while as a matter of fact, step in or intervention is rare, each matter is assessed on its own individual facts and circumstances
- noting that the Local Government Association Model Council Enforcement Policy refers to section 69 orders in paragraph 7.3.1 and the subsequent taking of action where there is default, and on that basis the considerations outlined in that policy are relevant to the current situation
- submitting that the council's actions remain lawful, reasonable and appropriate irrespective of any potential effect on the value of the complainants' property or whether or not they intend to sell it.

4. Having considered both parties' submissions, my view remains as set out in my provisional report.

Background

5. The complainants' property (**the complainants' property**) adjoins the rear of a property (**the Logos property**) currently owned by Logos Research Institute Pty Ltd (**Logos**) on which there is an unsupported vertical excavation (over four metres in height) created by a previous owner of the Logos property in 1991. According to the council, the upper excavation face comprises soil and the lower face comprises rock.

6. In 2010 a landslip occurred and entered the rear of the complainants' property. A substantial length of SA Water sewer pipe was exposed which was temporarily secured by ropes.

7. On 7 September 2010 the complainants contacted the council regarding the landslip. On 9 September 2010 council officers attended and took photographs of the site. On 10 September 2010 council staff and a consulting engineer met with Ms Ellina Christi, director of Logos, on the Logos property. Ms Christi was advised that the excavation was unsafe and that a compliance letter would follow and, if not obeyed, an emergency order pursuant to section 69 of the *Development Act 1993* (**the Development Act**) would be served on Logos.

8. On 16 September 2010 a compliance letter was sent to Logos requiring Logos to:
   - Provide adequate temporary barriers to prevent the public or surrounding land owners from entering into or near the excavation by no later than 27 September 2010
   - Provide a geotechnical assessment of the excavation by a professional engineer, which included a recommendation of suitable means to make safe the excavation and support the SA Water sewer infrastructure by no later than 18 October 2010.

9. According to the council, SA Water and United Water became involved at around this time and various options were considered for making repairs to the exposed sewer pipe. According to the complainants, SA Water and United Water (along with the council) were involved with the landslip right from the beginning. The council deferred taking further action at that stage on the basis that SA Water indicated that it might obtain an engineer's report. No engineer's report was provided to the council by SA Water at that stage.

10. On 3 February 2011 the council issued an emergency order to Logos (**the February 2011 order**). The February 2011 order required Logos to provide, among other things, adequate temporary barriers, the provision of adequate shoring of the face of the excavation, and, on completion, the provision of an engineer's certificate certifying the safety and stability of the excavation.

11. Logos appealed against the February 2011 order in the Environment Resources and Development Court (**the ERD Court**). The February 2011 order was ultimately withdrawn.

12. On 8 March 2011 the council issued a further emergency order to Logos (**the March 2011 order**) which required:
    - erection of a temporary barrier on the Logos property
    - erection of a temporary barrier on the complainants' property
    - making safe the excavation in accordance with the directions of a suitably qualified civil or structural engineer
    - providing certification from a suitably qualified civil or structural engineer confirming that the works have been undertaken to their satisfaction.

13. Logos appealed the March 2011 order. One of the grounds of appeal was that there was no emergency or threat to safety arising out of the condition of the excavation so as to validly invoke the operation of section 69 of the Development Act.

14. On 1 April 2011 the appeal was settled by consent and the ERD Court made consent orders accordingly (which varied the March 2011 order in relation to fencing requirements).

15. On 18 April 2011 council staff inspected the complainants' property and found that the required safety fence had been constructed in accordance with the March 2011 order (as amended by consent).

16. On 31 October 2011 the then solicitors for Logos provided the council with a report from Golder Associates (**the 2011 Golder Report**) for the purposes of certification as required by the March 2011 order. The Golder Report concluded that the rock face of the excavation was stable and that sliding had occurred in soil strength materials at the crest of that rock face.

17. The council took advice on the adequacy of the Golder Report. At the request of the complainants' lawyer, Mr Wayne Abbott, the council's lawyers liaised with Mr Abbott and provided him with a copy of the Golder Report. Mr Abbott provided the council with a copy of a report by TMK Engineers (**the TMK Report**) which concluded that the face of the excavation was unstable and unsafe.

18. The council sought further advice, including legal advice, in relation to the conflicting engineering reports. According to the council, the council's lawyers were instructed to keep the complainants' lawyer informed as and when appropriate.

19. In February 2012 the council's lawyers wrote to Logos' then lawyers advising that the council did not consider that the March 2011 order had been satisfied on the basis that the Golder Report was neither satisfactory nor correct. The complainants' lawyer was also advised at that time that the Golder Report did not satisfy the requirements of the March 2011 order.

20. In May 2012 the complainants' lawyer corresponded with the council's lawyers in relation to, among other things, the conflicting engineering reports and requested that the council take steps to enforce the March 2011 order.

21. On 13 July 2012 the complainants sent the council a further TMK report which highlighted costings of possible rectification works.

22. The council states that at this stage it:

> ..took legal and further engineering advice in relation to its options. The advice received recommended further investigations that would guide the Council as to its next steps. The Council was advised that any decision to prosecute should not be made until further investigations had occurred and the outcome of those investigations considered.

23. The council subsequently determined that it would commission its own engineering report. In November 2012 the council commissioned Coffey Geotechnics to undertake a geotechnical assessment of the excavation.

24. On 15 May 2013 Coffey provided its report to the council (**the Coffey Report**). The Coffey Report concluded that, in the absence of rectification works, further landslides in the next 10-20 years were likely to occur. The Coffey Report stated:

> Based on a preliminary assessment of the excavated slope and the review of photographs of land subsidence since construction, it is considered the process of erosion and weathering will continue to result in land subsidence of the excavated batter. To date land subsistence has occurred from approximately 10m3 extents, but typically less than 3m3 in extent. Based on the regularity of these events it is estimated that similar small scale instabilities at the crest of the batter will occur over time. To support the above assessment, the site has been classified with consideration of SGS 2007 qualitative risk assessment of likelihood and consequence, where by the:
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> - Likelihood of a landslide occurring is assigned to be almost certain (A). That is within the next 10 to 20 years an event is expected to occur that will result in; [sic]
> - The consequence to property of minor to medium extent (3 to 4). That is [sic] significant part of the site requiring large stabilization works and minor consequence damage; and
> - Thereby resulting in a high to very high landslide risk level for the project site.
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> …
>
> It is noted that a major extent of damage has already occurred at the site, as land subsidence led to the batter which started within 18 Hannaford Road Blackwood has progressed into the SA Water Easement and has recently extended/inclined into 9 Tester Drive. The potential for this to occur along the full length of 9 Tester drive [sic] is highly probable within a 10 to 20 year design life based on the land subsidence to date at the project site.
>
> While the timing and volume of an individual future land subsidence is unable to [sic] quantitatively predicted, land subsidence has occurred since construction of over-steep excavated batter geometry and therefore support the assessment that engineering support is required to stabilize the batter and mitigate future land subsidence events.
>
> RECOMMENDATIONS
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> With consideration of the previous land subsidence at the project site and the classification of landslide risk as per AGS 2007 the extent of land subsidence can be minimized by engineering controls. The following recommendations are suggested for the long term mitigation of land subsidence within the excavated batter slope:
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> - Covering the existing batter with an engineered reinforced wall.
> - Diverting and managing storm water drainage at the top of the slope.
> - Limit people access to the edge of the slope. Construction of stock retaining fence or upgrading the existing temporary fence should meet the intent of this recommendation.
>
> Without the recommended engineering controls the process of land subsidence will continue.

25. In June 2013 the council sought further legal advice on its options which included:
    - prosecuting Logos
    - undertaking the necessary work itself
    - issuing a further emergency order in light of the additional engineering advice.

26. The council states that a relevant consideration at this point was that ASIC had published notice of its intention to deregister Logos as a company. The council instructed its lawyers to ask ASIC not to deregister Logos while the March 2011 order was outstanding. That request was rejected. That said, according to the council, Logos would still appear to be a registered company, albeit one that is divesting itself of certain assets. The complainants have obtained a 'freezing order' on the assets of both Logos and Ms Christi to preserve the asset of the Logos property.

27. On 4 July 2013 the council issued an emergency order to Logos (**the July 2013 order**) requiring Logos to carry out the following works by 1 October 2013:

> (a) in accordance with a report procured by the Company and reasonably satisfactory to me (or some other person nominated by the Council who is an authorised officer who holds prescribed qualifications under Section 69(1a)) setting out such works in detail, fill-in the Excavation so as to return the slope of the Land in the area of the Excavation to a stable slope; OR
>
> (b) in accordance with a report procured by the Company and reasonably satisfactory to me (or some other person nominated by the Council who is an authorised officer who holds prescribed qualifications under Section 69(1a) setting out such works in detail, (i) cover the existing face of the Excavation with an engineered reinforced wall; and (ii) divert and manage storm water drainage at the top of the Excavation.

The July 2013 order is the subject of the current complaint.

28. On 4 July 2013 an emergency order was also issued to the complainants (**the order against the complainants**) requiring them to maintain and keep in reasonable repair the existing fence, including the warnings thereon, erected adjacent to the excavation. According to the complainants, they have complied with the emergency order but Logos has never complied with the July 2013 order.

29. In September 2013 the complainants' solicitors issued proceedings against Logos in the District Court seeking a mandatory injunction requiring Logos to construct a retaining wall (**the civil action**). The complainants have stated:

> These proceedings are based on our right to the support of our land and are entirely separate from and totally independent from any proceedings to enforce the Section 69 order.

30. According to the complainants, the proceedings were necessary only because the council would not undertake enforcement action and lodged due to 'time constraints'. (i.e. presumably court deadlines).

31. On 3 October 2013 Logos wrote to the council requesting that the July 2013 order be withdrawn. On 24 October 2013 the council's lawyers responded that the order would not be withdrawn and Logos was requested to comply with the order without further delay.

32. On 8 October 2013 the complainants' lawyer advised the council's lawyer of the civil action.

33. On 29 October 2013 council staff and the Mayor met with the complainants. The council advised the complainants at that meeting that the council was not intending to undertake further enforcement action as there was no immediate risk to person or property. The council told the complainants that it would review its position if the circumstances were to change or if it was provided with any further information.

34. On 30 October 2013, the council's lawyer wrote to the complainants' lawyer as follows:

> You have asked me to advise you as to whether my client intends to exercise its "step-in" powers under section 69(4) to itself carry out the works necessary to satisfy those requirements.
>
> I advise that my client has no present intention to do so.
>
> Of course, I cannot rule out a change of attitude in the future (for example, if the issue were to be revisited after the 2014 council elections). That said, I cannot foresee any change in the attitude of my client for at least the next six months.

According to the council, that letter was provided at the request of the complainants' lawyers 'to facilitate the Complainants' private civil action against Logos in the District Court.'

35. The council has told my investigation that it continued to cooperate with the complainants' lawyer to provide information to assist the complainants in their civil action. The complainants have described the assistance provided by the council as 'limited'.

36. In November 2013 the council's lawyers were advised that the civil trial which had been listed for hearing on 9 December 2013 had been adjourned to 7 April 2014. During that period, two mediation sessions were undertaken. According to the complainants, the council withdrew from mediation.

37. On 29 November 2013 the complainants' lawyer provided the council with a further report from TMK Consulting Engineers dated 28 November 2013 (**the TMK Report**) containing specifications of a retaining wall that the complainants sought to be constructed. On 4 December 2013 council staff and its lawyer met with the complainants' lawyer to provide feedback on the TMK Report.

38. On 28 February 2014 the complainants' lawyer provided the council's lawyers with a copy of a further report from Golder Associates (**the 2014 Golder Report**) commissioned by Logos which suggested that:
    - the rock face of the excavation was stable
    - drainage issues associated with the complainants' land had been responsible for causing two historical landslides
    - with effective stormwater and run off management on the complainants' property, there would be no justification for constructing large scale retaining walls.

39. On 12 March 2014 the council's lawyers advised the complainants' lawyer that:
    - the proposed work outlined in the 2014 Golder Report would not satisfy the requirements of the July 2013 order
    - if, however, the complainants and Logos were able to reach consensus as to the adequacy of the proposed work, or other works that would make the excavation safe for the foreseeable future, the council would consider varying the order.

40. A trial of the civil matter originally listed for 19 May 2014 was vacated due to issues with the court's timetable and subsequently relisted to commence in September 2014. According to the council, during this time members of council staff were made available to attend at trial if required by the complainants' lawyers.

41. On 15 September 2014 the complainants' lawyer advised the council's lawyers that the civil matter had been settled and that the terms of settlement required a retaining wall to be built by Logos in accordance with approvals which would be sought from the council and SA Water. The council has not yet received a proposed plan in relation to the retaining wall.

42. It appears that despite the purported settlement between Logos and the complainants in September 2014, Logos has not yet completed the agreed work and on that basis a trial date for the civil claim has been listed for January 2016 (with the possibility of the complainants' lawyers applying for summary judgment in the meantime).

43. According to the complainants, they have raised the council's failure to enforce the order with the council on numerous occasions including:
    - In May 2014 the complainants prepared a submission on the council's 2014/15 Draft Business Plan outlining the history of the September 2010 landslip and requesting that funds be made available to enforce the July 2013 order; while the complainants stated that they have not been informed of the outcome of that submission, the council stated that the submission was considered by the council on 10 June 2014 and that the Annual Business Plan was considered by the council and published, with the outcome being conveyed to the complainants in subsequent meetings
    - On 29 January 2015 the complainants attended a public forum and spoke with the Mayor, Mr Glenn Spear and other council members about enforcement of the July 2013 order, following that discussion up by email; as a result, Mayor Spear and Councillor Lindy Tauber inspected the complainants' property
    - On 11 May 2015 the complainants attended a Ward forum and asked what action would be taken to enforce compliance with the July 2013 order and by when; the council's response was that 'it was an operational matter with legal implications'
    - On 12 May 2015 the complainants emailed the Chief Executive Officer of the council, Mr Matthew Pears and later followed that email up with a letter seeking a response
    - On 3 June 2015 Mr Craig Harrison responded on behalf of Mr Pears as follows:

> The approach adopted by Council to date has been to require the property owners to inform any persons visiting the property of the potential risks associated with the earth embankment and to refrain from accessing and using the existing ½ tennis Court. This action has been Councils [sic] approach to ensure that the risks associated with the potential embankment collapsing further are appropriately managed. This approach has been adopted following careful consideration of the engineering advice received of the embankments[sic] stability and likelihood and timing of the embankment further collapsing. In the current circumstances this approach is considered to manage the likely risks to an acceptable level.
>
> A similar Notice has been placed on your property which requires you to have an open wire fence and signs displayed warning visitors to your property of the potential risks associated with the earth embankment to the rear of your property.
>
> Council has also requested that whilst these are actions being undertaken at this time, Council is prepared to review this position should the circumstances change.
>
> I advise that Council has no present intention to change its current approach.

44. The complainants have alleged that because of the council's failure to act, the order 'remains' on the complainants' land, thus devaluing their property by approximately $200,000. The complainants told my investigation:

> Devaluation of our property continues because the issue of return of support to our property remains a detriment to any potential purchaser. This cannot be solved until the adjoining owner is compelled to uphold their responsibility in this matter, which Council can enforce by upholding their order.

45. The complainants have provided my investigation with a property valuation prepared by a Certified Practising Valuer in support of that allegation.

46. Mr Harrison on (on behalf of the council) told my investigation:

> I have not been provided with a copy of the property valuation prepared for the complainants. I am therefore unable to comment as to any assumptions made, the basis upon which it has been prepared or as to its reasonableness.

Relevant law

47. Section 69 of the Development Act provides:

69—Emergency orders

(1) An authorised officer may make an emergency order under this section if the authorised officer is of the opinion that the order is necessary—

(a) because of a threat to safety arising out of the condition or use of a building or an excavation; or

(b) because of a threat to any State heritage place or local heritage place.

(1a) However, the power conferred by subsection (1)(a) may only be exercised by an authorised officer who holds prescribed qualifications.

(2) An emergency order may require the owner of any building or land to do any one or more of the following things:

(a) evacuate the building or land;

(b) not to conduct or not to allow the conduct of a specified activity or immediately terminate a specified activity;

(c) carry out building work or other work.

(3) An emergency order may also prohibit the occupation of a building or land or the use of a building or land for a specified activity, or an activity of a specified class.

(4) If an owner fails to carry out work as required by an emergency order, the council may cause the necessary work to be carried out.

(5) The reasonable costs and expenses incurred by the council (or any person acting on behalf of the council) under this section may be recovered by the council as a debt due from the owner.

(6) Where an amount is recoverable from a person by the council under this section—

(a) the council may, by notice in writing to the person, fix a period, being not less than 28 days from the date of the notice, within which the amount must be paid by the person, and, if the amount is not paid by the person within that period, the person is liable to pay interest charged at the prescribed rate on the amount unpaid; and

(b) the amount together with any interest charge so payable is until paid a charge in favour of the council on any land owned by the person.

(7) On completion of any work required to be carried out by an emergency order, the owner must notify the authorised officer in writing.

Penalty: Division 7 fine.

(8) An order under this section must be given in writing unless the authorised officer considers that urgent action is required, in which case it may be given orally.

(9) If the direction is given orally under subsection (8), the authorised officer who gave the direction must confirm the direction by notice in writing by 5 p.m. on the next business day.

(10) An appeal against an order under this section must be commenced within 14 days after the order is given to the appellant unless the Court allows a longer time for the commencement of the appeal.

(11) Subject to an order of the Court to the contrary, the operation of an order under this section is not suspended pending the determination of an appeal.

(12) A person who contravenes or fails to comply with an order under this section is guilty of an offence.

Penalty: Division 4 fine.

Default penalty: $200.

(13) It is a defence to a prosecution under subsection (12) if the defendant satisfies the court that he or she was unaware of the fact that an activity in respect of which the offence arose was the subject of an order under this section.

(14) In this section–

building includes a building in the course of construction;

excavation includes a well or hole.

Whether the council unreasonably failed to take action in relation to non-compliance with an emergency order

48. It is important to note at the outset that the purpose of a section 69 order is to address urgent threats to safety. The purpose of a section 69 order is not to address loss of amenity or value to land per se.

49. The complainants and the council appear to have differing views of the urgency of the risk of further landslips at the complainants' property. It is not my role to adjudicate on which view is to be preferred. Instead, my investigation is limited to the council's administrative processes. In my view, the most pertinent question at this stage is whether the council's decision to hold off on enforcement action was reasonably open to the council in all of the circumstances.

50. I am also mindful that the complaint could be read as suggesting that it is only the council who can remedy the issue on the complainants' behalf and address the devaluation of their land. I do not consider that to be the case. It is clear that the complainants have always had, for example, the option of pursuing Logos by way of civil action (as they have done, and that matter is yet to be resolved).

51. The council made the following points in its response to this allegation:
- it is extremely rare for a council to exercise step in powers in relation to an emergency order
- the excavated slope is not in an area accessible to the public
- while the issue is understandably of concern to the complainants, no injury or damage has occurred to date, there is no risk to the public and any further slipping of materials onto the tennis court at the present time would appear to present a low risk of damage to property or person
- the council's engineering advice is that while there is a likelihood of further future landslide occurring, minor consequential damage is anticipated and it is estimated that it will not occur for some 10 to 20 years
- the extent of remedial work required to address the future risk is a subject of dispute between the engineers involved.

52. The council stated:

> The Council has adopted the position that,[sic] the situation is stabilised such that there is no immediate threat. Given the difference in expert opinions as to the work required, the ongoing and unresolved civil proceedings, the absence of any public risk and the cost of exercising step in rights, the Council is of the view that it has acted reasonably in declining at the present time to exercise its step in power or otherwise to take further enforcement action. It has advised the Complainants and their lawyer that it would review this position in the event that circumstances were to change.

53. The complainants disputed the council's assertion that the excavated slope is not in an area accessible to the public, noting that their property is not fenced or gated from the street and that there was a previous incident of a lost and disorientated person finding their way to the back of their property.

54. The complainants also noted that the Coffey report does not say that damage will not occur for 10 or 20 years, instead that it will occur within 10 or 20 years. I accept the complainants' interpretation of the Coffey report in that regard.

55. The council has clarified in response to my provisional report that it accepts that the complainants have lost use and enjoyment of the rear of what it describes as 'a small and limited area of the rear of their land that is fenced.' The council has noted that the area is of a relatively steep grade and is heavily vegetated. The council stated:

> The point that was being made in the Council's original submission was not that there had been no loss of the use and enjoyment of any part of the complainants land, but rather that that part of their land which had been fenced off was relatively small and of limited recreational value because of its physical attributes.

56. According to the complainants, they have lost up to 6 metres (or 129 square metres) of unrestricted use of their entire back yard. The complainants also dispute that the area is heavily vegetated. While I accept that there has been some loss of use of the complainants' yard, I do not think that much turns on that issue for the purposes of my investigation. As noted, the purpose of an emergency order is to address safety issues rather than loss of amenity.

57. For the purposes of clarification, I understand that neither emergency order is registered on the certificates of title for either the complainants' property nor Logos' property (and I note that there is no power in the Development Act to do so). That said, the existence of an order applying to a subject property needs to be disclosed by a vendor when that property is sold, along with details of whether that order will be discharged or satisfied prior to or at settlement. Presumably the only order that would be disclosed if the complainants sold their property would be the order against the complainants (which has apparently been complied with).

58. The complainants' view is that the unstable, unretained excavation with a gap under their rear fence would be sufficient to dissuade any prospective buyer.

59. The council has indicated that it is unable to comment as to whether, and if so to what extent the complainants' land may be devalued. The complainants noted in response to my provisional report, however, that an objection regarding the capital value of their property was lodged with the Valuer General's Office on 17 September 2014. On inspection of the complainants' property by representatives of the Valuer General's Office, the valuation was reviewed and the capital value reduced from $510,000 to $310,000. According to the complainants, the council has accepted that devaluation and adjusted their rates accordingly.

60. While I make no finding as to the extent of any devaluation, I accept generally that the value of the complainants' property has been affected by the fact that Logos has not complied with the emergency order in relation to the Logos property. That said, I do not accept that the council 'caused' the devaluation of the complainants' property. I also reiterate that the purpose of an emergency order is to address safety issues rather than value of property per se.

61. In my provisional report, I noted a number of concerns, which I address below.

62. As a general proposition, in my view, if a council determines that there are reasonable grounds for issuing an emergency order in the first place, the council should be prepared to take reasonable steps to secure compliance with that order in the event of non-compliance.

63. In my provisional report, I noted with concern the council's assertion that it is 'extremely rare' for a council to exercise its step in powers in relation to an emergency order. While I acknowledged that it may not have been the council's intention, in my view that statement could have been interpreted as indicating a degree of inflexibility on the council's part. That said, I also noted that the council indicated that it would be willing to review its position if the circumstances changed.

64. The council responded that the council's statement should not be interpreted as indicating a degree of inflexibility and that each matter is assessed on its facts and circumstances. Instead, the council's point was that, as a matter of fact, 'step in' or other intervention is rare, particularly so where such intervention would require substantial work and significant expenses in circumstances where the general public was not at risk. I accept the council's response in that regard.

65. I also noted with concern in my provisional report that the council did not have any formal policies or guidelines in place in relation to issuing of emergency orders and the taking of enforcement action. The council has referred to the Local Government Association Model Council Enforcement Policy (**the LGA Policy**),[3] which largely relates to prosecution. That said, clause 7.3.2 of the policy provides:

> **7.1.1 Action in Regard to a Default**
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> Failure to comply with Orders or Directions will incur further enforcement action such as launch of a prosecution.
>
> Where action in regard to a default is provided for by the Act and the necessary work has not been carried out in the time allowed without good reason (for example, section 56 of the Act), Council may undertake the required work. Before doing the work Council will consider whether there is a realistic prospect that the person responsible will complete the work within a reasonable time. Where work in default is undertaken Council will seek to recover all costs over a fair period, using all statutory means available.
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> The decision to carry out action in default will be made by the Chief Executive Officer or delegate.
>
> Where an offence has been committed Council may issue an Expiation Notice or launch a prosecution in addition to taking action to fulfil an Order or Direction. This will only be done where the conduct of the recipient justifies taking such steps. Factors such as giving false information, the obstruction of Council staff and the harm or risk of harm caused by the recipient's delay will be considered in determining additional enforcement actions.

66. While I accept that the LGA Policy is relevant, I consider that it is of limited assistance in the present case.

67. I further note that the council is aware that there is a risk of further landslip within the next 10-20 years, albeit one with relatively minor consequences.

68. Having noted those concerns, on balance, when all of the circumstances are considered, it was in my view reasonably open to the council to take the approach that it has taken to this point.

[3] Model Council Enforcement Policy – Unlawful Development – June 2015

69. While this investigation is focused on the July 2013 order, I consider that the significant amount of work that the council undertook in relation to the March 2011 order (for example, seeking advice on the Golder and TMK reports and issuing the Coffey report) and the complex court history is relevant in understanding the council's approach to the July 2013 order.

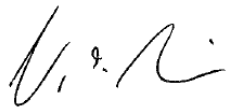
70. I acknowledge the complainants' assertion that the civil action was 'totally independent from any proceedings to enforce the section 69 order'. While that may be true in a strict legal sense, I do not consider that it was unreasonable of the council in all of the circumstances to await the outcome of the civil action before taking any action itself. I do not consider that the council can ultimately be held responsible for the delays in reaching and implementing a resolution of the civil action. I also note that the council has provided the complainants with a degree of assistance in the civil action.

71. That said, my view on that issue may have been different if there was any evidence of an immediate threat to safety. I accept that the council had a reasonable basis (particularly in light of the Coffey report) for determining that there was no such immediate threat. Further, while the potential effect on the value of the complainants' property is of concern, there is no suggestion that the complainants intend to sell the property in the immediate future (i.e. before the civil trial in January 2016). Also, it is relevant that the purpose of an emergency order is to address safety issues rather than issues of amenity or property value. In my view, it was reasonably open to the council to take the view that the immediate safety issues had been addressed.

72. On balance, in all of the circumstances, I do not consider that the council's actions amount to administrative error for the purposes of the Ombudsman Act.

Conclusion

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



Wayne Lines
SA OMBUDSMAN

3 November 2015