OmbudsmanSA

Redacted Report

Full investigation pursuant to referral under section 24(2)(a) of the *Independent Commissioner Against Corruption Act 2012*

Public Authority	District Council of Coober Pedy (the council)
Ombudsman reference	2017/12277
ICAC reference	2018/001315
Date of referral	28 November 2017
Issues	1. Whether the District Council of Coober Pedy has committed maladministration in public administration by incorrectly applying differential rating to properties 2. Whether the District Council of Coober Pedy has committed maladministration in public administration by incorrectly applying its sewerage rate 3. Whether the District Council of Coober Pedy has committed maladministration in public administration by failing to comply with the provisions of the *Development Act 1993* 4. Whether the District Council of Coober Pedy has committed maladministration in public administration by approving a grant of $80,000 to the Coober Pedy Miners Association 5. Whether the District Council of Coober Pedy has committed maladministration in public administration by approving expenditure of $20,000 for an opal symposium

Jurisdiction

This matter was referred to the Ombudsman by the Commissioner pursuant to section 24(2)(a) of the *Independent Commissioner Against Corruption Act 2012* (**the ICAC Act**), as raising potential issues of maladministration within the meaning of that Act (**the referral**).

Section 14B of the *Ombudsman Act 1972* provides:

> **14B—Referral of matter by OPI or ICAC**

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

(1) If a matter is referred to the Ombudsman under the ICAC Act, the matter—
(a) will be taken to relate to administrative acts for the purposes of this Act; and
(b) must be dealt with under this Act as if a complaint had been made under this Act and—
(i) if the matter was the subject of a complaint or report under the ICAC Act —as if the person who made the complaint or report under that Act was the Complainant under this Act; or
(ii) if the matter was assessed under that Act after being identified by the Commissioner acting on the Commissioner's own initiative or by the Commissioner or the Office in the course of performing functions under any Act—as if the Commissioner was the complainant under this Act.

(2) In this section—

Commissioner means the person holding or acting in the office of the Independent Commissioner Against Corruption under the ICAC Act;

ICAC Act means Independent Commissioner Against Corruption Act 2012;

Office means the Office for Public Integrity under the ICAC Act.

The referral gives rise to five issues. The complainant who reported the issues to the Commissioner is a concerned resident who does not wish to be identified.

The first issue relates to the council allegedly applying its differential rating system to properties incorrectly.

The second issue relates to the council allegedly applying its sewerage rate to properties incorrectly.

The third issue relates to the council allegedly failing to comply with the *Development Act 1993* as it had adopted the position that short term bed and breakfast accommodation did not require development approval.

The fourth issue relates to the council allegedly approving a grant of $80,000 to the Coober Pedy Miners Association.

The fifth issue relates to the council allegedly approving expenditure of $20,000 for an opal symposium.

In addition to considering whether the council has committed maladministration within the meaning of the ICAC Act, I have also considered whether the council has acted in a way that is unreasonable, unlawful or wrong within the meaning of section 25 of the *Ombudsman Act 1972.* In this regard, I have conducted an investigation on my own initiative pursuant to section 13(2) of the Ombudsman Act.

Investigation

My investigation has involved:

- assessing the information provided by the complainant
- meeting the complainant
- seeking a number of responses from the council
- seeking more particulars from the complainant
- considering the *Development Act 1993*
- considered the *Development Regulations 2008*
- considering the *Local Government Act 1999*
- considering the *Local Government (General) Regulations 2013*

- considering the Building Code of Australia
- considering the council's Strategic Management Plan 2013-2018
- providing the council and the complainant with my provisional report for comment, and considering their responses
- preparing this report.

Standard of proof

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

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

Response to my provisional report

The complainant did not provide any submissions in response to my provisional report.

The council responded to my provisional report by way of email on 6 November 2018. The council indicated it had no submissions to make regarding issues one, two, four and five.

In response to issue three, pertaining to whether the council had failed to comply with the *Development Act 1993*, the council provided lengthy submissions, some of which I will address here.

The council submitted:

> I do not wish to comment on the report other than that relating to the development Plan and Building Code interpretation…You will note that the interpretation put on this matter is one that requires considerable independent judgement of both parcels of law and your interpretation is but one opinion.
>
> As indicated the legal interpretation [of] this area of law requires a more definitive clarification than I believe you are putting on it and if necessary a law change to clarify this matter…
>
> It is claimed Council allegedly failed to comply with the Development Act 1993 as it had adopted the position that short term bed and breakfast accommodation did not require development approval.
>
> Firstly it is appropriate to highlight the fact that the description in the Development Act, regulations and Building Code of Australia relating to land and building use are subject to varying interpretations.
>
> Please take note that the opinion whether Development Plan Consent is required or not was also based on the opinion of numerous Councils. In my business as a Private Certifier[3] I have received numerous applications for accommodation of existing dwellings for no more than 5 persons and the Councils have stated that Development Plan Consent is not required…

---

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.

3 Whilst the council's response is purportedly the response of the Chief Executive Officer, Mr Pittman, it appears that the substance of the response was drafted by the council's contracted building surveyor, Mr Grant Riches.

I comment that this submission appears misguided. In my provisional report, I did not express the view that Development Plan Consent was required for bed and breakfast dwellings of 1-5 persons. Rather, I expressed the view that Development Plan Consent would appear to be required for bed and breakfast dwellings of 6 or more persons, as this would meet the definition of a 'motel'.

The council also submitted:

> With regard to the report to Council 16 May 2017, that decision relates to accommodation of up to 5 persons only. That determination relates to the land use and not the building rules as they vary.

I do not accept the submission that the report related only to land use. The report, which is included later in this report, clearly provides advice on both Development Consent and Building Rules Consent.

I also do not accept the submission that the report relates only to accommodation of up to five persons. I note that the recommendation at the conclusion of the report is termed:

> The buildings used for short term accommodation for travellers as described within this report are not deemed to be development therefore an application for Development Approval is not required.[4]

The report does not define or qualify what it means by 'the buildings used for short term accommodation' and certainly does not limit itself to a discussion of five travellers or fewer.

The council submitted:

> Please take note that an application for a change of land use is firstly to be determined as development needing approval and then if it does to be considered against the relevant Development Plan Zone.
>
> For example in the District Council of Coober Pedy Development Plan the Residential Zone recognises the potential use for residential purposes and other forms of tourist accommodation. Motels and Multiple Dwellings are non-complying. Also the Residential Underground Zone does not prescribe a Motel and Multiple Dwellings are not non-complying.

The purpose of this submission is unclear. I acknowledge that applications for development approval must be assessed against the relevant Development Plan. It is a matter for the council to determine whether a particular development application should be approved.

The council's submissions include a lengthy extract from the Victorian case of *Genco*.[5] The council has not provided submissions applying *Genco* to the particular locations which my investigation has considered, nor contrasting *Genco* with the South Australian judicial authorities which I have referred to in this report. I do not consider that the extracts provided by the council assist me in my consideration, noting that the legislative scheme in Victoria differs from the legislative scheme in South Australia.

The council also submitted:

> It is my opinion that the various classification descriptions can be interpreted differently. The period of stay does not have any relevance on the classification as long as the use of the building is akin to the occupancy.

---

4 My emphasis.

5 *Genco & Anor v Salter & Anor* [2013] VSCA 365, paragraphs [24], [100]-[112], [127], [137]-[142].

> Furthermore the building classification is a separate matter from the development plan land uses, which creates further discrepancies.
>
> Ultimately the classification is to be determined by the Building Surveyor.
>
> In conclusion your comments are acknowledged however I do not believe this matter can be resolved unless the legislation is amended providing clarity. Furthermore I believe the interpreted[sic] applied by this Council is correct…
>
> Accordingly it is recommended your Office seek changes to the legislation as differing interpretations appear to be applied by Council officers, lawyers, judges, Board and yourself.

With respect, I am unable to accept this submission. It is fundamentally untrue to state that the classification is to be determined by 'the Building Surveyor'. The classification of a development is to be determined by the relevant planning authority, which in most cases will be a Development Assessment Panel or a Planning Officer acting under delegation. I acknowledge that previously, the council engaged Mr Riches, a building surveyor, as an external contractor instead of employing a Planning Officer. As discussed later in this report, the council has now appointed an Assessment Manager and a Development Assessment Panel.

Given the *Development Act 1993* and the *Development Regulations 2008* will soon be repealed and replaced by the *Planning, Development and Infrastructure Act 2016*, I do not consider that I should make recommendations to the current government that the legislative scheme be changed. Whilst I acknowledge that Mr Riches' opinion differs from my own, I am unpersuaded by his submission.

I have further considered the council's submissions, where relevant, in the body of this report.

Background and evidence obtained in my investigation

Differential rating

1. The complainant alleges that differential rating has been incorrectly or inappropriately applied to properties within the council area.

2. Section 156 of the *Local Government Act 1999* provides that the council may determine the land use of each property within the council area for differential rating purposes.

3. The council currently applies differential rates for different land uses on the basis that the council has determined that commercial and industrial land ratepayers use a larger proportion of the council's funds compared to residential land ratepayers.[6]

4. The complainant alleges that differential rates are being wrongly applied to many properties on the basis of incorrect land use categories. In particular, the complainant alleges that some commercial properties are being incorrectly rated as Residential, resulting in significantly lower rates being charged.

5. The complainant states that the difference between the rates payable for residential or commercial properties is significant, as the differential general rate for commercial properties is over three times higher than residential properties. The complainant states that the designation of land use categories also affects the power and water supply charges levied against a property.

6. The complainant alleges that homes which are also used as opal businesses are not being categorised consistently by the council. The complainant alleges that the land at

[6] District Council of Coober Pedy Annual Business Plan 2016/2017.

[Business A], is rated as Residential. The complainant alleges that the property [Business A] contains two opal businesses, [Business B] and[Business C]. The complainant alleges that the property is also used as a residence but that the predominant use of the land is a commercial use.

7. By way of contrast, the complainant illustrates that a number of other apparently similar home businesses are rated as Commercial, such as [Business D], '[Business E] and [Business F]. The complainant alleges that there is no obvious reason for the properties to be rated differently.

8. In response to enquiries, the council stated:

> The Council determines whether properties which contain both a residence and a business selling opals should be classified as residential or commercial is (sic) based on the Supplementary Valuation Report which consist of Land Use Code and Local Government Code (please see attached).

9. The Land Use Code is dated 1 July 2015 and was prepared by the State Valuation Office. The Land Use Code relevantly provides:

> **Introduction**
>
> Each property is coded according to actual use. Where a number of activities are carried out on the one property the main activity is coded. For example, a garage operated by a retail store for the purpose of servicing its vehicles…such ancillary activities are regarded as part of the establishment and classified accordingly, i.e. retail store…
>
> **Local Government Codes (LGC)**
>
> Under the **Local Government Act, 1999,** a Council may declare differential general rates on rateable land (Sec 156). Differential rates may vary, amongst other things, according to the use of the land (Sec 156(1)). Section 156(4) states "A particular land use must not be used as a differentiating factor affecting the incidence of differential rates unless the land use is declared by the regulations to be a permissible differentiating factor".

10. The Land Use Code prescribes that a home industry where the owner resides in the property will be classified as Residential. This includes the following sub-categories:

> 1111 House & Office
> 1112 House & Surgery
> 1113 House with Manufacturing & Service Industry
> 1114 House & Holiday Cabin
> 1115 House & Flat
> 1117 House with single Bed & Breakfast
> 1118 House with unestablished grounds/gardens
> 1119 Unfinished house

11. In response to enquiries about [Business A], the council stated:

> According to the State Valuation Office Land Use Code, [Business A] has the Land Use Code listed as description – 1110 Home industry where owner resides in the property. The Local Government Code being Residential (1).

12. In response to enquiries about [Business D], [Business E] and [Business F], the council has indicated that:
    - [Business D] is a home business and, whilst it was previously rated as a Commercial shop, it should be rated as Residential under the Local Government Code. This error has been corrected in 2017/2018 financial year rates

- [Business E] and [Business F] are not home businesses and will continue to be rated as Commercial Shops.

13. The complainant alleges that a large number of properties being used as tourist accommodation are also being incorrectly rated as Residential instead of Commercial.

14. The complainant highlighted the following examples:
    - [Business G] has capacity for 15 beds across five rooms, has an independent website, and the predominant use of the land is commercial rather than a residence for the owners
    - [Business H] has capacity for eight guests in three different suites, has an independent website, is operated and advertised as a bed and breakfast accommodation facility, and the predominant use of the land is commercial
    - [Business I] has capacity for nine guests, has an independent website, and the predominant use of the land is commercial
    - [Business J] has capacity for 15 guests, has an independent website, is advertised as a bed and breakfast facility, is listed in a council-produced accommodation guide, and the predominant use of the land is commercial.

15. The complainant alleges that the above examples are all incorrectly categorised, and therefore rated, as residential.

16. In response to enquiries about whether bed and breakfast facilities are classified as residential or commercial, the council indicated that it relies upon the Land Use Code. The council provided the following table, outlining the land use classifications of six different bed and breakfast establishments.

Names	Land Use Code	Description	LGC
[Business G]	1117	House with single Bed & Breakfast	1 Residential
[Business H]	1101	House and Granny Flat	1 Residential
[Business I]	1833	Short Term Accommodation – Single Unit	1 Residential
[Business J]	1100	House	1 Residential
[Business K]	1117	House with single Bed & Breakfast	1 Residential
[Business L]	1115	House and Flat	1 Residential

17. The Land Use Code classifies ‘house and flat’ and ‘house with single bed and breakfast’ as sub-types of ‘home industry where owner resides in property’.

18. The Land Use Code classifies ‘hotel and motel’ broadly as LGC 4 Commercial. However, a number of sub-types are listed. ‘Short term accommodation – single unit’ is listed as LGC 1 Residential. ‘Short term accommodation – multiple units’ is listed as LGC 4 Commercial.

19. The complainant alleges that the land at [Business M] is incorrectly rated as vacant land instead of Commercial. The complainant alleges that the owner was granted development approval to build a [x metre] structure in 2014, which was completed in early 2016. The complainant alleges that the land was still rated as vacant land in the 2016/2017 financial year.

20. In response to enquiries, the council acknowledged that the land at [Business M] had previously been incorrectly classified as vacant land. The council confirmed that this error has been corrected and the land use is now recorded as Commercial.

Sewerage rate

21. The complainant alleges that charges for the council's sewerage scheme are being incorrectly or inappropriately applied to properties within the council area.

22. The complainant states that the council operates a waste water service, which purportedly applies to a geographical area identified as the Sewerage Scheme Area. The complainant alleges that all properties within the Sewerage Scheme Area that are either connected, or able to be connected, are required to pay a service charge.

23. The complainant alleges that the extent of the sewerage infrastructure, and the areas it services, are unclear. The complainant alleges that the plans for the sewerage infrastructure are rudimentary, inaccurate and unprofessional.

24. The complainant highlights the following examples of alleged inconsistency:
    - the property at [Business N] is shown in the 2016/2017 assessments to be paying effluent rates. However, the plans of the effluent system, obtained by the complainant through the Freedom of Information process, do not show this property as being even close to the sewerage line. This property is also not identified as being within the Sewerage Scheme Area for either the 2016/2017 budget or the 2017/2018 budget
    - the [Business O] is within the Sewerage Scheme Area and is connected to the scheme, but has not been paying the effluent charges
    - the property at [Business M] is within the Sewerage Scheme Area, but has not been paying any effluent charges

25. More generally, the complainant submits that in the council's annual budget, the council lists by allotment number the properties which come within the Sewerage Scheme Area. The complainant submits that not all of the properties listed are being charged the separate rate.

26. In response to enquiries, the council indicated that because sewerage access is made available, the Council is permitted to charge the separate rate, regardless of whether the land is actually connected to the sewerage scheme or not.

27. The council indicated that the property at [Business N] is connected to the sewerage scheme and has been paying the effluent rates on time. The council further clarified:

> [Business N] is not listed in the above properties [listed by allotment number] that are on the Sewerage Scheme, since the lots numbers were amalgamated in 2011 it has been charged an Effluent Rate because the new allotment can be connected.

28. The council indicated that the [Business O] is connected to the sewerage scheme and has been paying the effluent rates on time.

29. The council initially indicated that the property at [Business M] was not connected to the sewerage scheme and therefore no sewerage rate was being charged. The council further clarified that it has not been listed by allotment number as a property that is part of the sewerage scheme.

30. It appears that the remit of the sewerage scheme was originally defined based on a geographical area. However, it appears that the properties now connected to the

sewerage scheme are described by lot number, rather than by reference to the original plan.

31. The council has indicated:

> The sewerage system was constructed progressively anecdotally in 1996. No accurate records were kept.
>
> The sewerage scheme area is defined on the attached plan and it is my understanding that these are the allotments that can be connected to the scheme at a[n] Inspection Pit at the boundary of the properties. A detailed survey was recently undertaken and the existing system infrastructure identified. The properties depicted on the plan are those capable of being connected and in the sewerage area…
>
> At the last rate setting the council listed individually the rateable properties intended to be rated. Recently a detailed survey of all sewers and connections and inspection point locations has been recorded. The intent is to review that survey and set a rate for all properties that may be connected.

Development issues

32. The complainant alleges that the council has failed to comply with the provisions of the *Development Act 1993* in relation to tourist accommodation.

33. The complainant alleges that the council has formally adopted the position that bed and breakfast, or short term accommodation, does not require development approval. The complaint alleges that this position is wrong at law.

34. The complainant alleges that the use of a property as a bed and breakfast accommodation facility is a change of use which requires approval under the *Development Act 1993*.

35. The complainant also alleges that a bed and breakfast facility that provides accommodation for more than five travellers is a 'motel' for the purpose of the *Development Regulations 2008*. The complainant relies upon the Environment, Resources and Development Court judgement of *Pohl & Ors v Adelaide Hills Council & Anor* (No 1) [2009] SAERDC 44 (***Pohl***) in support of this allegation.

36. At a meeting of the council on 16 May 2017 the following resolution was passed:

> The buildings used for short term accommodation for travellers as described in this report are not deemed to be development therefore an application for Development Approval is not required.

37. The complainant alleges that the resolution produces a result that is wrong at law. The complainant also submits:

> The issue is not simply one of paperwork. Tourist accommodation often requires different standards under the Building Code of Australia, including greater fire safety standards. In the Coober Pedy context, the excavation of dugouts requires an appropriate level of geotechnical investigation, often required as a condition of approval.
>
> A collapse within a dugout used for tourist accommodation would have particularly serious consequences for the tourism industry in Coober Pedy, with underground accommodation a particular attraction.
>
> It appears that a number of tourist accommodation operations do not have any approval. Consequently there are legitimate concerns that the accommodation does not have the requisite level of safety…

> The Council appears not only to be failing to require those operators to comply with the *Development Act* but the Council has actively promoted unlawful tourist accommodation operators on its website and other mediums…
>
> Given the Council's tacit consent to some of these unauthorised activities, it may well have some liability where buildings are used for tourist accommodation without meeting the relevant Building Code standards.
>
> In addition to the potential safety issues, the failure to require appropriate approvals for tourist accommodation does not provide a 'level playing field' between tourist accommodation providers.
>
> Further the failure to require appropriate approvals results in a further loss of revenue in the form of development application and assessment fees and has flow on effects of rating and the receipt of revenue.

38. The report referred to in the council meeting of 16 May 2017 is titled 'Short Term Accommodation for Travellers' and was completed by Mr Grant Riches, the council's building consultant. The report relevantly states:

> In recent months Council and I have received several enquiries regarding the requirements under the Development Act for people wishing to use their dwellings for short term accommodation by travellers.
>
> As members of Council may be aware I have, in the past, required an application for Development Approval being lodged.
>
> I have issued Development Plan Consents and Building Rules Consents however now that these enquiries have been made I have looked at the legislation in more detail.
>
> With regard to the Development Act there are two specific consents I need to take into account:
>
> - Development Plan Consent
> - Building Rules Consent
>
> **Development Plan Consent**
>
> …
>
> A Development Plan Consent is primarily development being a change in the use of land.
>
> There are numerous land use descriptions contained in Schedule 1 of the Development Regulations.
>
> Numerous forms of dwellings are defined such as detached dwellings, row dwellings, group dwellings, etc.
>
> Bed and breakfast is not a defined use.
>
> Multiple dwellings means 1 dwelling occupied by more than 5 persons who live independently of one another and share common facilities within that dwelling.
>
> Motel means a building or group of buildings providing temporary accommodation for more than 5 travellers, and includes an associated restaurant facility, but does not include a hotel or residential flat building.
>
> A motel would normally include a reception with ensuites.
>
> A Bed and Breakfast, short term accommodation subject of this report and the type being offered in Coober Pedy would normally be a family or people travelling together, therefore not living independently of each other.

A dwelling is defined as a building or part of a building used as a self-contained residence.

On perusal of the relevant criteria pertaining to the use of dwellings and enquiries with other councils there is no change of land use therefore Development Plan Consent is not required!

Building Rules Consent

Building Rules Consent is required for work or activity in the nature of construction of a building.

If building work is to be performed an application for Building Rules Consent is required and the application is to be assessed against the provisions of the National Construction Code 2016, Building Code of Australia.

The Building Code of Australia, Volume 2 principles of classification relate to the classification of a building or part of a building determined by the purpose for which it is designed, constructed or adapted to be used.

Classes 1a and 1b are classified separately.

- A Class 1a building is a single dwelling
- A Class 1b is a boarding house, guest house, hostel of the like with a total floor area not exceeding 300m^2 and in which not more than 12 persons would be resident, or 4 or more single dwellings located on one allotment and used for short-term accommodation.

It is questionable whether the change of building classification is in fact building work requiring Building Rules Consent.

A class 1b building used for short-term accommodation generally does not require the signing of a lease agreement.

The main difference between Class 1a and 1b building is that a Class 1b requires:

- Smoke alarms be installed in every bedroom; and
- Every corridor or hallway associated with a bedroom, or if there is no corridor or hallway, in an area between the bedrooms and the remainder of the building, and on each other storey.

In addition to the smoke alarms a system of lighting must be installed to assist evacuation of occupants in the event of a fire, and be activated by the smoke alarm, and consist of:

- A light incorporated in the smoke alarm, or
- The lighting located in the corridor, hallway or area served by the smoke alarm

Even though it is questionable whether these dwellings require Development Approval I have in the past required an application be lodged and conditionally issued Building Rules Consent requiring Class 1b smoke alarms and emergency lighting activated by the smoke alarms be installed.

Rating

It is not my discipline to assess and assign the rating category.

If the accommodation is detached from the dwelling and its primary role is for profit and gain it could be rated as commercial.

Such a determination should be made by the relevant Council Department.

> **Conclusion**
>
> With regard to the Development Plan Consent it is my opinion that the land use subject of this report is not a change of land use therefore council has no decision to make. An application is therefore not required.
>
> With regard to the Building Rules Consent it is questionable whether it is building work however to ensure a reasonable level of safety is provided for occupants to evacuate in the event of a fire, I have required Class 1b smoke alarms and emergency lighting be installed.
>
> **Recommendation**
>
> The buildings used for short term accommodation for travellers as described within this report are not deemed to be development therefore an application for Development Approval is not required.

39. The *Guide to Establishing and Managing a Hosted Accommodation Business in Australia* relevantly states:[7]

> **Planning – Building Code of Australia (BCA)**
>
> ...
>
> **Change of Use**
>
> To operate a private residence as an accommodation business, there is a requirement under the BCA for a change of classification from 1(a) residential to 1(b) residential. 1(b) classification enables small scale accommodation providing for not more than 12 persons and a maximum floor area of not more than 300m^2. It requires hard-wired smoke alarms in approved areas, and compliance with fire safety and other regulations under the Code.
>
> Contact your local government Building Department for a change of classification. A building surveyor, or the local government building inspector will advise you of your state or territory government's application of the 1(b) classification.
>
> Residences greater than 300m^2 in floor area, and/or accommodation more than 12 persons will be classified 3. A class 3 building is subject to a greater degree of fire safety, including automatic sprinkler systems and exit signage. This requirement may be negated in certain circumstances by the number of storeys, the location of exit doors and the general configuration of the building. A building surveyor should be consulted.

40. The complainant also alleges that the land use at [Business P] was changed without approval, as it has now been paved and is being used for car parking.

41. In response to enquiries, the council indicated that in the 2016/2017 financial year the council listed the land use at [Business P] as Office (buildings) and should have rated the land as Commercial. However, the council acknowledged that it had incorrectly rated the land as Residential. The council further indicated that as this error had gone unnoticed, the land had also been rated as Residential for the 2017/2018 financial year. The council has indicated that it will be rated as Commercial in the 2018/2019 financial year.

42. In response to my provisional report, the council provided additional information, stating that an application to use the land at [Business P] as a car park was lodged on 12 October 2017 and that Development Plan Consent and Development Approval were granted on 30 October 2017.

---

[7] The Guide appeared to have been produced in 2015 by the Commonwealth government.

43. The complainant also alleges that the council's Development Assessment Panel has only held one meeting since September 2015, and that in that time all other development authorisations have been handled by the council's building consultant.

44. In response to this issue, the council stated:

> Prior to the transition to the planning, [Development] and Infrastructure Act 2016 (DPI Act) the council did not have a Development assessment Panel but rather a Development Assessment Committee. This was pursuant to an exemption of the minister under 56a9270[8] of the development act 1993 from a requirement to have a development assessment panel. All of the necessary powers were delegated to the committee. In Oct 2017 councils were required to have panels in order to transition to the DPI Act[.] The council have now appointed [a] panel[;] the council have also [appointed] a[n] Assessment Manager.
>
> The dates of the DAC meetings is listed below and only met when required.
> 18th august 2015, 2nd sept 2015, 18th oct 2016.

Grant to Coober Pedy Miners Association

45. The complainant alleges that the Coober Pedy Miners Association (**the Association**) received a grant of $80,000 from the council in circumstances where the financial situation of the council is poor and the amount of the grant is excessive and unjustified.

46. The complainant alleges that the Association periodically receives grants from the council, and that the council resolved to provide a grant of $80,000 in the 2015/2016 financial year. The complainant alleges that the purpose of this funding is not clear. The complainant alleges that the council is in a 'dire financial position' and questions the council's decision to gift such a large sum of money to the Association. The complainant cites the council's Annual Business Plan of 2016/2017 which states that as at 30 June 2016 the Council had debts of $7.2 million to the Local Government Finance Authority.

47. I understand that the Association was created in the 1980s and historically there has been a standing council policy to fund the administrative costs of the Association. I understand these costs have amounted to approximately $8000 per year.

48. It appears that the grant of $80,000 was the first instance where a large sum of money was granted to the Association.

49. In response to enquiries, the council stated:

- The District Council of Coober Pedy at the time of establishment, gave an undertaking that ongoing financial support would be given to the Coober Pedy Miners' Association (formerly the Coober Pedy Miners' and Progress Association).
- In February 2015 Council approved Community Donation Grant to the Miners' Association and to increase it CPI annually.
- At the 21st April 2015 Council meeting a motion was passed to invite both the Coober Pedy Retail Business & Tourism Association and the Coober Pedy Miners' Association to submit proposals for consideration in the 2015/16 financial year budget
- A proposal from the Coober Pedy Miners' Association dated 1st June 2015 was sent to Council. This proposal outlined the history of Councils contribution to the opal mining industry reference the Coober Pedy Strategic Plan 2013/14-2017/18 and the Regional Development Australia Far North Roadmap. It listed the goals/objectives that the funds would be used to complete. The proposal was presented to the Budget Workshops and at Workshop 4 after public consultation

[8] Upon consideration of the *Development Act 1993*, I am satisfied that this is a typographical error and should read "56a(27)".

and public meetings also mentioned in the Other Items for Discussion to reaffirm allocations to both the Coober Pedy Miners Association and Coober Pedy Retail Business and Tourism Association.

- The Annual Budgets by Department 2015/2016 which allocated the amount of $80,000 to the Coober Pedy Miners Association was adopted by Council on 31st August 2015.
- The grant funds requested by the Coober Pedy Miners Association in there (sic) submission would be used to complete the actions contained within the Council's strategic plan at the time as well as other actions identified by the association. e.g. review the previous opal industry studies and consult with stakeholders (nationally) regarding next steps; reinvigorate the local opal industry by facilitating increased exploration activities on the Coober Pedy precious stones field; submit an application to the South Australian Government's program for accelerated exploration program to initiate an opal exploration program in the Coober Pedy precious stones field, reform the Opal industry alliance in order to once again achieve some unity within the South Australian opal mining industry; lobby the State and Commonwealth Government's to actively support the industry that produces Australia's National Gemstone, South Australia's state gemstone emblem and New South Wales state gemstone emblem; work with the Australian trade commission to organise a trade delegation to key cities in China, and possibly elsewhere to promote South Australian opal in potentially new and/or growing markets; facilitate improved communication and resource pooling with the National Opal Miners Association Inc. the current national representative body for Australian opal miners; source funding to commission a South Australian Opal Industry Strategic Plan which will identify actions and human resources to carry out those actions for the industry; develop greater ties between the South Australian opal industry and the South Australian Chamber of Mines and Energy; engage with the Department of State Development with the aim of re-establishing the opal cutting and polishing course at the TAFE SA – Coober Pedy campus.[9]

Expenditure for opal symposium

50. The complainant alleges that the council approved $20,000 in travel expenditure for three persons to attend an opal symposium in Queensland in circumstances where the financial situation of the council is poor and the amount of the travel expenditure is excessive and unjustified.

51. The complainant alleges that during the 2015/2016 financial year the council allocated $20,000 for [Person A], [Person B] and [Person C], to attend a three day opal symposium in Winton, Queensland.

52. In response to enquiries, the council has indicated that no council funding was spent on the opal symposium.

53. My investigation sought further information from the complainant. The complainant provided evidence that a grant had been proposed, but no evidence that a grant had been approved or that money had been spent. The complainant indicated that they may have been mistaken.

Relevant law/policies

54. Section 5(4) of the ICAC Act provides:

> (4) ***Maladministration in public administration***–
>
> (a) means–

[9] Email to my Officer on 10 April 2018.

(i) conduct of a public officer, or a practice, policy or procedure of a public authority, that results in an irregular and unauthorised use of public money or substantial mismanagement of public resources; or

(ii) conduct of a public officer involving substantial mismanagement in or in relation to the performance of official functions; and

(b) includes conduct resulting from impropriety, incompetence or negligence; and

(c) is to be assessed having regard to relevant statutory provisions and administrative instructions and directions.

55. Section 6 of the *Development Act 1993* relevantly states:

6—Concept of change in the use of land

(1) For the purpose of determining whether a change in the use of land has occurred, the commencement or revival of a particular use of the land will, subject to subsection (2), be regarded as a change in the use of the land if—

(a) the use supersedes a previous use of the land; or

(b) the commencement of the use or the revival of the use follows upon a period of non-use; or

(c) the use is additional to a previously established use of the land which continues despite the commencement of the new use.

(2) The revival of a use of land after a period of discontinuance will be regarded as the continuation of an existing use unless—

(a) the period intervening between the discontinuance and revival of the use exceeds two years; or

(b) during the whole or a part of the period intervening between its discontinuance and revival, the use was superseded by some other use; or

(c) the Development Assessment Commission or a council has made a declaration under subsection (3) and the declaration remains unrevoked.

(3) Where—

(a) a particular use of land has been discontinued for a period of six months or more (being a period that extends up to the date on which the Development Assessment Commission or a council acts under this subsection); and

(b) the revival of that use would in the opinion of the Development Assessment Commission or council be inconsistent with the relevant Development Plan and have an adverse effect on the locality in which the land is situated,

the Development Assessment Commission or council may, by notice in writing served on the owner and the occupier of the land, declare that a revival of the use will be treated, for the purposes of this Act, as a change in the use of the land.

(4) The owner or occupier may, within one month after service of a notice under subsection (3), or such extended period as may be allowed by the Court, appeal to the Court against the declaration.

(5) On an appeal under subsection (4), the Court may confirm or revoke the declaration.

(6) For the purposes of this section, a particular use of land will be disregarded if the extent of the use is trifling or insignificant.

56. Sections 32 and 33 of the *Development Act 1993* relevantly state:

32—Development must be approved under this Act

Subject to this Act, no development may be undertaken unless the development is an approved development.

33—Matters against which development must be assessed

(1) A development is an approved development if, and only if, a relevant authority has assessed the development against, and granted a consent in respect of, each of the following matters (insofar as they are relevant to the particular development):

(a) the provisions of the appropriate Development Plan (***development plan consent***);

(b) the provisions of the Building Rules (***building rules consent***);

(c) in relation to a proposed division of land (otherwise than under the *Community Titles Act 1996* or the *Strata Titles Act 1988*)—the requirement that the following

conditions be satisfied (or will be satisfied by the imposition of conditions under this Act)

…

(2) An application may be made for all or any of the consents required for the approval of a proposed development, or for any one or more of those consents.
(3) A relevant authority may, in granting a development plan consent, reserve its decision on a specified matter until further assessment of the relevant development under this Act.
(4) A development will be taken to be an approved development when all relevant consents have been granted and a relevant authority has, in accordance with this Act, indicated that the development is approved.

57. Section 56A of the *Development Act 1993* relevantly states:

56A—Councils to establish development assessment panels
(1) A council must establish a panel (a ***council development assessment panel***) for the purposes of this Part.
(2) The functions of a council development assessment panel are—
(a) to act as a delegate of the council in accordance with the requirements of this Act; and
(b) as it thinks fit, to provide advice and reports to the council on trends, issues and other matters relating to planning or development that have become apparent or arisen through its assessment of applications under this Act; and
(c) to perform other functions (other than functions involving the formulation of policy) assigned to the panel by the council.

…

(26) Despite a preceding subsection, a council is not required to establish a council development assessment panel under this section if all of its powers and functions as a relevant authority (after taking into account any powers or functions that have been assigned to a regional development assessment panel or other body under this Act) have been delegated to other persons or bodies under this Act.
(27) In addition, the Minister may, on application by a council with an area that lies wholly outside Metropolitan Adelaide, exempt the council from the requirement to establish a panel under this section if the Minister is satisfied that the number of applications for development plan consent made to the council as a relevant authority under this Act in any year (on average) does not justify the constitution of a panel under this section.

58. The South Australian Government Gazette of 25 August 2016 relevantly states:

DISTRICT COUNCIL OF COOBER PEDY

Declaration of Rates

Pursuant to Sections 153(1)(b) and 156(1)(a) of the Local Government Act 1999, declared differential general rates on land within its area for the year ending 30 June 2017, varying according to the use of the land as follows:

Land Use 1 – Residential 0.4009 cents in the dollar
Land Use 2 – Commercial – Shop 1.2482 cents in the dollar
Land Use 3 – Commercial – Office 1.2482 cents in the dollar
Land Use 4 – Commercial – Other 1.2482 cents in the dollar
Land Use 5 – Industry Light 1.2886 cents in the dollar
Land Use 6 – Industry – Other 1.2886 cents in the dollar
Land Use 7 – Primary Production 1.2886 cents in the dollar
Land Use 8 – Vacant Land 0.2512 cents in the dollar
Land Use 9 – Other 1.2886 cents in the dollar

Pursuant to Section 152(1)(c)(ii) of the Local Government Act 1999, declared that a fixed charge of $390 will apply to all rateable land within the Council's area for the year ending 30 June 2017.

Sewerage Separate Rate

Pursuant to and in accordance with Section 154 of the Local Government Act 1999, declared a separate rate in respect of all rateable land within the area of the Council and within the Sewerage Scheme Area for the year ending 30 June 2017, for the purposes of making available, supporting and maintaining the Coober Pedy Sewerage Scheme, being a rate of 0.4594 cents in the dollar based on the capital value of the rateable land, with the exception of those properties that cannot be connected.

59. The Building Code of Australia (Volume Two) relevantly provides:

1.3.1 Principles of classification
The classification of a building or part of a building is determined by the purpose for which it is designed, constructed or adapted to be used.

1.3.2 Classification
Class 1 and 10 buildings are classified as follows:
Class 1 – one or more buildings, which in association constitute–
(a) **Class 1a** – a single dwelling being–
(i) a detached house; or
(ii) one of a group of two or more attached dwellings, each being a building, separated by a *fire-resisting* wall, including a row house, terrace house, town house or villa unit; or

(b) **Class 1b** –
(i) a boarding house, guest house, hostel or the like–

(A) with a total area of all floors not exceeding 300 measured over the enclosing walls of the Class 1b building; and
(B) in which not more than 12 persons would ordinarily be resident; or

(ii) 4 or more single dwellings located on one allotment and used for short-term holiday accommodation,
which are not located above or below another dwelling or another Class of building other than a *private garage*

Explanatory information:
Class 1b buildings used for short-term holiday accommodation include cabins in caravan parks, tourist parks, farm stay, holiday resorts and similar tourist accommodation. This accommodation itself is typically rented out on a commercial basis for short periods and generally does not require the signing of a lease agreement. Short-term accommodation can also be provided in a boarding house, guest house, hostel, bed and breakfast accommodation or the like.

60. The Building Code of Australia (Volume One) relevantly provides:

A3.2 Classifications
Buildings are classified as follows:
…
Class 3: a residential building, other than a building of Class 1 or 2, which is a common place of long term or transient living for a number of unrelated persons, including–
(a) a boarding house, guest house, hostel, lodging house or backpackers accommodation; or
(b) a residential part of a hotel or motel; or
(c) a residential part of a *school*; or
(d) accommodation for the aged, children or people with disabilities; or
(e) a residential part of a *health-care building* which accommodates members of staff; or
(f) a residential part of a *detention centre*.

Whether the District Council of Coober Pedy has committed maladministration in public administration by incorrectly applying differential rating to properties

61. I have considered whether the council's application of its differential rate constitutes a practice that has resulted in the substantial mismanagement of public resources, and therefore constitutes maladministration in public administration.

62. The council does not appear to have erred by incorrectly applying differential rating to the opal businesses within the council area.

63. In my view, the council has provided adequate explanation as to why [Business B], [Business C] and [Business D] are all rated as Residential, being classified as home industries under the Land Use Code.

64. The council has provided adequate explanation as to why [Business E] and [Business F] are rated as Commercial. No evidence has been provided to my investigation that the owners of these two opal shops also reside on the premises. These two shops also appear to be located in a retail district and appear to be commercial shops rather than home businesses.

65. I acknowledge that the council appears to have made errors in some individual cases:
    - incorrectly rating [Business D] as Commercial instead of Residential
    - incorrectly rating [Business M] as Vacant instead of Commercial.

66. The council has now corrected the two errors. It has:
    - reversed charges to [Business D] $1840.40 for rates, and $423.30 for water access on 19 June 2018 (total $2,263.40)
    - confirmed that [Business M] was charged commercial rates since the beginning of 2015/16 financial year, and added an effluent charge at the beginning of the 2018/19 financial year of $333.60 (based on the property's capital value) after reviewing the map showed that [Business M] had access.

    I do not consider that these errors amount to a substantial mismanagement of public resources.

67. I have considered whether the council has erred by classifying the bed and breakfast properties as Residential. The council has indicated which Land Use Code applies to each individual bed and breakfast. I am satisfied that the council has considered each bed and breakfast property individually in order to apply the Land Use Code.

68. In order to have a bed and breakfast property classified as Commercial, the property must constitute multiple separate units.

69. The *Development Act 1993* does not provide a definition of 'unit'. The council's Development Plan also does not provide a definition of 'unit' or 'self-contained'.

70. I have considered the judicial authorities. Commissioner Green in the Environment, Resources and Development Court described a development as 'near self-contained' because it featured a shared laundry.[10] Justice Blue described an extension which would 'create a mezzanine floor bedroom, kitchen, bathroom and lounge room' as 'a semi-self-contained living space'.[11]

71. In considering the meaning of 'private residence', Justice Blue stated that where a flat is being described as a private residence, the flat 'needs to be structurally separate

---

[10] *WC Projects Pty Ltd v City of Marion* [2016] SAERDC 35, referred to by Blue J in *Corporation of the City of Marion v WC Projects Pty Ltd* [2017] SASC 74 at [23].

[11] *Carter v Brine* [2015] SASC 204 at [110].

from other flats and self-contained with its own external door either to the outside of the building or at least to a common entranceway or passage'.[12]

72. Justice Blue also referred to comments by Justice Lowe in *Cobbold v Abraham*.[13] In that case, it was held that:

> …the authorities show that a crucial test is the degree of separation of the parts of the building in question. In my opinion, where one portion of the building is structurally so separated from the rest of the building as to be capable of occupation by a separate family or household it may constitute a separate dwelling.[14]

73. The word 'unit' is not separately defined in the Land Use Code. The Land Use Code indicates that 'dwelling' is defined as a self-contained residence. 'Home unit' is defined as 'land used for one dwelling in a group of two or more dwellings contained in a building (or buildings) on a site where accessways and/or grounds are shared'.

74. The Land Use Code classifies 'single unit', 'multiple unit' and 'home unit' as Residential. It also classifies 'short term accommodation – single unit' as Residential. However, it classifies 'short term accommodation – multiple units' as Commercial.

75. The property known and advertised as [Business G] is quite clearly separate units. Each 'room' has a separate living space, bedroom, dining room and ensuite. The rooms are accessed through separate front doors. In my view, [Business G] is clearly a commercial operation, making available separate and self-contained motel rooms. It should therefore be classified under the Land Use Code as Commercial.

76. The property known and advertised as [Business H] contains a large common social area. However, it advertises both a one bedroom and a two bedroom self-contained underground bed and breakfast, in addition to a separate one bedroom underground studio. Each of these features a bedroom, ensuite, lounge, dining area and car park. I note that the two bed and breakfast rooms share a laundry and kitchen, although each has its own barbecue area. The studio features a kitchenette, although access to the shared laundry and kitchen is still provided.

77. [Business H] is advertised as being suitable for either a large family or group, or for couples seeking a private retreat. I consider that in order to constitute multiple units, each unit must be a self-contained residence. Typically a self-contained residence will contain separate sleeping, cooking and bathroom facilities. However, I also consider that I may take into account the intentions of the owners of the property.[15]

78. In my view, the owners of [Business H] clearly intended to create a commercial venture which enabled them to provide rooms to multiple, independent groups of guests. While I note that two of the rooms have shared kitchen access, I note that the studio has an independent kitchenette. In my view, [Business H] constitutes at least two separate units which are self-contained residences. [Business H] should therefore be classified under the Land Use Code as Commercial.

79. The website for [Business I] advertises one self-contained residence which appears to sleep four persons. However, I note the website states:

> **Our B&B Accommodation is undergoing extensions**

---

12 *Highfield Property Investments Pty Ltd v Commercial & Residential Developments (SA) Pty Ltd* [2012] SASC 165 at [230].
13 [1993] VLR 385, referred to in *Highfield Property Investments Pty Ltd v Commercial & Residential Developments (SA) Pty Ltd* [2012] SASC 165 at [231].
14 *Coppold v Abraham* [1993] VLR 385 at 391.
15 *Pohl & Ors v Adelaide Hills Council & Anor (No 1)* [2009] SAERDC 44 at [30]-[31].

> Three new B& B are under construction and will be able to satisfy the numerous client demands.

80. It is unclear when the website was last updated. However, I note that in addition to at least one underground accommodation, [Business I] offers two above-ground units.[16] It is apparent that each of the three units is a self-contained residence. [Business I] should therefore be classified under the Land Use Code as Commercial.

81. [Business J] is advertised as including a four bedroom house which sleeps 13 and a three bedroom house which sleeps six.[17] However, it is also advertised as a standalone holiday house.[18] One website advertises [Business J] as a four bedroom house which includes 'a Self Contained room which is located at the front of the property and operates separate to the main property as it does not have access to the main house.'[19]

82. [Business J].com advertises that up to 21 guests can be accommodated in the following units:
    - above ground home style accommodation for 13 guests
    - a breakaway room in the same building as the above house which is 'semi-self contained' and does not have access to the inside of the house, for two guests
    - above ground home style accommodation for six guests
    - a semi dugout unit for six guests
    - an above ground unit for six guests.

83. It appears that each of the five accommodation options listed on the [Business J] website constitutes a self-contained residence. [Business J] should therefore be classified under the Land Use Code as Commercial.

84. [Business K] is advertised on [Business K].com as one underground residence. This is consistent with how it is advertised on other sites.[20] There is no evidence before me that [Business K] includes other self-contained residences. It is therefore correctly classified as Residential.

85. [Business L] is advertised on [Business L].com as a fully self-contained guest apartment, located next to the owners' dugout. This is consistent with how it is advertised on other sites.[21] It is therefore correctly classified as Residential.

86. In summary, I consider that the council has incorrectly classified four bed and breakfast establishments as Residential in circumstances where they should be Commercial.

87. In order for this to constitute maladministration, it must be a practice, policy or procedure of the council that:
    - results in an irregular and unauthorised use of public money; or
    - results in substantial mismanagement of public resources.

88. There is no evidence before me that the decision to classify these establishments as Residential was unauthorised.

89. I have considered whether the incorrect classification has led to a substantial mismanagement of public resources.

---

16 Advertised on booking.com, bedandbreakfast.eu and agoda.com.
17 Advertised on booking.com.
18 Tripadvisor.com and bedandbreakfast.eu.
19 Stayz.com.
20 Cooberpedy.com, tripadvisor.com and au.hotels.com.
21 Cooberpedy.com, truelocal.com.au and australias.com.

90. I note that the rate charged for commercial properties is approximately three times higher than the rates charges for residential properties. I accept that this is likely to amount to several hundred dollars per property, with the council failing to collect several thousand dollars' worth of rates which it should be charging. The council appears to operate on a budget of approximately $13 million per annum.[22]

91. Whilst I consider that the council has erred, I do not consider that the failure to correctly classify four properties under the Land Use Code amounts to 'substantial mismanagement of public resources'. In reaching this view, I have considered the amount of the loss of revenue to the council and the small number of properties affected.

Opinion

In light of the above, my view is that the council did not commit maladministration in public administration for the purposes of section 5(4)(a)(i) of the ICAC Act.

However, my view is that by failing to correctly classify four properties under the Land Use Code, the council has acted in a manner that was wrong within the meaning of section 25(1)(g) of the Ombudsman Act.

To remedy this error, I recommend under section 25(2) of the Ombudsman Act that the council reclassify the following four properties as Commercial:

- [Business G]
- [Business H]
- [Business I]
- [Business J].

Whether the District Council of Coober Pedy has committed maladministration in public administration by incorrectly applying its sewerage rate

92. The council does not appear to have erred by incorrectly or inappropriately applying its sewerage rate. The council has provided reasonable responses to the alleged inconsistencies identified by the complainant. I am satisfied that the properties to which a sewerage connection is available appear to be paying the sewerage rate.

93. My investigation has not identified any systemic issues of incorrect application of the sewerage rate. Nevertheless, the council has recently undertaken a detailed survey of the existing sewerage infrastructure. I consider this was appropriate action for the council to take, given the original plans were unclear.

Opinion

In light of the above, my view is that the council did not commit maladministration in public administration for purposes of section 5(4)(a)(i) of the ICAC Act.

Whether the District Council of Coober Pedy has committed maladministration in public administration by failing to comply with the provisions of the *Development Act 1993*

94. The complainant alleges that the position adopted by the council on 16 May 2017 in relation to the classification of bed and breakfast facilities is wrong at law.

---

[22] Annual Business Plan and Annual Budget 2017/2018.

95. I have considered whether the decision of the council on 16 May 2017 created a practice, policy or procedure that resulted in the substantial mismanagement of public resources, and therefore constitutes maladministration.

96. I have also considered whether the decision of the council resulted in an outcome that is contrary to law.

97. I have first considered whether the council should be requiring Development Consent for a change of land use and whether the council should be requiring Building Rules Consent.

Development Consent

98. The *Development Act 1993* defines 'development' to include 'a change in the use of land'.[23] Therefore, if the use of land changes, the owner of the land is required to obtain Development Consent.[24]

99. I have considered the case of *Pohl*. The owners of land at 25 Wilpena Terrace, Aldgate applied for development approval to construct a single storey detached dwelling (including tourist accommodation – Bed & Breakfast for a maximum of six persons). Court action was brought by the adjoining neighbours, Mr and Mrs Pohl. The Pohls submitted to the court that the development was a motel, as defined by the *Development Regulations 1993*.

100. The *Development Regulations 1993* have since been superseded by the *Development Regulations 2008*. The court in *Pohl* quoted the definition of 'motel' under the *Development Regulations 1993* as:

> ***motel*** means a building or group of buildings providing temporary accommodation for more than 5 travellers, and includes an associated restaurant facility, but does not include a hotel or residential flat building;

101. I note that this definition is identical to the definition present in the *Development Regulations 2008* which are still in force today.

102. At paragraphs 8-9 the court in *Pohl* stated:

> It was not argued by any party that the proposed development is either a hotel or a residential flat building.
>
> No party submitted that a building must include a restaurant facility, in addition to providing accommodation for more than 5 travellers, in order to be a motel. I read the definition as meaning that any restaurant facility associated with a motel will be part of the motel. It follows that it is irrelevant for present purposes that the proposed development does not include an associated restaurant facility.

103. At paragraph 12 the court commented:

> The proposed development has the characteristics of a detached dwelling. It does not appear to provide what is usually expected of a motel as the expression is commonly used. By that I mean the plans do not show a reception area, nor is each bedroom provided with ensuite bathroom facilities.

---

[23] *Development Act 1993* section 4(1).
[24] *Development Act 1993* section 33(1)(a).

104. However, the court determined that the development did in fact meet the definition of a motel. The court stated at paragraphs 30-31:

> It is clear from all the documentation associated with the application, including the plans and the second respondent's planner's statement in support of the application, that although the form of the building is that of a dwelling, the proposed use is as a bed and breakfast facility, with the foreshadowed intention that at some future point in time Mr and Ms McArthur (of Haigmore) would want to cease that use and change the use to a self-contained residence for themselves (their dwelling). I have concluded that the nature of the use for which approval was sought was a bed and breakfast facility for up to 6 travellers.
>
> Having reached this conclusion, the relevant authority in this Court must next look at whether the proposed use falls within any of the definitions in the *Development Regulations*. It then becomes obvious that however else the development might be described, whether as a bed and breakfast facility or otherwise, **it is a motel as defined**. This approach is consistent with the Supreme Court decisions in *Telstra Corporation Limited v Corporation of The City of Mitcham* (2001) 79 SASR 509 and *The Chappel Investment Company Pty Ltd and The Smallacombe Investment Company Pty Ltd v The City of Mitcham* [2009] SASC 23.[25]

105. I accept that the case of Pohl is authority for the proposition that if a bed and breakfast can provide temporary accommodation for six or more travellers, then the bed and breakfast meets the definition of a motel; and that therefore the use of the land will be for the purposes of a motel.

106. In my provisional report, I expressed the view that it appeared that if a property owner decided to convert their residential dwelling into a bed and breakfast facility, and that bed and breakfast facility can accommodate six or more travellers, then the property owner will be changing the use of the land. The property owner should therefore apply to the council for Development Consent.

107. In its response to my provisional report, the council provided the following submissions:

> With regard to determining the nature of development, pursuant to regulation 16 below, it is appropriate to reference the following definitions in Schedule 1 of the regulations:
>
> *Regulation 16 – Nature of development (1) If an application will require a relevant authority to assess a proposed development against the provisions of a Development Plan, the relevant authority must determine the nature of the development, and proceed to deal with the application according to that determination.*
>
> *dwelling means a building or part of a building used as a self-contained residence;*
>
> *multiple dwelling means 1 dwelling occupied by more than 5 persons who live independently of one another and share common facilities within that dwelling;*
>
> *motel means a building or group of buildings providing temporary accommodation for more than 5 travellers, and includes an associated restaurant facility, but does not include a hotel or residential flat building;*
>
> On reading your report the issues alleged by the complainant as illegal relate to Bed and Breakfast development. As noted in my aforementioned report[26] there is not, to my knowledge, any reference to a Bed and Breakfast development in the Development Act or regulations.

---

[25] My emphasis.
[26] Grant Riches' report to the council on 16 May 2017.

> I have searched the legislation and legal definitions in order to seek clarification of land uses.
>
> As above the definition of a dwelling refers to a residence.
>
> A dwelling can either be a domicile or a residence which merely requires bodily presence as an inhabitant. A residence is generally transient in its nature – although it doesn't destroy the national character. Wikipedia definition of residence includes "a residence is offered to travellers as temporary lodgings where they can rent a room".
>
> In addition it may be appropriate to have regard to the definitions of home and house.
>
> A home is more aligned to a domicile but not limited to, however a house is more a place of accommodation, shelter, etc.
>
> If my reading is correct a dwelling can be a house/residence of unrelated transient people.
>
> Accordingly there is no change of land use and accordingly no application is required.

108. I am unpersuaded by the council's submissions. The council has not provided authorities (with the exception of Wikipedia, which is not an authority) for its propositions. I acknowledge that the term 'bed and breakfast' has not been defined in South Australian legislation. The council has not submitted that I have incorrectly interpreted the *Pohl* case. I remain of the view that a bed and breakfast which accommodates six or more travellers meets the definition of a 'motel' under the *Development Regulations 2008*.

109. Clearly a motel is one use of the land. A dwelling used as a domicile for the inhabitants is a different use of the land. Therefore if a building is constructed, or converted, for the purpose of a bed and breakfast facility, and that facility can accommodate six or more travellers, the owner of the property has changed the use of the land.

110. The council's position is that it does not require Development Consent for bed and breakfast accommodation as it does not consider this to be a change in the land use. I remain of the view that the council's position is wrong at law with respect to bed and breakfast facilities which can accommodate six or more travellers.

Building Rules Consent

111. The council's position on Building Rules Consent was unclear. The 'Short Term Accommodation for Travellers' report concluded that an application for Development Approval would not be required for short term accommodation as described within the report. Given that the report explained that a Class 1b dwelling can accommodate a maximum of 12 guests, I understand the report to be recommending to the council that as long as the bed and breakfast could not accommodate 13 or more persons, no Development Approval would be required.

112. However, the report also stated that the council's building consultant had been requiring Class 1b Building Rules Consent for bed and breakfast accommodation. Given that Building Rules Consent is a type of consent associated with a Development Approval, clarification was sought from the council on its position.

113. The council responded that:

> The report adopted by Council, as attached, details the consents required/not required. As the actual use as a dwelling is not changing no development plan consent, building rules consent or development approval is required however an application is sought for

> building rules consent to ensure adequate life safety is provided in the nature of smoke alarms and an emergency light illuminating a path of travel to the exits.

114. I consider that the council's response is confused and demonstrates a fundamental misunderstanding as to the meaning of Development Approval. However, I understand that the council continues to require Building Rules Consent for bed and breakfast accommodation.

115. The council has not explained the legal basis for the requirement for Building Rules Consent. However, I accept that a change in the classification of a building will necessarily require Building Rules Consent.[27] The principal reason for the classification of buildings under the *Development Act 1993* is to ensure that buildings are structurally sound and may be safely used for the purpose for which they have been constructed or adapted. If a building is used for a purpose other than that appropriate for its classification, there are risks that it might not be structurally adequate for that use, therefore putting its occupants in danger.[28]

116. The importance of ensuring the safety of underground accommodation in Coober Pedy was discussed by the Environmental, Resources and Development Court in its 1998 *Opal Inn* judgment:

> As a township and a community, Coober Pedy is unique. It attracts many tourists who make a valuable contribution to its economy. One of the unique features of Coober Pedy is living underground. Tourists are attracted to the concept of underground churches, clubs, restaurants, homes and motels. The opportunity to spend one or two nights underground attracts many…if only one underground room collapses and a tourist is killed or seriously injured, with the consequence that the view that underground accommodation is unsafe ripples through the tourist industry, the damage to the economy of Coober Pedy will be horrific.[29]

117. I am satisfied that under the Building Code of Australia, bed and breakfast accommodation for 12 or fewer persons is properly classified as a Class 1b building.

118. It appears from the council's response to my provisional report that the council agrees with my view on this point. The council stated:

> Building Rules Consent may be interpreted differently however it is my opinion that the occupation of a dwelling for B & B compared to up to 5 travellers are not to be considered the same. The reasons for such an opinion are D3.1 of the BCA and Building Advisory Notice 04/16.
>
> A B & B is to be assigned a Class 1b however a dwelling used for up to 5 travellers would be a Class 1a building.

119. Therefore if, at the time the building was constructed, the building was not used as a bed and breakfast, but due to a change of use the building is now being used as a bed and breakfast which accommodates six or more travellers, it follows that Building Rules Consent is required.

120. Given that the council has indicated it presently requires Building Rules Consent for bed and breakfast accommodation, it does not appear that the council has been systemically acting in a manner that is wrong at law.

121. However, I would caution the council to ensure that it is aware of the number of travellers which may be accommodated at each bed and breakfast facility. If the bed

---

27 *Development Regulations 2008* regulation 82(2).
28 *Schmidt v Mount Barker DC* [2001] SAERDC 30.
29 *Opal Inn Pty Ltd v District Council of Coober Pedy and Stoneymede Pty Ltd* (1998) ERDC No 337 of 1997.

and breakfast can accommodate 1-5 travellers, no Development Consent or Building Rules consent is required. If the bed and breakfast can accommodate 6-12 travellers, Development Consent and Building Rules Consent for a Class 1b building is required. If the bed and breakfast can accommodate 13 or more travellers, Development Consent and Building Rules Consent for a Class 3 building is required.[30]

Has the council committed maladministration?

122. My view is that the council has acted in a manner that is wrong at law by determining that no Development Consent would be required for bed and breakfast facilities.

123. It has been alleged that such conduct could amount to a practice of the council which results in the substantial mismanagement of public resources in that the council is not properly undertaking its functions, and is potentially making itself liable should there be any public safety incidents involving tourists staying at unregulated bed and breakfast establishments.

124. The effect of the council decision was that the council did not require applications for Change of Use, but did require applications for Building Rules Consent. The practical result is that the council may have been depriving itself of the income which would be raised through the application fees which are associated with a Change of Use application.

125. I note that as the council has continued to require Building Rules Consent, requiring smoke alarms and emergency lighting to be installed within bed and breakfast accommodation facilities, I do not consider that there has been a substantial risk to public safety.

126. In the circumstances, I do not consider that failing to require the lodgement of Change of Use applications amounts to maladministration.

127. I have also considered the allegation that the council's Development Assessment Panel has been meeting infrequently and that this could constitute maladministration. However, I consider that the council has provided sufficient explanation for this, including an exemption from the Minister for Planning. I do not consider that the council has acted contrary to the provisions of the *Development Act 1993* by failing to hold regular Development Assessment Panel meetings.

Opinion

In light of the above, my view is that the council did not commit maladministration in public administration for purposes of section 5(4)(a)(i) of the ICAC Act.

However, given my view that the council has been incorrectly applying the *Development Act 1993,* my view is that the council has acted in a manner which is contrary to law within the meaning of section 25(1)(a) of the Ombudsman Act.

To remedy this error, I recommend under section 25(2) of the Ombudsman Act that the council resolve to require Change of Use applications, and issue Development Plan Consents, to bed and breakfast facilities which accommodate six or more travellers.

[30] I comment that it appears that Underground B&B can accommodate 16 guests and [Business J] can accommodate 21 guests. The council may wish to review whether the correct Development Approval has been issued for these two motels.

Whether the District Council of Coober Pedy has committed maladministration in public administration by approving a grant of $80,000 to the Coober Pedy Miners Association

128. In order for approval of the grant to constitute maladministration, the approval must be either irregular and unauthorised, or it must constitute the substantial mismanagement of public resources.

129. The grant was approved by the elected body of the council. Therefore, it was not unauthorised.

130. I have considered the nature of the grant and the purposes for which the grant money was intended to be expended. I note that many of the proposed uses of the grant money by the Association fulfilled items within the council's Strategic Plan 2013-2018, such as:
    - being a pivotal provider of services to the mining community
    - nurturing the opal mining industry to meet demand from national and international markets
    - ensuring the long term future of Coober Pedy is the primary responsibility of the Council but other organisations and agencies need to share the responsibility and challenges
    - enhancing the economic prosperity of Coober Pedy
    - facilitating the ongoing development of the opal industry
    - fostering mining developments in the Coober Pedy region
    - seeking solutions to limited local labour market.

131. The Strategic Plan also notes that Chinese tourism is becoming the biggest market for opals; the fact that Coober Pedy is struggling with high unemployment and a declining population; and the challenge of reducing numbers of miners given that younger people are not interested in opal mining, instead being attracted to alternative mining opportunities.

132. Within this context, it appears that the expenditure of the $80,000 by the Association, in the manner proposed, is likely to be of benefit to the local community in addition to aiding the council in achieving the goals set out in its Strategic Plan. I particularly note that the Association plans to dedicate some of the funds towards reinvigorating the local opal industry, lobbying the State and Commonwealth governments to support the opal industry in Coober Pedy, organise a trade delegation to key cities in China and aim to re-establish the opal cutting and polishing course through TAFE SA.

133. I note the complainant's allegation that due to the poor financial state of the council and its high amount of debt, the grant of $80,000 was inappropriate and may constitute maladministration.

134. Whilst the grant was significantly larger than the usual amount which the council provides to the Association, I do not consider that approval of the grant constituted the substantial mismanagement of public resources. I note that it was within the council's power to approve the grant and that it appears that the grant was approved for a valid purpose and for a public benefit. In the circumstances, my view is that the approval of the grant did not amount to mismanagement of public resources.

Opinion

In light of the above, my view is that the council did not commit maladministration in public administration for purposes of section 5(4)(a)(i) of the ICAC Act.

Whether the District Council of Coober Pedy has committed maladministration in public administration by approving expenditure of $20,000 for an opal symposium

135. This issue was referred to me by the Commissioner based on information initially provided by the complainant.

136. The council has indicated that no public funding was in fact spent on the opal symposium.

137. The complainant has indicated that they are unable to provide any evidence that the council approved expenditure of $20,000 for an opal symposium, and that they may have been mistaken in their belief that this amount had been expended.

138. Based on the information provided, my investigation did not consider it necessary or justifiable to conduct further enquiries in relation to this issue. In reaching this view, my investigation was conscious of the serious nature of any allegation of maladministration.

Opinion

In light of the above, my view is that having regard to the circumstances of the case, continuing to investigate this issue is unnecessary or unjustifiable within the meaning of section 17(2)(d) of the Ombudsman Act.

Summary

In light of the above, my view is that:

- the council did not commit maladministration in public administration by incorrectly applying differential rating to properties
- by failing to correctly classify four properties under the Land Use Code, the council has acted in a manner that was wrong
- the council did not commit maladministration in public administration by incorrectly applying its sewerage rate
- the council did not commit maladministration in public administration by failing to comply with the provisions of the *Development Act 1993*
- the council has acted in a manner which is contrary to law by failing to comply with the provisions of the *Development Act 1993*
- the council did not commit maladministration in public administration by approving a grant of $80,000 to the Coober Pedy Miners Association
- continuing to investigate whether the council committed maladministration in public administration by approving expenditure of $20,000 for an opal symposium is not necessary or justifiable.

Recommendations

I make the following recommendations under section 25(2) of the Ombudsman Act:

- That the council reclassify the following four properties as Commercial:
    - [Business G]
    - [Business H]
    - [Business I]
    - [Business J].

- That the council resolve to require Change of Use applications, and issue Development Plan Consents, to bed and breakfast facilities which accommodate six or more travellers.

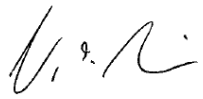
Final comment

In accordance with section 25(4) of the Ombudsman Act the council should report to the Ombudsman by **13 May 2019** on what steps have been taken to give effect to the recommendations above; including:

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

In the event that no action has been taken, reason(s) for the inaction should be provided to the Ombudsman.

I have also sent a copy of my report to the Minister for Local Government as required by section 25(3) of the *Ombudsman Act 1972*.



Wayne Lines
SA OMBUDSMAN

14 February 2019