



Building and Development Dispute Resolution Committees—Decision

Sustainable Planning Act 2009

Appeal Number:	04 – 17
Applicant:	Murray and Victoria Family Trust
Assessment Manager:	Brisbane City Council (Council)
Concurrence Agency: (if applicable)	N/A
Site Address:	68-70 Junction Street, Woolloongabba, described as Lots 346 and 347 on RP12076 – the subject site

Appeal

Appeal under section 521 of the *Sustainable Planning Act 2009* (SPA) against a decision by the Brisbane City Council (Council) to refuse a request for a permissible change to a material change of use development permit over the subject site.

Date and time of hearing:	16 March 2017, at 12:30pm
Place of hearing:	Mineral House, 41 George Street, Brisbane
Committee:	James Dunstan – Chair Peter Rourke – Member Neil de Bruyn – Member
Present:	John Giles – representing the Applicant Jon Neale – representing the Applicant Dayne Habermann – representing the Applicant Milena Mog – representing Council Lucy Ting – representing Council Rachael Green – representing Council

Decision:

The Building and Development Dispute Resolution Committee (Committee), in accordance with section 564 of the SPA, **sets aside** the decision of Council to refuse the request for a permissible change to a material change of use development permit (Council reference A004056092) and approves the change subject to the following conditions:

1. The development is to be undertaken in accordance with the following plans and specifications prepared and submitted to the Committee:
 - a. Architectural Drawings by John Giles Associates Project Number 14-1496, Sheets SK02-SK25 dated 13/04/17;
 - b. Flood Investigation Report by Milanovic Neale Consulting Engineers Reference C2692 Dated 31 March 2017

2. Finished floor levels for habitable, non-habitable and visitor carparking must comply with the requirements of the flood study report;
3. The undercroft treatment to the raised dwelling must allow free passage of flood water and not increase localised flooding. The hydraulic engineer is to design and certify the undercroft treatment prior to works commencing on site.

Background

On 3 February 2011, Council issued a decision notice giving a Material Change of Use (MCU) development permit and building works preliminary approvals over the subject site. The MCU development permit was for the use of the subject site for three multi-unit dwellings, as defined under The Brisbane City Plan 2000 (CP2000), and the building works preliminary approvals were for minor demolition works and extensions to the existing, pre-1946 dwelling house on the subject site, which was to form one of the three proposed multi-unit dwelling units, and for the construction of the two additional multi-unit dwellings.

This original development approval (original approval) was based upon a flood assessment report prepared by HCE Engineers (HCE), which proposed that the subject site as a whole be filled and that a 450mm diameter drainage pipe be constructed between Junction Street and Norman Creek, to the east of the subject site, to provide immunity against overland flow conditions affecting the subject site. The original approval included a condition (Condition 31) requiring, *inter alia*, that the development be constructed in accordance with the recommendations of the HCE report, including the provision of a relief drainage system, comprising of both 450mm and 525mm diameter pipes, linking Junction Street at the subject site to Norman Creek.

On or about 2 February 2015, a request was made on the Applicant's behalf for a permissible change to the original approval, to reposition the original dwelling house within the proposed multi-unit development from the southern side of the subject site to the northern side, and to extend the relevant period of the original approval by two years, to 3 February 2017. This request was approved by Council on 15 May 2015. This permissible change (first permissible change) did not affect the HCE report or Condition 31.

On or about 24 November 2015, a second permissible change request (second permissible change request) was made on the applicant's behalf. The effect of the second permissible change request was to amend Condition 31, to delete the reference to the HCE report and its recommended solutions for achieving floor immunity and to substitute a revised flood assessment report and associated recommendations, prepared by Milanovic Neale Consulting Engineers (MNCE). The second permissible change request did not go so far as to propose revised wording for this condition.

The second permissible change request was refused by Council and the Applicant was duly advised of this decision in correspondence dated 11 January 2017. The grounds for refusal were that:

- a) the change was not consistent with the Flood Overlay Code, specifically Code Purposes 2 (a) to (d), Performance Outcome (PO) 5 and PO11; and
- b) the change is not consistent with the development application, and
- c) the change is not considered to be a permissible change as defined under SPA, as the changed development would be a substantially different development in terms of the introduction of new and/or increased impacts.

The code provisions referred to in these grounds for refusal essentially relate to the minimisation of exposure of people and property to flood-related risks, the minimisation of any additional burden on emergency services operations, the mitigation of flood risks and the maintenance of safe vehicular access for residents and emergency vehicles.

On 10 February 2017, the Applicant lodged a notice of appeal (Form 10) with the Committees Registrar against the above-mentioned decision by Council.

A hearing for the appeal was held off site at 41 George Street, Brisbane on 16 March 2017. At the hearing, the Committee decided it was necessary for the Applicant to provide further written submissions to define the development proposed under the second permissible change request (the proposed development) and its associated hydraulic impacts more precisely. It was further decided that Council be given time to review the Applicant's further submissions, and to respond to same with its own further, written submissions.

The Applicant's further written submissions were received by the Registrar on 3 and 4 April 2017. These submissions consisted of an updated flood investigation report by MNCE (dated 31 March 2017) and a series of plans more clearly illustrating the development proposed under the second permissible change.

The Council's response submissions were received by the Registrar on 13 April 2017. These submissions maintained the Council's position to the effect that the proposed development would have unacceptable impacts in terms of flood impacts, and would comprise of a substantially different development as a result of these impacts.

Material Considered

The material considered in arriving at this decision comprises:

1. 'Form 10 – Appeal Notice', grounds for appeal and correspondence accompanying the appeal lodged with the Committees Registrar on 10 February 2017.
2. Written submissions and supporting documentation tabled by Council at the Committee hearing on 16 March 2017.
3. Council Decision reference A002468388 dated 03/02/2011 and associated delegates report;
4. Council Decision reference A004056092 dated 15/05/2015 and associated delegates report;
5. Council Decision reference A004268786 dated 11/01/2017 and associated delegates report;
6. Flood Investigation Report by HCE Engineers reference 4479 dated 15/07/2010;
7. Flood Investigation Report by Milanovic Neale Consulting Engineers reference C2692 dated 31 March 2017;
8. Architectural Drawings by John Giles Associates Project Number 14-1496, Sheets SK02-SK25 dated 13/04/17;
9. Brisbane City Plan 2000 (CP2000);
10. Brisbane City Plan 2014 (CP2014).
11. Sustainable Planning Act 2009 (SPA);
12. Sustainable Planning Regulation 2009 (SPR);
13. Further documentary submissions provided on behalf of the applicant on 3 and 4 April 2017.
14. Further written submissions provided by Council on 13 April 2017.

Findings of Fact

The Committee makes the following findings of fact:

- 1) The original approval was given under City Plan 2000 (CP2000). Under Section 684 of SPA, City Plan 2014 (CP2014), which commenced subsequently, is not able to stop or

further regulate the development approved under the original approval. Section 374(2) of SPA requires the responsible entity (in this case, Council) to have regard to the planning instruments, plans, codes etc. applying when the original application was made, and permits that entity to give the weight it considers appropriate to the instruments etc. applying when the permissible change request was made.

- 2) Section 317 of SPA allows an assessment manager to give weight to a later planning instrument. It is noted that the decision by Council to refuse the second permissible change request was based solely on CP 2014 flood overlay code requirements, with no regard to the previous decision or flood impacts already accepted by Council.
- 3) The development approval arising from the first permissible change is the current approval (current approval A004056092) over the subject site, and is the approval against which the effects of the development proposed by the second permissible change request (A004268786) are to be compared.
- 4) The subject site is mapped under CP2014 as being potentially subject to flooding from the Brisbane River, Norman Creek and overland flow. The defining (worst-case) flood event is that arising from overland flow.
- 5) The defined flood event (DFE) is the 2% AEP (annual exceedance probability) event, the maximum flood level of which is given as 5.75m AHD (Australian Height Datum). The minimum levels required under CP2014 to achieve acceptable flood immunity during a DFE are as follows:
 - Habitable floor level: DFE level + 0.5m = 6.25m AHD,
 - Non-habitable floor level: DFE level + 0.3m = 6.05m AHD,
 - Uncovered parking level: DFE level = 5.75m AHD.
- 6) The flood mitigation solutions provided under the current approval are those set out under Condition 31, being the filling of the subject site and the construction of a relief drainage system, comprising of a combination of 450mm and 525mm diameter pipes draining to Norman Creek, to mitigate the impacts of the proposed site filling.
- 7) The flood mitigation solutions proposed by the Applicant under the second permissible change request are those set out under the Flooding Investigation Report prepared by MNCE and dated 31 March 2017. These comprise of the filling of the lower-lying, eastern part of the subject site, the development of the internal driveway and open car parking spaces, garages and other non-habitable spaces, and the habitable levels of the proposed dwellings, to those identified in (5) above. Instead of diverting overland flow around the site and via a relief drainage system, as proposed under Condition 31, the current proposal will permit overland flow to traverse part of the subject site.
- 8) The MNCE report referred to in (7) above provides a comparative analysis of the implications of the flood mitigation solutions approved under the current approval documented contained in the HCE Consulting Engineers report reference 4479 and those proposed under the second permissible change request. This report advises that the mitigation measures now proposed would, in comparison to those currently approved under A004056092:
 - reduce the impact of flooding (in terms of flood depth) on upstream properties and road areas,
 - reduce the peak depth/velocity product of overland flow within Junction Street, and
 - result in a minor increase in flood depth in a small area of Junction Street and part of an adjacent church car park.

- 9) In relation to the increased flood depths affecting parts of Junction Street and the adjacent car park, the MNCE report notes that there would be no increase in flood depths relative to the impacts now capable of arising from the subject site in its current, pre-development state.
- 10) Council's response to the updated MNCE report referred to in (7) and (8) above states that the proposed development, when compared to the current approval, would result in an increased risk of flooding, and highlights the following conclusions:
- The proposed development would increase flood levels in Junction Road by 20mm and the adjacent church car park by up to 70mm during a 2% AEP flood event,
 - The subject site would itself be inundated during such an event and would involve an unsafe hydraulic hazard,
 - The proposed enclosure of the Unit 1 undercroft with timber battens would be unacceptable and this should be replaced by a valance treatment instead,
 - The development would introduce new and different impacts to that approved under the first permissible change, and would thus be a substantially different development (implying that the proposed change would not be a permissible change as defined under Section 367 of SPA).
- 11) In relation to flood impacts, and based upon the evidence presented by both the Applicant and Council, the Committee finds that the development proposed under the second permissible change request will generally result in significantly reduced impacts, when compared to those of the current approval. The Committee also finds that the increased flood depths that would affect parts of Junction Street and the adjacent church car park would be localised and relatively minor (and would also be no worse than the impacts potentially arising from the subject site in its current, pre-development state).
- 12) In relation to hydraulic hazard affecting the site, and the enclosure of the Unit 1 undercroft, the Committee finds that these are matters that could reasonably be addressed by way of development approval conditions. The conditions could require affected buildings and structures to be designed to withstand the relevant degree of hydraulic hazard and to comply with relevant building assessment provisions.
- 13) In relation to the question of whether or not the proposed development would be a substantially different development, and therefore not a permissible change, the Committee finds that this would not be the case and therefore that the change does constitute a permissible change. In this regard, the Committee accepts the findings of the MNCE report dated 31 March 2017 to the effect that the proposed development would generally result in a reduction of flood impacts, and that increased impacts will be minor, localised and no worse than would be the case under the *status quo*.

Reasons for the Decision

- 1) The proposed change to the current approval is a permissible change, as defined under Section 367 of SPA.
- 2) The decision made by Council relied solely on the provisions in the current CP2014 flood overlay code and did not take into account the reduction of impacts compared to the previously approved development. Although Section 317 of SPA allows Council to consider later planning instruments, Section 684 does not allow a new planning instrument to affect development approvals that are already in place;
- 3) The development proposed under the change will result in reduced flood impacts on upstream land when compared to the existing lawful approval for development (A004056092), and only relatively minor increases in impacts on localised areas of Junction Street and a church car park.

- 4) The proposed development would achieve acceptable levels of flood immunity for both habitable and non-habitable areas of the proposed dwelling units, as well as for the open car parking areas.
- 5) The proposed development provides a greater level of flood immunity and lesser impact on surrounding properties than the development already approved in previous council decisions;
- 6) The proposed development will generally achieve the outcomes sought by the Flood Overlay Code under CP2014, in that the exposure of people and property to flood-related risks will be reduced in comparison to the current approval, there will be no additional burden on emergency services operations, flood risks will be mitigated to an acceptable degree and safe vehicular access for residents' and emergency vehicles will be maintained.

Therefore, the Committee sets aside the decision of Council to refuse the request for a permissible change to a material change of use development permit (Council reference A004268786) and approves subject to the following conditions:.

1. The development is to be undertaken in accordance with the following plans and specifications prepared and submitted to the Committee:
 - a. Architectural Drawings by John Giles Associates Project Number 14-1496, Sheets SK02-SK25 dated 13/04/17;
 - b. Flood Investigation Report by Milanovic Neale Consulting Engineers Reference C2692 Dated 31 March 2017; and
2. Finished floor levels for habitable, non-habitable and visitor carparking must comply with the requirements of the flood study report; and
3. The undercroft treatment to the raised dwelling must allow free passage of flood waters and not increase localised flooding. The hydraulic engineer is to design and certify the undercroft treatment prior to works commencing on site.

James Dunstan
Building and Development Committee Chair
Date: 11 May, 2017

Appeal Rights

Section 479 of the *Sustainable Planning Act 2009* provides that a party to a proceeding decided by a Committee may appeal to the Planning and Environment Court against the Committee's decision, but only on the ground:

- (a) of error or mistake in law on the part of the Committee or
- (b) that the Committee had no jurisdiction to make the decision or exceeded its jurisdiction in making the decision.

The appeal must be started within 20 business days after the day notice of the Committee's decision is given to the party.

Enquiries

All correspondence should be addressed to:

The Registrar of Building and Development Dispute Resolution Committees
Building Codes Queensland
Department of Housing and Public Works
GPO Box 2457
Brisbane QLD 4001
Telephone (07) 1800 804 833 Facsimile (07) 3237 1248