



Building and Development Dispute Resolution Committees—Decision

Sustainable Planning Act 2009

Appeal Number: 66-11
Applicant: Christopher J. Mayo & Georgy L. Mayo
Assessment Manager: Brisbane City Council (Council)
Site Address: 9 Brydon Street, Highgate Hill and described as Lot 85 on RP12103, the subject site

Appeal

Appeal about a refusal by the Assessment Manager (Brisbane City Council) on 15 July 2011 for a Development Application (DA) for preliminary building approval under section 241 of the *Sustainable Planning Act 2009* (SPA), for demolition of a pre-1946 house (pre-1900) in a Demolition Control Precinct (DCP).

Date of hearing: 10.00am, Wednesday 14 September 2011

Place of hearing: Offices of Department of Local Government and Planning, Level 5, 63 George Street Brisbane

Tribunal: Ernest Harvey – Chairperson
Danyelle Kelson – General Referee
Peter Ho – General Referee

Present: Christopher Mayo – Applicant
Georgy Mayo – Applicant
Nick Brisoe – Applicant's representative
Steve Adams – Council

Decision:

The Committee, in accordance with section 564 of the SPA **confirms** the decision appealed against and **dismisses** the appeal.

Background

The land, subject to this appeal is located at 9 Brydon Street, Highgate Hill, described as lot 85 on RP12103 containing an area of about 430m². The Brisbane City Plan 2000 (City Plan) defines the lot as being a small lot, situated in a DCP of the low-medium density zone and located within the West End/Woolloongabba Local Plan (Local Plan).

The Appellant's town planners, AAD Design, made the application for preliminary building approval under section 241 of the SPA, for building works for demolition of a pre-1946 house in a DCP on 25

May 2011. The development application sought to remove the pre-1946 house and stated that the house:

- Is not located in a character street;
- Is structurally unsound and not reasonably capable of being made structurally sound; and
- Was constructed around World War 1 in the period between 1910 and 1920.

Chapter 3 of the City Plan identifies the level of assessment for the DA as being Code Notifiable requiring public notification. The Demolition Code (Code) sets out the process for public notification to be undertaken by the applicant and the disclosure material provides advice to the community that:

Any comments you make will be taken into account by Council in assessing the application.

However, making comments does not give you any right to appeal against Council's decision on the application.

On 15 July 2011 Council issued its decision notice under section 334 of the SPA. Council refused the application on the following grounds:

- a) Does not achieve Acceptable Solution A1.1, as the house has not been substantially altered and does have the appearance of being constructed in or prior to 1946;*
- b) Does not achieve Acceptable Solution A1.2, as it has not been adequately demonstrated that the building is not reasonably capable of being made structurally sound;*
- c) Does not achieve Acceptable Solution A1.3, as the demolition of the building will result in the loss of traditional timber and tin building character within the Demolition Control Precinct where in a Low-medium Density Residential Area;*
- d) Does not achieve acceptable solution A1.4, because the street does have traditional building character. The street is characterised by a variety of traditional pre-1946 buildings form and styles;*
- e) The proposal does not meet the Performance Criterion 1 as the existing pre-1946 building does represent traditional building character, is capable of structural repair and does contribute positively to the character of the street;*
- f) Does not achieve Acceptable Solution A7.1, as it has not been adequately demonstrated that the building is not reasonable capable of being made structurally sound;*
- g) The proposal does not meet Performance Criteria 7 as the house built prior to 1900 is capable of structural repair; and*
- h) Is otherwise contrary to the Purpose of the Demolition Code.*

The Applicants appealed the decision of Council on 10 August 2011.

Material Considered

The material considered in arriving at this decision comprises:

1. 'Form 10 – Notice for Appeal/Declaration'
2. The SPA.
3. Brisbane City Plan 2000.
4. Brisbane City Council Decision Notice of 15 July 2011 containing grounds for refusal.
5. AAD Design Pty Ltd – town planning consultants' application material dated May 2011.
6. Michael Kingsbury's (civil & structural engineer (REPQ04895)) building assessment – structural report dated 16 May 2011.
7. Danma Services Pty Ltd (licensed builder BSA number1072318) building construction estimate for remediation works at 9 Brydon Street, Highgate Hill.
8. Council's aerial mapping of pre-1946 houses.
9. Council's eBimap
10. Registered plan numbers SP157449 and RP12103

11. Council internal memorandums presented to the Committee at the hearing, dated 14 June 2011 relating to research into dating establishment of the house, and dated 21 June 2011 relating to Council's structural inspection of the house on 17 June 2011.
12. The Appellants written submission supporting their grounds for appeal received by email prior to the hearing date.
13. Copies of Planning & Environment Court of Queensland judgments:
 - Craig Securities (No2) Pty Ltd v Brisbane City Council [2006] QPEC 044
 - Ken Ryan & Associates Pty Ltd v Brisbane City Council & Ors [2007] QPEC
 - Gould v The Brisbane City Council [2000] QPE 048
 - Armstrong v Brisbane City Council [2003] QPEC 007

Findings of Fact

The Committee makes the following findings of fact:

The application for removal of a pre-1946 house under the City Plan triggered code notifiable assessment in accordance with the levels of assessment tables in chapter 3, section 5.2.3. The Demolition Code (Code) is listed as the only code applying to assessment of the application.

The subject site is located on the southern side of Brydon Street, contained within the Low-medium Density Residential zone and identified as being located within a DCP. The DCP depicted on Council's mapping system encompasses seven residential lots bounded on the north by Brydon Street and on the west by Dauphin Terrace. Of the seven lots, 71 per cent of the pre-1946 houses (five houses) remain. The Committee has not undertaken research to ascertain the extent of modifications made to these pre-1946 houses nor does it see this as being necessary to make its determination.

A review of Council's pre-1946 mapping shows Brydon Street as being constructed to the frontage of number 13 Brydon Street. In 2003 the land to the east of number 11 Brydon Street was subdivided by registered plan SP157449 resulting in Brydon Street being extended approximately 80m further to the east of number 11 Brydon Street. This has resulted in two distinctly different styles of houses being constructed in Brydon Street, houses having been constructed pre-1946 within the DCP, and houses having been constructed post 2003 on new lots.

The appeal that the Committee has to consider has particular emphasis on the City Plan Code. The purpose of the Code seeks to protect traditional character housing. The purpose of the Code is stated as to:

- *Protect the residential buildings that give residential areas in the Demolition Control Precinct their traditional character and amenity.*
- *Ensure the preservation of buildings where they form an important part of a streetscape where the buildings and streetscape were constructed and/or established in or prior to the end of 1946.*
- *Allow demolition or removal of post-1946 residential buildings or structurally unsound buildings.*

There are two performance criteria of the Code which specifically relate to the assessment of application to demolish the pre-1946 house being P1 and P7.

P1 of the Code specifies three criteria that need to be addressed:

The building:

- *Must not represent 'traditional building character', or*
- *Must not be capable of structural repair, or*
- *Must not contribute positively to the visual character of the street.*

P7 of the Code specifically relates to buildings built prior to 1900:

The building must not be capable of structural repair.

Council, through their senior historian Carmel Black, researched the history of 9 Brydon Street. This research included checking the titling system and identifying that the land was purchased in 1890. The historian's research also revealed that the landowner Mr. Samuel F. Hunter (carpenter) was recorded as having received mail deliveries to Brydon Street in 1895. Although the Appellants were reluctant to accept the Council's conclusions regarding the age of the house, no evidence was advanced by them to the contrary. The Committee is satisfied that Council has established reasonable grounds for accepting that the house was constructed prior to 1900, and that performance criteria P7 should apply to the assessment of the DA.

The appeal documents and grounds for appeal generally related to the structural soundness of the house. Submissions made at the hearing focused on the issue of structural soundness, in particular, on the extent of work required to make the house structurally sound, the level of difficulty in carrying out those works and the cost of building works.

The Appellant's engineer Mr. Kingsbury had prepared his structural assessment of the house on 16 May 2011 which had been presented to Council on 25 May 2011 during the application assessment period. Mr. Kingsbury made a number of comments on the structure of the house noting that:

- The external steps along the western side of the building were showing signs of cracking
- The front entry veranda is set at ground level probably requiring replacement
- The upper internal areas appeared sound, with flooring being firm underfoot and that there was no evidence of cracking in the walls on this level
- The lower level of the building was not in a sound condition with evidence of cracking to walls and with some areas showing separation between bearers and stumps
- The concrete footings supporting the eastern wall stumps were exposed to almost their full depth.

Council senior engineer Mr. Spillane inspected the site on 17 June 2011 and a copy of the memo dated 21 June 2011 was provided to the Committee at the hearing. Mr. Spillane made a number of recommendations in his memo being that:

- The house required restumping particularly along the eastern wall of the house
- This restumping required adequate socketting of footings into founding material to prevent further undermining
- Timber previously affected by contact with the ground in the north western corner required replacement.

The Committee attended a site visit on Monday 5 September 2011 to inspect the condition of the dwelling and those elements of the building that required structural repair. It was noted by the Committee that the Appellants had the house tenanted at the time of the inspection and that while the house required structural repair, the house appeared to be habitable.

The upper level of the house appeared to be the original house and reasonably unaltered. However the lower level of the house had been modified with building works that were not in keeping with the style of the upper level original pre-1900 house. The structural work identified in Mr. Kingsley's report and confirmed by Council's engineer as needing structural repair particularly relating to restumping and securing of exposed footings along the eastern side of the building was verified by the Committee.

It was also noted by the Committee that the adjoining lot at number 11 Brydon Street had been excavated along its western boundary adjoining the eastern side to the subject house. This excavation has contributed to exposing the footings of the house compounding structural unsoundness in this area.

The Appellant's builder, Danma Services Pty Ltd, submitted estimates of costs to repair the structural defects to be in the vicinity of \$103,237. The Danma Services Pty Ltd report included in their costs construction of a 12m long retaining wall along the eastern side of the house. It was noted that this report was neither dated nor signed by a representative of the company.

Reasons for the Decision

The Committee based its decision on the version of the City Plan applying at the time the appeal was made. In the City Plan there are numerous references throughout the scheme referring to retention of the city's traditional building character. Firstly the strategic plan section 4.2.2.4 refers to maintaining character in older suburbs. The West End-Woolloongabba District Local Plan in section 2.5 of the development principles states:

Development in the Local Plan area is to compliment the traditional 'timber and tin' character by respecting the character streetscapes and amenity of the area. The West End Estate and pre-1946 housing is to be protected.

Section 3 of the Code states that the purpose of the Code is to:

- *Protect the residential buildings that give the residential areas in the Demolition Control Precinct their traditional character and amenity.*
- *Ensure the preservation of buildings where they form an important part of a streetscape where the buildings and streetscape were constructed and/or established in or prior to the end of 1946.*
- *Allow demolition or removal of post-1946 residential buildings or structurally unsound buildings.*

The Committee's decision was guided by the three criteria set out in the purpose of the Code and Performance Criteria P1 and P7 in section 5 of the Code.

The Committee considered the issue of pre-1900 buildings structural soundness. Both Council's engineer and the appellants engineer agreed that the building required structural repair. The engineers however were in disagreement on the extent of repair required to make the building structurally sound.

The City Plan Code states in acceptable solution A1.2 of P1 and A7.1 of P7:

An engineering report must be submitted demonstrating that the building is structurally unsound and not reasonable capable of being made structurally sound.

The Appellants structural engineer Mr Kingsbury in his appraisal of the existing building (report of 16 May 2011) stated that:

The upper internal areas appear sound, and flooring is firm underfoot. There is no evidence of cracking in the walls in this level of the building.

Mr. Kingsbury also identified that the lower level was in poor condition and that parts of the building appeared to have been modified and may not reflect the character of the original house. In the Committees opinion the additions to the lower level of the house do not form part of the pre-1900 house and therefore in considering the issue of making the house structurally sound, repair to the lower level additions that are not supporting the upper level were not assessed as being reasonably required to make the pre-1900 house structurally sound.

Council's engineer Mr. Spillane in his memo dated 21 June 2011 also identified that the upper level pre-1900 component of the house as generally structurally sound. Mr. Spillane in his memo goes on to state that:

There are however, issues with stumps/footings, and with the later modifications to the dwelling, i.e. lower level and retaining walls. The existing floor framing/hoop pine flooring on the original level is generally considered to be in a sound condition.

The appellants made submissions at the hearing relating to the costs of building works relating to making the house structurally sound as well as the practicality and complexity of performing structural

repairs.

The Committee in considering the extent of work required to make the pre-1900 house structurally sound relied on the wording of acceptable solution A1.2 of P1 and A7.1 of P7 '*that the building is structurally unsound and not reasonable capable of being made structurally sound.*' In the decided cases, *Ken Ryan & Associates Pty Ltd v Brisbane City Council & Ors* [2007] QPEC and *Craig Securities (No2) Pty Ltd v Brisbane City Council* [2006] QPEC 044 both make the point that the reference to reasonableness may also involve considerations such as the practical ability to perform the work. In the Danma Services Pty Ltd report on costs relating to building works, costs were allocated to physical digging of foundations by labourers due to the fact that access was restricted because of the closeness of the eastern side of the house to its boundary. The Committee are of the opinion that 'reasonableness' of structural works will vary depending on the issues of each case.

It is well established on the cases that the test of what is 'reasonable' is an objective one and assessed against the background of the Code. The subjective preferences of an individual owner are irrelevant and form no part of the acceptable solutions (*Armstrong v BCC* [2003] QPEC 007; also *Ryan, Craig, and Gould v The Brisbane City Council* [2000] QPE 048 .

In relation to the use of wording 'structurally sound' in acceptable solution A1.2 of P1 and A7.1 of P7, this connotes that in an engineering sense the fundamental attributes of the structure are present in an acceptable condition (*Craig Securities*) and does not connote 'perfection'. The Code does not provide, directly or, even by inference, a requirement that the standard of structural soundness meets present day building codes and standards (*Craig Securities*).

The Committee are of the view that restumping of the house and other structural works identified by the engineers would not require the construction of the 12m long retaining wall that Danma Services Pty Ltd recommended and costed in their building estimate of \$103,237 to make the building structurally sound. The allocation of costs to the retaining wall accounted for a substantial amount of the total cost estimate submitted by Danma Services Pty Ltd.

The Committee are of the opinion that the pre-1900 building is reasonably capable of being made structurally sound.

The Committee were aware that Council's decision notice dated 15 July 2011 identified four submitters, Mr. Lynch, Mr. Cassels, Mr. Marquis-Kyle (all from Highgate Hill) and Mr. Heywood (from Bardon) as having made submissions to council during the public notification period. In addition the Committee were provided with a copy of the detailed submission made to council on 24 June 2011 by Mr. Nadin and Ms. Chalmers landowners of number 11 Brydon Street.

The Committee notes that while the application triggered public notification under the City Plan, the application does not trigger public notification under the SPA. Therefore the four submitters listed on council's decision notice of 15 July 2011 and the submission by Mr. Nadin and Ms. Chalmers have no rights of appeal under the SPA and their written submissions were not taken into consideration in the Committee's decision process.

Based on the assessment of facts, material presented to the committee, and the City Plan, it is the Committee's decision that the Decision Notice being appealed against be confirmed and the appeal be dismissed.

Ernest Harvey
Building and Development Committee Chair
Date: 20 October 2011

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 Infrastructure and Planning
PO Box 15009
CITY EAST QLD 4002
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