



## Development Tribunal – Decision Notice

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### Planning Act 2016

<b>Appeal Number:</b>	36-2017
<b>Appellant:</b>	Don Grehan, Will Newman and Helen Newman
<b>Assessment Manager:</b>	Brisbane City Council
<b>Concurrence Agency:</b> (if applicable)	N/A
<b>Site Address:</b>	42 Penrose Street, Auchenflower and described as Lot 53 on RP58428 – the subject site

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### Appeal

Appeal under section 230 of the *Planning Act 2016* (PA) against the Decision Notice of the Assessment Manager to refuse an application for a Preliminary Approval for a Permissible Change to a Development Approval for building work under section 334 of the *Sustainable Planning Act 2009* (SPA) for the alterations and additions to create a third storey in an existing Class 1a dwelling. Brisbane City Council (Council) as the Assessment Manager refused the application for the additional building work on 17 grounds.

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<b>Date and time of hearing:</b>	25 October 2017 at 10.00 am
<b>Place of hearing:</b>	The subject site 42 Penrose Street, Auchenflower
<b>Tribunal:</b>	Mr Markus Pye – Chair Mr John O'Dwyer - Member
<b>Present:</b>	Mr. Don Grehan - Appellant Mr William Newman - Appellant Ms Helen Newman - Appellant Ms Lisa Smith (Designer) - agent for the Applicant Ms. Milena Mog – Brisbane City Council - Council representative Mr Craig McAuley – Brisbane City Council - Council representative

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### Decision:

1. The Development Tribunal (Tribunal), in accordance with section 254 of the PA **sets aside** the decision of the Assessment Manager to refuse the alterations and additions to the existing Class 1a dwelling, and **approves** the application.
2. Please be advised that you may election to lodge an appeal/declaration about this matter in the Planning and Environment Court (the Court). The Court appeal period starts again from the date you receive this Decision Notice which should be attached to the Court appeal lodgement documentation.

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3. The following link outlines the steps required to lodge an appeal with the Court.  
<http://www.courts.qld.gov.au/courts/planning-and-environment-court/going-to-planning-and-environment-court/starting-proceedings-in-the-court>

### Background

4. The subject site is located at 42 Penrose Street, Auchenflower and has an area of 708 m<sup>2</sup> and is zoned CR2 - Character (Infill Housing) Zone under Council's Brisbane City Plan 2014 (BCP2014).
5. An Application for a Development Permit for Building Works was lodged by Lisang Design and approved by the building certifier Don Grehan of Pacific BCQ on 30 September 2016. This development permit approved alterations to the then existing building that created a three level two storey dwelling under BCP2014. Works commenced immediately on the approved works.
6. The applicant subsequently in October 2016 made an Application for Permissible Change to the development permit for further alterations to enclose the undercroft to create a gymnasium area and a further bedroom to Pacific BCQ as the assessment manager. The effect of these changes was to change the number of storeys to 3 storeys over part of the site. As a result, on 12 January 2017 Don Grehan of Pacific BCQ acting on behalf of the owner applied to BCC for a code assessable material change of use.
7. The works the subject of the original approval were still under construction in February 2017, and it appears that the works the subject of this appeal were being undertaken.
8. On 17 February 2017, Council requested further information. Various telephone conversations occurred and emails were exchanged on the matter until on May 26, 2017 Lisa Smith of Lisang Design provided a response to the information request.
9. On 14 July 2017, Council issued a decision notice to refuse the application on 17 grounds.
10. The Applicants lodged an appeal with the Tribunal on 10 August 2017 against that decision.
11. The subject site is on the southern side of a ridge that drops away significantly to the east and rises to the west. The original dwelling on the site presented as a one storey dwelling to Penrose Street. The additions and alterations approved in September 2016 changed this to a dwelling that presented as a two storey dwelling with a low gabled roof.
12. The dwellings to the east (32 Penrose Street) and west (44 Penrose Street) of the subject site present as a single storey dwelling with a high gabled roof. 46 Penrose Street to the west presents as a two storey dwelling with a medium gabled roof. There are one and two-storey dwellings on the opposite side of Penrose Street within 35m of the subject site.
13. The site drops steeply down to the Dacre Street Frontage. At nominal ground level of the dwelling, there is a pool at the rear of the dwelling that is contained within a retaining wall below the level of the ground floor. Below that again is a free standing garage that is accessed off Dacre Street. There is no vehicular access to Penrose Street. The subject site contains an easement that provides vehicular access to 44 and 46 Penrose Street to the west.

### Material Considered

14. The material considered in arriving at this decision comprises:
  - A. Form 10 – Appeal Notice, grounds for appeal and correspondence accompanying the appeal lodged with the Tribunal Registrar on 10 August 2017.

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- B. Application by Lisang Design Request to Change an existing approval
- C. Application dated 12 January 2017 by Don Grehan of Pacific BCQ to BCC comprising IDAS Form 1 - Application Details, IDAS Form 6 - Building or operational work assessable against a planning scheme and Request to change an existing approval for a code assessable material change of use for a permissible change to an existing development permit.
- D. The following drawings:
  - Site Plan - drawing 01 Issue 3 dated 02/16 by YL Drafting Service
  - North and South Elevations - drawing 03c Issue 3 dated 02/16 by YL Drafting Service
  - West Elevation - - drawing 03a Issue 3 dated 02/16 by YL Drafting Service
  - East Elevation - drawing 03b Issue 3 dated 02/16 by YL Drafting Service
  - Top Floor and Roof Plans - - drawing 02c Issue 3 dated 02/16 by YL Drafting Service
  - 1st Floor Plan - drawing 02b Issue 3 dated 02/16 by YL Drafting Service
  - Ground Floor Plan - drawing 02a Issue 3 dated 02/16 by YL Drafting Service showing extent of undercroft below 1<sup>st</sup> floor and 2<sup>nd</sup> floor additions
  - Ground Floor Plan - drawing 02a Issue 3 dated 02/16 by YL Drafting Service showing areas to be converted to bedroom and gymnasium that trigger the definition of third storey.
- E. Letter dated 12 January 2017 from Pacific BCQ to Council submitting the application for the change to an existing approval.
- F. Development Application Decision Notice dated 30 September 2016 from Assessment Manager, Pacific BCQ, Private Building Certifier, to the Applicant granting a development approval for the original building works application for alterations and additions to create the three level, two storey building.
- G. Council request for further information dated 17 February 2017.
- H. Applicant's response to information request provided on May 26, 2017 by Lisa Smith of Lisang Design on behalf of the applicant.
- I. Assessment Manager letter to Applicant advising refusal of Development Permit dated 14 July 2017, with accompanying grounds of refusal and information regarding appeals.
- J. Applicant's Form 10 application for Appeal to the Committee dated 2 August 2017 with accompanying Grounds for Appeal and Attachments.
- K. Verbal submissions at the hearing from all parties to the appeal.
- L. Extracts from BCP2014 submitted by the parties at the hearing, advising relevant details supporting the party's arguments.
- M. The *Brisbane City Plan 2014* (**BCP2014**).
- N. The *Sustainable Planning Act 2009* (**SPA**).
- O. The *Planning Act 2016* (**PA**).

## Site Inspection

- 15. At the start of the hearing, an inspection of the property was conducted by the Committee in the presence of the parties to inform the Committee of the salient parts of the building

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that were under consideration. The inspection also considered the views of the development from both street frontages to Penrose Street and to Dacre Street and the relevant height of the dwelling on the subject site against the adjoining and nearby dwellings in Penrose Street.

### Main Issues Raised By the Parties to the Appeal

#### *Brisbane City Council*

16. The Council raised 17 grounds in its decision notice, however, at the hearing the Council representatives argued there were two main issues relevant to the Tribunal's decision namely:
  - a **Number of Storeys** - The alterations and additions to the existing Class 1a dwelling constituted a three storey building that exceeds the limit of two storeys in Acceptable Outcome AO2 of the Dwelling House Code creating conflict with the Dwelling House Code in BCP2014.
  - b **The building height on the Penrose Street Frontage** – The proposed extensions to the dwelling exceeds the Acceptable Outcome AO2 of the Dwelling House Code and results in a building height which is not consistent with the building height of the dwelling houses in the same zone and within 35m of any point of the street frontage which is not consistent with Performance Outcome PO2 of the Dwelling House Code

#### *Appellant*

17. The Applicants raise three main issues in their submissions to the Tribunal namely:
  - a **Extent of 3-storey section** - That the three storey section of the building only occupies a minor part of the overall floor space of the structure and is not visible from either street frontage. The extent of the three storey section is also reduced as part of the area is below natural surface level.
  - b **Building Height** - The use of the term **building height** in Performance Outcome PO2 of the Dwelling House Code is such that the dwelling is not in conflict with PO2
  - c **The building height on the Penrose Street Frontage** – The height of the building when viewed from Penrose Street is not inconsistent with the height of dwellings within 35m of the subject site's Penrose Street frontage and so is not in conflict with Performance Outcome PO2 of the Dwelling House Code.

### Findings of Fact

18. The Tribunal makes the following findings of fact:

#### *Subject Site*

19. The subject site consists of an allotment with an area of 708 m<sup>2</sup> located at 42 Penrose Street, Auchenflower and is zoned CR2 Character (Infill Housing) Zone under BCP2014.
20. The subject site is subject to:
  - the Traditional Building Character overlay (Neighbourhood Character),
  - the Dwelling House Character Overlay
  - the Ithaca District neighbourhood plan and is in the Hillside Character precinct.

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21. The subject site is a rectangular block facing north with a two street frontage including Penrose Street to the north and Dacre Street to the south. The site falls significantly down from Penrose Street to Dacre Street. The allotment has an existing dwelling that has been altered in accordance with a development permit issued under SPA on 30 September 2016 for a three level, two storey dwelling house at the subject site by Pacific BCQ a private certifier.
22. The existing dwelling steps down the site making use of the topography.
23. The proposed alterations and additions comprise filling in at the ground level to provide a new habitable area below part of the existing dwelling matching the rear and side setbacks.
24. In Penrose Street there is a mix of older and renovated one and two storey residential dwellings. The dwelling at 46 Penrose Street to the west presents as a two level dwelling and is reported to have been converted to a three storey dwelling although Council advised any such additions have not been approved.
25. The dwelling on the subject site presents as a two level dwelling.
26. The Appeal relates to matters relating to Performance Outcome 2 and Acceptable Outcome 2 of the Dwelling House Code as set out below. The proposed development is not compliant with AO2(a)(i) as a part of the development is more than two storeys in height.

### PO2

Development has a [building height](#) that:  
(a) is consistent with the building height of [dwelling houses](#) prevailing in the immediate vicinity;  
(b) does not unduly overshadow adjoining [dwelling houses](#) and their associated private open space in terms of access to sunlight and daylight.

Note—In interpreting PO2, the term ‘prevailing in the immediate vicinity’ means the building height of more than 50% of the dwelling houses in the same zone as the subject site and within 35m of any point of the street frontage of the subject site.

### AO2

Development in the:

(a) [Low density residential zone](#), [Character residential zone](#), 2 storey mix zone precinct of the [Low–medium density residential zone](#), 2 or 3 storey mix zone precinct of the Low–medium density residential zone, [Rural residential zone](#), [Environmental management zone](#), [Rural zone](#) or [Emerging community zone](#) results in a maximum [building height](#) of 9.5m and:

(i) 2 [storeys](#); or

(ii) 1 storey if the development also includes a space that is situated between one floor level and the floor level next above, or if there is no floor above, the ceiling or roof above that contains only a bathroom, shower room, laundry, water closet, or other sanitary compartment;

(b) Up to 3 storeys zone precinct of the [Low–medium density residential zone](#) or in the [Medium density residential zone](#) results in a maximum [building height](#) of 11.5m and:

(i) 3 storeys; or

(ii) 2 storeys if the development also includes a space that is situated between one floor level and the floor level next above, or if there is no floor above, the ceiling or roof above that contains only a bathroom, shower room, laundry, water closet, or other sanitary compartment.

Editor's note—This acceptable outcome is only for the maximum building height. Side boundary setbacks are provided in accordance with the Queensland Development Code; which vary according to the height of the building.

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### Code and Neighbourhood Plan Assessment

27. The Tribunal has accepted the information provided in the response to the information request as demonstrating the proposed development is not inconsistent with the relevant provisions of the balance of the Dwelling House Code and other relevant Codes and the Ithaca District Neighbourhood Plan.
28. The substantive issues of the Appeal are based on an assessment of section 9.3.7 Dwelling House Code, Table 9.3.7.3 Performance Outcome PO2 and Acceptable Outcome A02 of the BCP2014.
29. The building work the subject of the application for a change of a development approval constitutes a three storey building.
30. The Committee accepts the proposed development is not compliant with Acceptable Outcome A02(a) as the proposed building work constitutes a three storey building.
31. The Tribunal then considered PO2.
32. PO2 has four elements – An initial sentence, paragraphs (a) and (b) and a Note. As the Note is a Note and not an Editor’s Note, it is considered part of the scheme and has to be given weight.
33. The parties agreed the proposed development was not inconsistent with PO2(b) and would not unduly overshadow adjoining premises.
34. In the initial sentence the term “building height” was considered. This is defined in BCP2014 as follows:

*Building height, of a building, means—*  
*(a) the vertical distance, measured in meters, between the ground level of the building and the highest point on the roof of the building , other than a point that is part of an aerial, chimney, flagpole or load bearing antenna; or*  
*(b) the number of storeys in the building above ground level.*
35. Therefore “building height” in PO2 can be considered against paragraph (a) or paragraph (b) of that definition.
36. The Tribunal considered it was logical that paragraph (a) of that definition should be used in considering PO2(a) as the prevailing building height in storeys of the dwellings fronting Penrose Street in the immediate vicinity of the subject site was a mixture of one, two and possibly three storey developments but they only present visually to Penrose Street as one or two storey developments.
37. Council argued supporting use of paragraph (b) in the definition of “building height” that:

*The proposal is not considered to comply with Performance Outcome P02 of the Dwelling house code, as it will result in a 3 storey dwelling house which is inconsistent with the prevailing building height of dwelling houses in the immediate vicinity. In interpreting P02, the term ‘prevailing in the immediate vicinity’ means the building height of more than 50% of the dwelling houses in the same zone as the subject site and within 35m of any point of the street frontage of the subject site. There are no dwelling houses within 35m of any point of the street frontage of the subject site which are 3 storeys in height.*

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38. As the land slopes steeply away from Penrose Street on either side of the road, it was not possible for the Tribunal to visually determine on site the number of storeys above ground level in each of the dwellings within 35m of the frontage of the subject site.
39. The Tribunal therefore considered the height in metres of the dwellings within 35m of the frontage of the subject site in considering PO2(a).
40. A number of the one-storey dwellings in that 35m distance have tall gables that means they effectively have the height of a two storey building. Buildings are set at various distances back from the street frontage creating the appearance of a diversity of building heights.
41. Therefore there is no clear height against which to assess this building. There are 11 dwellings within the 35m frontage distance - 33-35, 37-39, 41-41A, 43-47 and 49 on the northern side of Penrose Street and 28, 30 and 32 to the east and 44, 46 and 48 to the west on the south side of Penrose Street. The majority of these have the height of a two storey building (33-35, 41-41A, 43-47, 28, 44, 46 and 48).
42. The Tribunal therefore considered the height in metres above ground level at the Penrose Street frontage of the dwellings within 35m of the frontage of the subject site in considering PO2(a).
43. A number of the one-storey dwellings in that 35m distance have tall gables that means they effectively have the height of a two storey building. Buildings are set at various distances back from the street frontage creating the appearance of a diversity of building heights. Therefore there is no clear height against which to assess this building. There are 11 dwellings within the 35m frontage distance - 33-35, 37-39, 41-41A, 43-47 and 49 on the northern side of Penrose Street and 28, 30 and dwelling on the subject site while being two storeys high at the frontage, has a low roof profile in comparison to other dwellings and fits within the array of heights of the other dwellings prevailing in the immediate vicinity.
44. The Tribunal also considered that the existing dwelling as approved in September 2016 complies with AO2. That approval created the existing building height and appearance at the frontage. There will be no change to the appearance of the building from Penrose Street arising from the works that are the subject of this Appeal.

## **Reasons for the Decision**

45. As the building work as proposed does not comply with AO2 of the Dwelling House Code, the Tribunal has assessed the application against PO2 of that Code.
46. The additions that created the existing two storey building height at the Penrose Street frontage were lawfully erected in accordance with the Building Permit issued on 30 September 2016 and were compliant with AO2 and so not referable to Council.
47. The proposed three storey development has a frontage to Penrose Street that was lawfully erected.
48. The building height of that existing frontage is consistent with the building height of dwelling houses prevailing in the immediate vicinity and the proposed development does not unduly overshadow adjoining dwelling houses and their associated private open space in terms of access to sunlight and daylight. Therefore the proposed development is consistent with PO2 of the Dwelling House Code.

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49. The development is not inconsistent with any of the other Overlay Codes applicable to the land and is not inconsistent with the Ithaca District neighbourhood plan.

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Markus Pye  
**Development Tribunal Chair**  
**Date: 20 November 2017**



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### **Appeal Rights**

Schedule 1, Table 2 (1) of the *Planning Act 2016* provides that an appeal may be made against a decision of a Tribunal to the Planning and Environment Court, other than a decision under section 252, on the ground of -

- (a) an error or mistake in law on the part of the Tribunal; or
- (b) jurisdictional error.

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

### **Enquiries**

All correspondence should be addressed to:

The Registrar of Development Tribunals  
Department of Housing and Public Works  
GPO Box 2457  
Brisbane QLD 4001

**Telephone (07) 1800 804 833 Facsimile (07) 3237 1248**