



Building and Development Dispute Resolution Committees—Decision

Sustainable Planning Act 2009

Appeal Number:	16-17
Applicant:	Scott Fern
Assessment Manager:	Trevor Gerhardt
Concurrence Agency:	Brisbane City Council
Site Address:	104 Payne Street, Auchenflower, Qld, 4066 and described as Lot 18 RP 85472

Appeal

Appeal under section 527 of *Sustainable Planning Act 2009* (SPA) against the Decision Notice of the Assessment Manager to refuse the alterations and additions to an existing Class 1a dwelling. Brisbane City Council (Council) as the Concurrence Agency directed the Assessment Manager to refuse the building work as it did not comply with the performance outcomes of the Brisbane City Plan 2014, Ithaca District Neighbourhood Plan Code 7.2.9.2, Table 7.2.9.2.3.A, Performance Outcome PO18, PO19, PO20, PO21, and PO23.

Date and time of hearing:	29 May, 2017 at 2.30pm
Place of hearing:	The subject site – 104 Payne Street, Auchenflower and described as Lot 18 on RP 85472, and Mineral House, Level 16, 41 George St, Brisbane
Committee:	Mr Henk Mulder - Chair Ms Lauren Turner - Member Mr John Panaretos - Member Mr Richard Prout - Member
Present:	Mr. Trevor Gerhardt - Assessment Manager and agent for the Applicant Ms. Marcia Thompson - Council representative Ms. Milena Mog - Council representative

Decision:

The Building and Development Dispute Resolution Committee (Committee) finds that the application, the subject of this Appeal lapsed under section 273 of the SPA. The Committee finds that it does not have power to excuse or cure the lapsing. Therefore, the Committee finds that the appeal is not properly constituted and the Committee **does not** have jurisdiction to determine the Appeal.

Background

The subject site is a 607 m² allotment located at 104 Payne Street, Auchenflower, and is zoned CR2 Character (Infill Housing) under the Brisbane City Plan 2014 (BCP2014). The land and residential development in the surrounding area of the subject site is steep and contains traditional character housing with significant ridge lines.

The subject site is located in the Traditional Building Character overlay (Neighbourhood Character), and whilst within the Ithaca District Neighbourhood Plan the subject site is not in a precinct or sub-precinct.

The existing dwelling on the site appears to have been extended and renovated on a number of occasions making it hard to identify the style/era of the original dwelling. The building is built over three levels with varying roof lines, with the ground floor area consisting of off-street parking and storage only.

In September 2016, the property owner lodged a Development Application for building work with the Assessment Manager for alterations and additions to the existing dwelling incorporating a new second storey at the southern end (rear) of the building establishing new floor area of approximately 64m².

The proposed development did not comply with the Acceptable Outcomes of the Ithaca District Neighbourhood Plan and the Queensland Development Code MP1.2 (QDC MP1.2). Consequently, the Assessment Manager identified the following triggers for referral to Council and lodged a request for referral agency response for building work under the Sustainable Planning Regulation 2009 (SPR) Schedule 7, Table 1 (For building work assessable against the Building Act), namely:

- (a) Item 17, being the amenity and aesthetic impact of the building or structure if the building work is carried out and s.1.7.4 of Brisbane City Plan; and
- (b) Items 19, 20, and 21, all being Design and Siting.

The Council issued a concurrence agency response on 4 September 2016 against SPR Schedule 7, Table 1, Item 17 amenity and aesthetics directing the Assessment Manager to refuse the application.

The Assessment Manager issued a Development Application Decision Notice on 18 October 2016 refusing the proposed alterations and additions to the existing Class 1a dwelling.

The Applicant, through the agency of the Assessment Manager, lodged an appeal with the Committee on 20 October 2016.

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 20 October 2016;
2. Assessment Manager Decision Notice, Development Application No: 0002016257, dated 18 October 2016, refusing the alterations and additions as directed by Council;

3. Concurrence Agency Response from Council dated 4 September 2016 (Reference No A004482522) instructing Assessment Manager to refuse Development Application for Building Work;
4. Assessment Manager letter to Council making Application for concurrence agency response, dated 19 September 2016;
5. The following drawings:
 - Site Plan, Drawing Number BA A001, dated 8/9/16 by LVO Architecture;
 - Lower Ground Floor Plan, Drawing Number BA A110, dated 8/9/16 by LVO Architecture;
 - Ground Floor Plan, Drawing Number BA A111, dated 8/9/16 by LVO Architecture;
 - First Floor Plan, Drawing Number BA A112, dated 8/9/16 by LVO Architecture;
 - Roof Plan, Drawing Number BA A113, dated 8/9/16 by LVO Architecture;
 - West Elevation, Drawing Number BA A200, dated 8/9/16 by LVO Architecture;
 - North South Elevation Sheet 2, Drawing Number BA A2001, dated 8/9/16 by LVO Architecture;
 - East Elevation Sheet 3, Drawing Number BA A202, dated 8/9/16 by LVO Architecture;
 - Section-Sheet 1, Drawing Number BA A300, dated 8/9/16 by LVO Architecture;
 - Construction Details – Sheet 1, Drawing Number BA A400, dated 8/9/16 by LVO Architecture.
5. IDAS Form 1 - Application Details, IDAS Form 2 - Building work requiring assessment against the *Building Act 1975*;
6. Acknowledgement Notice from the Assessment Manager, Trevor Gerhardt, Private Building Certifier, to the Applicant confirming receipt of the application dated 19 September 2016;
7. Letter from the Applicant dated 19 October 2016, to the Committee, providing justification as to why the alterations and additions to the dwelling should be approved;
8. Two written submissions from Council to Committee undated though provided just prior to each hearing.
9. Letter from Council to Committee dated 2 February 2017 regarding this appeal and a number of other appeals;
10. Letter from Committee Chair for Appeals 41-16, 42-16, 44-16, and 28-16 to Chief Executive Department of Housing and Public Works dated 15 March 2017;
11. Letter from Committee Chair for Appeals 41-16, 42-16, 44-16, and 28-16 to Council and Assessment Manager dated 15 March 2017;
12. Verbal submissions at the hearing from all parties to the appeal;
13. Written submissions provided at the hearing;
14. The *Brisbane City Plan 2014* (CP2014);
15. The *Sustainable Planning Act 2009* (SPA);
16. The *Sustainable Planning Regulation 2009* (SPR);

17. The *Building Act 1975* (BA);
18. The *Building Regulation 2006* (BR);
19. Queensland Development Code MP 1.2 (QDC MP1.2);
20. Integrated Development Assessment System (IDAS).

Main Issues Raised by the Parties to the Appeal

Council

The Council raised two main issues in its submissions to the Committee namely:

21. **Lapsing** – At the hearing the Council advised that as two concurrence applications were originally sought by the Assessment Manager i.e. design and siting plus amenity and aesthetics, for which the former required a fee in contrast with the latter. Council advised that as no fee was paid for the design and siting concurrence referral, the Appeal was rendered invalid as the application had lapsed.

The Committee queried the internal process for assessing the two issues and Council confirmed the applications were reviewed separately due to the fee differentiation. Council continued to formalise their response for aesthetics and amenity, as after 10 business days it would have been considered a deemed approval if they had not responded.

Council advised that currently this would be seen as a single concurrence response application, despite separate sections within Council undertaking the reviews required.

22. **Code Assessment** – Council contended that the alterations and additions to the existing Class 1a dwelling constituted a three storey building requiring a separate Preliminary Approval for Building Work (Code Assessment) pursuant BCP2014 to be assessed by Council.

Therefore, as the building development application involves assessable development, in which Council is not a concurrency agency and as per Section 83 (General restrictions on granting building development approval) of the BA, the Assessment Manager cannot issue a Development Approval for Building Work until under the Planning Act, all necessary development permits are effective for the development.

As such a private certifier cannot lawfully grant a building development approval in the form of a Development Approval.

Applicant

The Applicant raised three main issues in its submissions to the Committee namely:

23. That the codes nominated under the BCP2014 Table 1.7.4 have no effect;
24. That pursuant to section 288(2) of the SPA, the Council, as Concurrency Agency, has overstepped its authority and had no jurisdiction to refuse the proposed development using the wording in the decision, as it relates to an Acceptable Outcome and a Performance Outcome in the BCP2014 and not the wording used in section 288 of the SPA; and
25. The Committee should declare that the certifier be at liberty to approve the development application within the SPA, section 527(1)(a) as if there were no concurrence agency requirements.

Findings of Fact

The Committee makes the following findings of fact:

Subject Site

26. The subject site is a 607 m² allotment located at 104 Payne Street, Auchenflower, and is zoned CR2 Character (Infill Housing) under the BCP2014. The subject site is located in the Traditional Building Character overlay (Neighbourhood Character), and whilst within the Ithaca District Neighbourhood Plan the subject site is not in a precinct or sub-precinct;
27. The land and residential development in the surrounding area of the subject site is steep and contain traditional character housing with significant ridge lines;
28. The allotment is a long rectangular allotment running north-south with a 16m street frontage facing Payne Street to the north. The allotment falls steeply from the street and the existing dwelling has been cut into the hill side on the western side of the allotment;
29. The existing dwelling on the site appears to have been extended and renovated on a number of occasions making it hard to identify the style/era of the original dwelling;
30. The existing dwelling is built over three levels with varying roof lines. The ground floor area consisting of off street parking and storage only. The existing dwelling form carries from a 6.0 metre front setback to a 5.170 metre rear setback and 1.088 metre setback from western side boundary.
31. External wall materials vary between rendered block, rendered lightweight cladding and timber cladding. The building outline has a number of recesses along the external wall line;
32. The proposed alterations and additions to the existing dwelling incorporating a new second storey at the southern end of the building establishing new floor area of approximately 64m². As the ground floor area directly below the proposed additions has never been developed ie no floor or enclosed walls, the new storey is defined as a second storey addition as per the BCP2014;
33. The streetscape in Payne Street and its neighbourhood vicinity consists of predominantly older and modest residential dwellings of timber cladding and metal sheet roofs, with some newer residences using brick and cement rendered finishes under roofing tiles. None that were observed by the Committee are more than two storeys, in the streetscape surrounding the subject site. The predominant older and more established character of the vicinity can be seen to have been modified with newer buildings establishing a broader mix of type and style of dwelling.

The Application Process

34. In September 2016, the property owner lodged a Development Application for building work with the Assessment Manager for alterations and additions to the existing dwelling incorporating a new second storey at the southern end of the building establishing new floor area of approximately 64m². The property owner supplied drawing from LVO Architecture and Urban Design detailing the proposed development;
35. The proposed development did not comply with Acceptable Outcome and Performance Outcome PO18, PO19, PO20, PO21, and PO23, of the BCP20014, Ithaca District Neighbourhood Plan Code 7.2.9.2, Table 7.2.9.2.3.A;

36. The Assessment Manager lodged a request for referral agency response for building work with the Council on 19 September 2016 along with plans detailing the proposed development. The referral agency responses requested by the Assessment Manager were under the SPR Schedule 7, Table 1 (For building work assessable against the BA), namely:
- (a) Item 17, being the amenity and aesthetic impact of the building or structure if the building work is carried out; and;
 - (b) Items 19, 20, and 21, all being Design and Siting.
37. In the cover letter setting out the application material provided to the Concurrence Agency, the Assessment Manager noted “no fee applicable”. As per the Council fees and charges at the time of the lodgment there was no fee applicable to the amenity and aesthetic referral however there was a fee applicable to the design and siting referral;
38. The Council issued a concurrency response on 4 September 2016 against SPR Schedule 7, Table 1, Item 17 amenity and aesthetics directing the Assessment Manager to refuse the application as it did not meet the Performance Outcomes of the BCP 2014, Ithaca District Neighbourhood Plan Code 7.2.9.2, Table 7.2.9.2.3.A, Performance Outcome PO18, PO19, PO20, PO21, and PO23, as such it has:
- ‘Have an extremely adverse effect on the amenity or likely amenity of the locality; or be in extreme conflict with the character of the locality.’*
39. The Assessment Manager issued a Development Application Decision Notice on 18 October 2016 refusing the proposed alterations and additions to the existing Class 1a dwelling;
40. The Applicant, through the agency of the Assessment Manager, lodged an appeal with the Committee on 20 October 2016;
41. The Applicant’s written submission to the Committee and verbal submission at the hearing related to section 288(2) (Limitation on concurrence agency’s power to refuse application) of the SPA which states:

288 Limitation on concurrence agency’s power to refuse application

(2) To the extent a local government’s concurrence agency jurisdiction is about assessing the amenity and aesthetic impact of a building or structure, the concurrence agency may only tell the assessment manager to refuse the application if the concurrence agency considers—

- (a) the building or structure, when built, will have an extremely adverse effect on the amenity or likely amenity of its neighbourhood; or*
- (b) the aesthetics of the building or structure, when built, will be in extreme conflict with the character of its neighbourhood.*

42. The Applicant stated: That pursuant to section 288(2) of the SPA, the Council, as Concurrence Agency, has over-stepped its authority and has no jurisdiction to refuse the proposed development using the following wording, as it relates to an Acceptable Outcome and a Performance Outcome in the Brisbane City Plan 2014 and not the wording used in Section 288 of the SPA namely:

Reasons for Refusal

The reasons for refusal are:

- *Have an extremely adverse effect on the amenity or likely amenity of the locality ;or*
- *be in extreme conflict with the character of the locality.*

Concurrence Agency Response

43. The Committee finds that the Council have only provided a Concurrence Agency Response in relation to the amenity and aesthetics referral as only this part of the application was properly referred (further discussion on this issue is set out below).
44. The Committee finds that, in relation to the amenity and aesthetics referral, the Council has undertaken its concurrence agency assessment according to law.
45. The Committee is of the opinion that the Council has complied with the requirements of Section 288(2) of SPA in providing its Concurrence Agency Response., The wording in the Concurrence Agency Response clearly states in the opening statement that the proposed development is refused on the grounds that *“Have an extremely adverse effect on the amenity or likely amenity of the locality; or be in extreme conflict with the character of the locality”*.
46. The Council response then provides additional justification as to why the Council has come to this conclusion based on its qualitative statement and quantifiable standard. It is noted that there is nothing under provisions of the BA or SPA that prevents a concurrency agency from providing additional justification/clarification for its decision.

Lapsing

The Committee finds that the application also required referral to the Council, as concurrence agency, for design and siting under the SPR Schedule 7, Items 19, 20 and 21 because:

- a. The existing dwelling has a side boundary setback of 1.088 m from the western side boundary and a rear boundary setback of 5.170m;
- b. The minimum setback from a side boundary for a dwelling where the height of that part is greater than 4.5m but not more than 7.5m as per section A2(a)(ii) of the QDCMP1.2 is 2.00 m;
- c. The proposed alteration to the dwelling incorporate a second storey with a setback of 1.008 m from the western side boundary. As such it does not meet the Acceptable Requirements of the QDCMP1.2.;
- d. The proposed alterations to the dwelling constitute Building Work as defined by the BA and SPA;
- e. The QDCMP1.2 under the heading ‘Application’ confirms that the proposed alterations to the dwelling trigger an assessment against the Code namely:

Application

MP 1.2 applies to new building work for single detached dwellings (Class 1) and associated Class 10 buildings and structures on lots less 450m² and over in area including "community title lots" having only one detached dwelling on a lot

- f. The Ithaca District Neighbourhood Plan Code 7.2.9.2, Table 7.2.9.2.3.A, Performance Outcome AO23.2 requires a minimum rear boundary setback of 6 m. The proposed alteration to the dwelling do not comply with this Acceptable Measure.
 - g. Section 33 (Alternative provisions to QDC boundary clearance and site cover provisions for particular buildings) of the BA allows a planning schemes to include alternative provisions for single detached Class 1 buildings and Class 10 buildings or structures to the provisions of the QDC for boundary clearance and site cover.
 - h. Table 1.6.1 (Building assessment provisions in the planning scheme for an assessment manager) of the BCP2014 states that the Ithaca District Neighbourhood Plan Code 7.2.9.2 contains alternative provisions to the QDC MP1.2 under section 33 of the BA.
47. The Committee is therefore of the opinion that the proposed development does trigger a Concurrence Agency Referral to Council for a siting variation against the performance criteria P2 of the QDC MP 1.2.
48. As noted in the background material, the Assessment Manager lodged a request for referral agency response for building work with the Council on 19 September 2016. The referral agency responses requested by the Assessment Manager were under the SPR Schedule 7, Table 1 (For building work assessable against the BA), namely:
- (a) Item 17, being the amenity and aesthetic impact of the building or structure if the building work is carried out; and
 - (b) Items 19, 20, and 21, all being Design and Siting.
50. In the cover letter setting out the application material provided to the Concurrence Agency, the Assessment Manager noted "no fee applicable".
51. As per the Council fees and charges at the time of the lodgement there was no fee applicable to the amenity and aesthetic referral however there was a fee applicable to the design and siting referral.
52. Pursuant to section 272(1)(c) of the SPA the Brisbane City Council's application fee (prescribed under the City of Brisbane Act 2010) forms part of the referral agency material that must be given to the Council as a concurrence agency. Pursuant to section 272(2)(a) that application fee must be given to the Council within 20 business days after the applicant receives the acknowledgement notice.
53. The fee for the design and siting referral was not paid at any time.
54. Pursuant to section 273 of the SPA, the application lapses if the applicant does not comply with section 272.
55. The application was not otherwise revived under the SPA.

Code Assessment – House Code

56. The Committee is of the opinion that the proposed dwelling additions are complying with Acceptable Outcome A02(a) of the BCP2014, Dwelling House Code 9.3.7, Table 9.3.7, as the ground floor area directly below the proposed additions has never been developed ie no floor or enclosed walls.

57. As such it is not a storey as defined under the BCP2014 which states the following:

Storey

(a) Means a space within a building between 2 floor levels or a floor level and a ceiling or roof, other than—

- (i) a space containing only a lift shaft, stairway or meter room; or*
- (ii) a space containing only a bathroom, shower room, laundry, toilet or other sanitary compartment; or*
- (iii) a space containing only a combination of the things stated in subparagraph; or*
- (iv) a basement with a ceiling that is not more than 1m above ground level; and*

(b) includes—

- (i) a mezzanine; and*
- (ii) a roofed structure that is on, or part of, a rooftop, if the structure does not accommodate building plant and equipment.*

58. Given the above, in the location of the proposed new storey the dwelling still constitutes a two storey building as per BCP2014.

59. Therefore, in the Committee's opinion, the application does not trigger a Material Change of Use Code Assessable application to be made to the Council.

Reasons for the Decision

60. The Committee finds that the application required two separate referrals. One referral, being the amenity and aesthetics referral, which was referred in accordance with the SPA. The other referral, being for design and siting. The referral for design and siting did not comply with section 272 of the SPA as the referral's agencies fee was not paid in the required timeframe. The application therefore lapsed pursuant to section 273 of the SPA.

61. The Committee finds that the lapsing of the application cannot be cured by the incorrect issuing of the decision notice. The Committee finds that it does not have the power to excuse the lapsing.

62. Therefore, the Committee finds that the appeal is not properly constituted and the Committee does not have jurisdiction to determine the Appeal.

Henk Mulder
Building and Development Committee Chair
Date: 18 October 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:

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