



Development Tribunal – Decision Notice

**Sustainable Planning Act 2009
Planning Act 2016**

Appeal Number: 42 – 16
Applicant: Malcolm Aikman
Assessment Manager: Trevor Gerhardt
Concurrence Agency: Brisbane City Council (Council)
(if applicable)
Site Address: 30 Waterline Crescent Bulimba Qld 4171, and described as Lot 22 on SP 159514, the subject site.

Appeal

Appeal under section 527 of *Sustainable Planning Act 2009* (SPA) against a Decision Notice of the Assessment Manager to refuse alterations and additions to a dwelling house, being of a building Class 1a. Council as the Concurrence Agency directed the Assessment Manager to refuse the building as the proposed building work will have an extremely adverse effect on the amenity or likely amenity.

Date and time of hearing: 6th June 2017 at 10.45 pm
Place of hearing: Mineral House, Level 16, 41 George St, Brisbane
Tribunal: Mr Henk Mulder - Chair
Ms Lauren Turner - Member
Mr John O'Dwyer - Member
Mr Don Grehan - Member
Present: Mr. Trevor Gerhardt - Assessment Manager and agent for the Applicant
Ms. Marcia Thompson - Council representative
Ms. Aileen Patterson - Council representative

Decision:

The Development Tribunal (**Tribunal**), in accordance with section 564(2)(c) of the SPA **sets aside** the decision of the Assessment Manager on 17 October 2016 to refuse the Application for a proposed extension to an existing dwelling, and **makes a new decision** to approve the Application for a Development Permit for Building Work in accordance with the amended Plan submitted by the Applicant to the A/Registrar on 20 June 2017, subject to following.

- (a) The Development Permit Conditions DA no 0002016256 dated 17 October 2016 form part of the approval and must be complied with;
- (b) The site development must be undertaken as shown on the following drawings:
 - New Level Plan Number SK01, 'A' still dated Sep 2016, by unknown
 - Upper Level Plan Number SK02, 'A' still dated Sep 2016 by unknown
 - Lower Level Plan Number SK03, 'A' still dated Sep 2016 by unknown;
 - Elevations 1, Drawing Number SK04, 'A' still dated Sep 2016 by unknown
 - Elevations 2, Drawing Number SK05, 'A' still dated Sep 2016 by unknown;

and

- (c) The extent and type of the roofed area and open wall area to the extension are to remain unchanged unless approved by a subsequent application.

Background

1. The subject site is a 437m² allotment located at 30 Waterline Crescent Bulimba Qld 4171.
2. In September 2016, the Applicant sought approval for an additional storey to be added on top of the existing residence.
3. The Application was referred to the Council as a concurrence agency triggered under the SPR, Schedule 7, Item 17.
4. Council as concurrency agency gave its response to the Assessment Manager on 27 September 2016 directing a refusal of the application, based on the proposal having an extremely adverse effect on the amenity or likely amenity of the locality, as proposed.
5. The Applicant through the Assessment Manager made an appeal to the Building and Development Dispute Resolution Committees (BDDRC) on 18 October 2016.
6. A Committee was formed and a hearing was completed on 1st December 2016.
7. A decision had been pending at the time of a request on 2 February 2017 from Council to not issue the decision as there were similar matters which were the subject of a **PEC** (Planning and Environment Court) appeal, the outcome of which would affect a significant number of different appeals.
8. Following the PEC decision, a new Committee was formed on 11 April 2017, relevantly with the Chair of the Committee being a registered architect. On 3 July 2017, the *Planning Act 2016* (PA) repealed the *Sustainable Planning Act 2009* (SPA) and section 309 of the PA had the effect that the Committee then became a Tribunal under the PA. Additionally, section 311 of the PA had the effect that the SPA continues to apply to these proceedings.

9. The key issue in the appeal, and that which informed the discussions at the site inspection and at the hearing, is the amenity and aesthetic impact of the proposed development.
10. The streetscape in Waterline Crescent and its neighbourhood vicinity is highly consistent with a contemporary use of glazing and render finishes for residences set out in regard to streetscape, and landscaping. Heights and scales vary at the corner of the subject site between two storey and the appearance of three storey dwellings.
11. As part of the hearing, consideration for how the proposal may prove acceptable was discussed and a revised set of drawings was sought by the Committee (as it then was) and submitted by the Applicant.

Material Considered

The material considered in arriving at this decision comprises:

1. Letter from the Assessment Manager dated 13 September 2016 making Application for a concurrency response to Brisbane City Council;
2. Acknowledgement Notice from the Assessment Manager, to the Applicant confirming receipt of the application dated 13 September 2016;
3. IDAS Form 1 and Form 2 Building work assessment application details;
4. The following drawings:
 - New Level Plan Number SK01, dated Sep 2016 by unknown
 - Upper Level Plan Number SK02, dated Sep 2016 by unknown
 - Lower Level Plan Number SK03, dated Sep 2016 by unknown;
 - Elevations 1, Drawing Number SK04, dated Sep 2016 by unknown
 - Elevations 2, Drawing Number SK05, dated Sep 2016 by unknown;
5. Concurrence Agency Response from Council dated dated 27 September 2016 instructing Assessment Manager to refuse Development Application for Building Work;
6. Assessment Manager Decision Notice to Applicant, dated 17 October 2016, refusing the alterations and additions as directed by Council for Development Application No: 0002016256, with accompanying conditions and information regarding appeals;
7. Form 10 – Appeal Notice, grounds for appeal and correspondence accompanying the appeal lodged with the Committees Registrar on 19 October 2016;
8. Letters to the Assessment Manager and Council confirming BDDRC Committee dated 8 November 2016;
9. Letters to the Applicant and Council dated 22 November 2016 confirming a hearing date 1 December 2016;
10. Emails between 22 November - 28 November confirming representatives and dates for hearing;
11. Council undated written submission for the hearing, provided via email 29 November 2016;
12. Council letter dated 2 February 2017 requesting pending decision not be issued based on similar matters being the subject of a Planning and Environment Court appeal;

13. Appeal Chair's letter to Council dated 11 February 2017 advising decision issuance as soon as possible;
14. Appeal Chair's letter to chief executive (**CE**), DHPW dated 15 March 2017 advising feasibility for proceeding to a Decision in the Appeal;
15. Appeal Chair's letter to Assessment Manager on behalf of the Applicant dated 15 March 2017 of amenity and aesthetics consideration for the appeals and pathways for a conclusion;
16. Verbal submissions at the hearing from all parties to the appeal;
17. Written submission provided by Council at the hearing
18. Supreme Court of Queensland - Court of Appeal (**QCA**) – *Brisbane City Council v Gerhardt* [2016] QCA 76 Holmes CJ and Philip McMurdo JA and Daubney J dated 1 April 2016 (**[2016] QCA 76**)
19. Planning and Environment Court (**PEC**) - *Brisbane City Council v Reynolds & Anor* [2017] QPEC 012 (17/352) Kefford DCJ dated 10 March 2017 (**[2017] QPEC 012**)
20. The *Brisbane City Plan 2014 (CP2014)* section 1.7.4 and codes listed in Table 1.7.4 - [Dwelling house \(small lot\) code](#);
21. The *Sustainable Planning Act 2009 (SPA)*;
22. The *Sustainable Planning Regulation 2009 (SPR)*
23. The *Building Act 1975 (BA1975)*.
24. The *Building Regulation 2006 (BR2006)*
25. The *Planning Act 2017 (PA 2017)*

Findings of Fact

The Tribunal makes the following findings of fact:

A. Subject Site

12. The subject site is a 437m² allotment located at 30 Waterline Crescent Bulimba Qld 4171. It is zoned LMR2 Low medium density residential (2 or 3 storey mix) under **CP2014**.
13. The purpose of the Low-medium density residential zone code is to provide for a range and mix of dwelling types including dwelling houses and multiple dwellings supported by community uses and small-scale non-residential services and facilities that cater for local residents.
14. The subject site is located in the Bulimba District Neighbourhood Plan and is not in a precinct.
15. The allotment is a curved corner lot with a rounded two-street frontage, and a south westerly aspect, with little change in level.
16. The allotment has an existing dwelling, two storeys in height, finished generally in coloured render.
17. The proposed alterations and additions comprise extending the habitable floor area to above the second floor, revising the roof and establishing a pergola over a new roof deck.
18. The streetscape in Waterline Crescent and its neighbourhood vicinity is highly consistent with a contemporary use of landscaping, glazing and render finishes for the amenity of the

residents and the neighbourhood. Heights and scales vary at this corner between two and the appearance of three storey dwellings.

B.The Application

19. The Application was referred to the Council as a Concurrence Agency triggered under the SPR, Schedule 7, Item 17 on 13 September 2016.
20. Council directed refusal of the application by way of its Concurrence Agency Response. The Assessment Manager subsequently issued a Decision Notice to the Applicant refusing the application. The Applicant ultimately appealed the decision.
21. Following the **PEC** decision referred to in the Background section, a new Committee was formed to address the issue of Amenity and Aesthetics, being the basis of the Council's referral as a Concurrence Agency and its refusal in its Concurrence Agency Response.

C.The Hearing and the submissions:

22. The hearing was undertaken off-site, at Mineral House, later in the morning after the site inspection on 6 June 2017. The Assessment Manager, Council's representatives and the Committee (now the Tribunal) were in attendance.
23. The appeal information was sought from the Applicant through the Assessment Manager as agent, and is as described in the Application, above.
24. The discussion for the proposed site use included clarifying the scale and effect for residences.
25. It was noted on site and discussed at the meeting that the river side of the subject property, to the west, had a number of properties that appeared to be three storey, establishing a scale and density for this part of the locality.
26. The adjacent neighbour to the east is most directly affected by the subject site proposal, based on existing height and orientation variations between the neighbours. Changes to the proposal were discussed, including reducing the roof extent and type, and ensuring open wall areas at the proposed extension to minimise change to the existing height variation between the adjacent properties.
27. The Committee (as it then was) requested the Applicant to provide a revised set of drawings that incorporated the agreed changes to the proposed extension. These drawings were subsequently provided and are referenced in the decision.

The Council's position

28. The Concurrence Agency Response from Council considered that the proposed building work will have *an extremely adverse effect on the amenity or likely amenity of the locality*. Council proceeded to refer to **Dwelling house (small lot) code PO2 and PO9**, as the applicable amenity and aesthetic assessment criteria.
29. At the hearing the Council discussed the relevancy of the CP2014 codes, and held the view that the refusal was based on the Dwelling house (small lot) code which discusses the qualitative and quantitative outcomes not achieved which informed the direction for a refusal.
30. At the hearing the Council identified one non-compliance with the relevant acceptable outcomes was that the building will be 3 storeys, whereas the code acceptable outcomes only provide for a maximum of two storeys in the relevant zone precinct. An extract of the Dwelling house (small lot) code in the Planning Scheme is set out below:

9.3.8 Dwelling house (small lot) code

9.3.8.3 Performance outcomes and acceptable outcomes
 Table 9.3.8.3.A—Performance outcomes and acceptable outcomes

<p>PO2</p> <p>Development is of a bulk and scale that:</p> <ul style="list-style-type: none"> · (a) is consistent with and complements the built form and front boundary setbacks prevailing in the street and local area; · (b) does not create overbearing development for adjoining dwelling houses and their private open space; <p>(c) does not impact on the amenity and privacy of residents in adjoining dwelling houses;</p> <p>(d) does not result in the loss of significant views or outlook of adjoining residents;</p> <p>(e) provides for natural light, sunlight and breezes.</p> <p>Note—In interpreting the building height elements of built form in PO2(a) 'prevailing in the street and local area' 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.</p>	<p>AO2.2</p> <p>Development in the:</p> <p>(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 7.5m above ground level at side and rear walls, increasing at no more than 30 degrees to a maximum building height of 9.5m above</p> <p>(i) 2 storeys; or</p> <p>(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; or</p> <p>(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 9.5m above ground level at side and rear walls, increasing at no more than 30 degrees to a maximum building height of 11.5m above ground level and:</p> <p>(i) 3 storeys; or</p> <p>(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.</p> <p>Note—The lowest point forming part of the maximum building height identified in AO2.2(a) being 7.5m or AO2.4(b) being 9.5m is determined by the applicable setback identified in AO2.4(a) or AO2.4(c), but not AO2.4(b) in this code.</p> <p>Editor's note—For example, the point at which the maximum building height of 7.5m above ground (as per AO2.2(a) provides) is determined to be setback 1m if the adjoining lot has a dwelling house with habitable spaces setback from the shared boundary. If the same adjoining dwelling had a built to the side boundary non-habitable garage (as provided for by AO2.4(b)), the point at which the maximum building height of 7.5m above ground is measured from would remain 1m.</p> <p>Editor's note—In interpretation of what maximum building height is provided for by AO2.2(a) or (b), the width of a subject lot will determine the maximum building height by way of the point either where 300 planes rising from opposite boundaries meet or the maximum building height identified in AO2.2 (a) or (b), whichever is the lesser is the maximum building height.</p>
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AO2.3

Development results in a minimum street frontage setback that is:

(a) on the **primary street frontage**:

(i) 6m where all adjoining dwelling houses have a setback of 6m or more; or

(ii) the same as the least setback, but not less than 3m, of an adjoining dwelling house where that dwelling house has a setback less than 6m; or

(iii) 3m where there is no adjoining dwelling house;

(b) on a **secondary street frontage**:

(i) 1.5m; or

(ii) 0m for non-habitable spaces up to 3m building height where the secondary street frontage is opposite to the primary street frontage and the road reserve of the secondary street frontage is 8m or less wide and a minor road;

(c)

in addition to either (a) where the setback is less than 5.5m or (b)(i) above, a minimum of 5.5m street frontage setback for garages.

AO2.4

Development results in a minimum side boundary setback that is:

- (a) 1m for habitable spaces; or
- (b) 0.5m and a maximum height of 3.5m for non-habitable spaces only for a maximum length of:
 - (i) 15m, where located in the Low–medium density residential zone, Medium density residential zone or High density residential zone; or
 - (ii) 9m, where in the Low density residential zone or the Character residential zone; or
- (c) 0m where:
 - (i) matching the extent of an existing built to boundary wall on the adjoining property; or
 - (ii) the adjoining property is 300m² or less and in the Residential zone category other than in the Character zone precinct of the Character residential zone; or
 - (iii) on a lot with an average width of 7.5m or less where the adjoining property is 300m² or less and in the Residential zone category other than in the Character zone precinct of the Character residential zone and the adjoining property has no existing built to the boundary wall; or
 - (iv) on a lot with an average width of more than 7.5m in the Low density residential zone or the Infill housing zone precinct of the Character residential zone where the registered owner of the adjoining premises does not object to a setback less than AO2.4(b) but only for non-habitable spaces, a maximum height of 3m and a maximum length of 9m.

Note—AO2.4(c)(ii) and (iii) apply to the development of a dwelling house at the same time as an adjoining dwelling house or adjoining dwelling houses developed at separate times.

Editor's note—For the purpose of satisfying AO2.4(c)(iv), confirmation in writing in the form of a statutory declaration from the registered owner of the adjoining premises is required to be submitted to demonstrate compliance.

AO2.5

Development results in a minimum rear boundary setback that is:

- 6m, where on a lot with an average depth of more than 25m; or
- on a lot with an average depth of 25m or less:
 - 3m, for a wall up to 4.5m high; 4.5m, for a wall over 4.5m high.

<p>PO9</p> <p>Development minimises direct overlooking between dwellings via building siting and layout and the design of windows, balconies and screening devices.</p>	<p>AO9.1</p> <p>Development that is within 2m for the storey closest to the ground level or 9m for storeys above, of a neighbouring dwelling house (refer to Figure f) incorporates windows, decks, balconies, terraces or roof decks that:</p> <p>(a) are offset from the window of a habitable room in the adjacent dwelling house to limit direct outlook as shown in Figure g; or</p> <p>(b) where a window, have:</p> <p>(i) sill heights of 1.5m above the floor level of that storey; or</p> <p>(ii) are covered by fixed obscure glazing in any part of the window below 1.5m above floor level of that storey; or</p> <p>(iii) have fixed external screens; or</p> <p>(iv) where at the ground storey, fencing to a height of 1.5m above ground-storey floor level;</p> <p>(c) where a deck, balcony, terrace, or roof deck have fixed screening.</p>
	<p>AO9.2</p> <p>Development ensures that a roof deck or viewing platform:</p> <p>(a) is set back at least 1.5m from the side boundary;</p> <p>(b) has a floor level no more than 7m above ground level or 1.5m less than the height of the roof, whichever is less.</p>
	<p>AO9.3</p> <p>Development incorporates screening devices that are:</p> <p>(a) solid translucent screens, perforated or slatted panels, or</p> <p>fixed louvres that have a maximum of 25% openings, with a maximum opening dimension of 50mm, that are permanently fixed and durable (refer to Figure h and Figure i);</p> <p>(b) offset a minimum of 0.3m from the face of the wall around any window.</p> <p>Note—Screening devices may be hinged to facilitate emergency egress only.</p>

31. Council outlined bulk, scale, overbearing to private open space, bulk and height diminishing neighbours' amenity and privacy; bulk and height adversely affecting natural light, sunlight and breezes and, from PO9, include direct overlooking between dwellings.

The Applicant's position

32. The Applicant considers that the use of the nominated Planning codes relied on by the Council for an amenity and aesthetics assessment should be disregarded as they do not form a part of the Building assessment provisions.

33. The Applicant seeks to have the Council's response set aside and the application approved only with those conditions already set out in the decision notice of the Assessment Manager.

- 34. The Applicant considers that **BR2006 Part 3** (*Prescribed matters or aspects for local laws or local planning instruments*) does not nominate the codes used by Council for amenity and aesthetics as prescribed matters or aspects for local laws or local planning instruments, and so the codes should not be considered.
- 35. The Applicant considers the Dwelling house (small lot) code is not a Building assessment provision and must be disregarded.
- 36. The Applicant considers that the extent of the jurisdiction of the Council as concurrence agency is the terms used in **SPR09 Schedule 7 Table 1, Item 17, Column 3**:

Schedule 7

Table 1—For building work assessable against the Building Act		
Column 1 Application involving	Column 2 Referral agency and type	Column 3 Referral jurisdiction
<p>17 Building work for a building or structure if it is</p> <ul style="list-style-type: none"> (a) a single detached class 1(a)(i) building, class 1(a)(ii) building comprising not more than 2 attached dwellings or a class 10 building or structure; and (b) in a locality and of a form for which the local government has, by resolution or in its planning scheme, declared that the form may <ul style="list-style-type: none"> (i) have an extremely adverse effect on the amenity, or likely amenity, of the locality; or (ii) be in extreme conflict with the character of the locality 	<p>The local government— as a concurrence agency</p>	<p>The amenity and aesthetic impact of the building or structure if the building work is carried out</p>

That is, only an assessment of:

“The amenity and aesthetic impact of the building or structure if the building work is carried out”

- 37. The CP2014 Codes contained in Table 1.7.4 are considered by the Applicant to have no relevancy.
- 38. CP2014 Section 1.7.4 states the following:
 - 1.7.4 Declaration for amenity and aesthetic impact referral agency assessment
 - For the purpose of Schedule 7, item 17 of the Regulation, building work for a building or structure which is a single detached class 1(a)(i) building, ... in a locality identified in Table 1.7.4 that does not comply with the acceptable outcomes in the codes identified in Table 1.7.4, is declared to:
 - (a) have an extremely adverse effect on the amenity or likely amenity of the locality; or
 - (b) be in extreme conflict with the character of the locality.

1.7.4 Declaration for amenity and aesthetic impact referral agency assessment

Table 1.7.4	
Locality	Codes
Land in the following zones: (a) Rural zone (b) Rural residential zone (c) Environmental management zone (d) Low density residential zone (e) Character residential zone and zone precincts (f) Low–medium density residential zone and zone precincts (g) Medium density residential zone (h) Emerging community zone	Dwelling house code Dwelling house (small lot) code
Land in the Traditional building character overlay	Traditional building character (design) code
Land in a neighbourhood plan area	A relevant neighbourhood plan code to the extent provided

39. The Applicant (and emphasised through the Assessment Manager acting as agent) considers that a lack of explanatory detail from Council exists in their concurrence agency response for these issues of the amenity and aesthetics, as it pertained to the direction of a refusal for the Assessment Manager.

40. For completeness, the refusal was directed by Council on the basis of the following:

- The proposed building work will have an extremely adverse effect on the amenity or likely amenity of the locality as:
 - o The proposal is not considered to comply with Performance Outcome PO2 of the Dwelling house (small lot) code, as it will result in development which is not consistent with or complements the bulk and scale of dwelling houses prevailing in the street and locality; and
 - o The proposal is not considered to comply with Performance Outcome PO2 of the Dwelling house (small lot) code, as the height and bulk will result in overbearing development for adjoining dwelling houses and their private open space; and
 - o The proposal is not considered to comply with Performance Outcome PO2 of the Dwelling house (small lot) code, as the height and bulk will impact the amenity and privacy of residents in adjoining dwelling houses; and
 - o The proposal is not considered to comply with Performance Outcome PO2 of the Dwelling house (small lot) code, as the height and bulk will adversely impact the access to natural light, sunlight and breezes.
 - o The proposal is not considered to comply with Performance Outcome PO9 of the Dwelling house (small lot) code, as it will result in direct overlooking between dwellings.

Planning Scheme Code

41. The Tribunal accepts the Council's submission that the Codes outlined in Table 1.7.4 of CP2014 are the appropriate benchmark for its assessment of the Application.
42. The Tribunal recognises that the planning scheme zone applying to the site is "LMR2 Low medium density residential (2 or 3 storey mix)".
43. The Tribunal accepts that the Acceptable Outcomes contain a two storey limit, however, the Tribunal consider that the zone designation and the Performance outcomes can apply to a development seeking three storeys.
44. The Tribunal has considered the performance outcomes and the acceptable outcomes and considers the proposed development (as amended during the Appeal) is not inconsistent with those provisions in relation to aesthetics and amenity.

Jurisdiction

45. This Committee (now Tribunal) was established as a result of the decision of Kefford DCJ in *Brisbane City Council v Reynolds & Anor* [2017] PEC 012 with a registered architect as the Chair as the appeal is about aesthetics and amenity. Therefore, the Tribunal is lawfully established.

Reasons for the Decision

46. The Tribunal is satisfied that the proposal set out in the revised drawings received by email on 21 June 2017 from the Applicant, and subject to conditions imposed in this decision, is acceptable in terms of any *adverse effect, bulk, scale light, and extreme conflict with the character of the locality*.
47. The Tribunal is satisfied the proposed extension is in a zone *LMR2 Low medium density residential (2 or 3 storey mix)* where there are existing residences nearby with a similar scale and bulk. As a result, the subject dwelling with the proposed extension will fit into the existing streetscape and not dominate.

Henk Mulder
Development Tribunal Chair
Date: 24 November 2017

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 (*i.e.* a decision by a Development Tribunal that it has no jurisdiction), 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:

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