



Development Tribunal – Decision Notice

Planning Act 2016

Appeal Number:	54-16
Appellant:	Li Chen
Respondent (Assessment Manager):	Trevor Gerhardt
Co-respondent (Concurrence Agency): (if applicable)	Brisbane City Council
Site Address:	145 Fernberg Road, Paddington

Appeal

Appeal under section 527 of Sustainable Planning Act 2009 (SPA) against:

1. 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 is declared in section 1.7.4 of the Brisbane City Plan 2014 (CP2014) to be in a locality and of a form that may 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.
 2. Deemed refusal of design and siting.
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Date and commencement time of hearing:	20 January 2017 from 2.00pm
Place of hearing:	The subject site
Tribunal:	Kelly McIntyre – Chair Neil de Bruyn - Member Catherine Baudet - Member
Present:	Li Chen and Trevor Gerhardt – Appellant Marcia Thompson – Council Representative

Decision:

The Development Tribunal (Tribunal), in accordance with section 564(2)(a) of the SPA confirms the Decision Notice in respect of amenity & aesthetic and pursuant to section 564(2)(d) of the SPA, the Tribunal orders the Assessment Manager to decide the application with regard to design & siting.

Background

This matter involves an appeal to the Building and Development Dispute Resolution Committee **(the Committee)** pursuant to section 527 of the *Sustainable Planning Act 2009 (SPA)*, by Mr Trevor Gerhardt, as agent for the Applicant.

Mr Gerhardt is a Private Building Certifier licensed in Queensland and accredited to level 1 by the Queensland Building and Construction Commission **(QBCC)** (Licence number A80404) and was the assessment manager, pursuant to section 11 of the *Building Act 1975 (BA)*, for the building development application **(Assessment Manager)** for the proposed construction of a second storey.

On or about 9 November 2016, a building development application pursuant to section 6 of the BA was lodged with the Assessment Manager seeking approval for alterations and additions to a class 1 (a) building located at 145 Fernberg Road, Paddington **(the Building Development Application)**. In particular, the construction of a second storey.

The land has an area of 405m² and is improved by a single storey dwelling house which was constructed post-1946**(the Land)**.

The Building Development Application triggered the need for the Council to provide a concurrence agency response in respect of Design & Siting, pursuant to schedule 7, Table 1, Item 17 of the *Sustainable Planning Regulation 2009 Qld (SPR)* and Amenity & Aesthetics pursuant to section 1.7.4 of City Plan 2014, prior to the Assessment Manager being able to grant approval pursuant to section 83(1)(d) of the BA.

On or about 9 November 2016, the Assessment Manager submitted a concurrence agency application to the Council for Design & Siting and Amenity & Aesthetics.

The application for a concurrence agency response identified the work being performed as *“Proposed Building Work; Alterations & additions to existing house dwelling”* and sought a concurrence agency response for the following:

Sustainable Planning Regulation 2009, Table 1 for building work assessable against the Building Act, schedule 7, Design and Siting 19, 20, 21.

The additions to rear existing house dwelling with a proposed boundary setback of 1500mm OMP to the rear boundary. The proposed building work does not affect the neighbouring properties.

Sustainable Planning Regulation 2009, Schedule 7, Table 1 for building work assessable against the Building Act, item 17 Amenity and aesthetic impact of particular building work.

Brisbane City Council City Plan 2014 - Part 1.7.4 Declaration for amenity and aesthetic impact referral agency assessment, Table 1.7.4 " Declared locality and building form for amenity and aesthetic impact referral agency assessment, declaration under Sustainable Planning Regulation 2009 Schedule 7, Table 1, item 17.

The proposed building work; Alterations & additions to existing house dwelling. There is no extreme or adverse impact on neighbouring properties, and does not affect the neighbouring properties. There is no extreme effect to the amenity, likely amenity or extreme conflict with the character of the locality.

The proposed building work will not:

(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.

The “Acknowledgement notice” attached to the application for the concurrence agency response identifies that the application seeks development approval for *“Carrying out building work (assessable under the Building Act 1975) and that it is Part 1, Table 1, Item 1 of the Sustainable Planning Regulation 2009, schedule 3 for a “Development Permit”.*

The IDAS Form 2 incorporated mandatory supporting information in the form of:

“... Plans, drawings and specifications to enable assessment against section 30 (building assessment provisions) of the Building Act 1975 to comply with the information requirements of chapter 3, parts one and two of the Building Act 1975”

The IDAS Form 1 includes the following notation under description of the proposal:

“... Alterations & additions to existing house dwelling

Note. Concurrence agency request does not include Building Work being Brisbane City Council City Plan 5.3.4 Prescribed exempt development”

On or about 23 November 2016, the Council provided a concurrence agency response in respect of amenity & aesthetic directing the Assessment Manger pursuant to section 287(2)(b) of the SPA to refuse the Building Development Application as the Council’s delegate considered that, in respect of amenity and aesthetic impact of particular building work, the building work would:

- (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;*

The concurrence agency referral response identified that it involved:

(a) alterations and additions to a dwelling house located within the dwelling house character overlay, traditional building character overlay and the Ithaca district neighbourhood plan under the Brisbane City plan 2014 (CP2014);

The Council in its response of 23 November 2016, identified that the alterations and additions were within the jurisdiction of the Council as identified in schedule 7 of SPR and section 1.7.4 of CP2014. Furthermore it identified that the response for the alterations and additions and building work components of the building development application which were assessed by Council, were assessed against the dwelling house code, traditional building character (design) overlay code, Ithaca district neighbourhood plan code of CP2014.

The reasons for refusal were identified in “Attachment 1” and included:

- 1. the proposed extensions conflict with the strategic outcomes (theme 2(1)(c)) as the proposed building work will significantly alter the appearance of the dwelling when viewed from the street;*
- 2. applicant has not adequately demonstrated that consideration has been given to the adverse aesthetic impact the extensions will have on the dwelling house in terms of loss of amenity (alteration to the traditional setting of the dwelling) anaesthetic (alteration to how the dwelling presents and contributes to the traditional setting of the street) [Theme 5 - strategic outcome (g)(iv);*

3. *proposal is in conflict with the purpose of the traditional building character (design) overlay code (1) as the development fails to implement the policy direction identified in the strategic framework (Theme 2 and Theme 5);*
4. *Fernberg Road is comprised of a relatively strong character streetscape of existing pre-1947 dwelling houses of a similar and complementary built form, scale, setting, materials, and detailing. The Proposed building work will be in extreme conflict with the character of the locality as:*
 - a. *Proposal does not comply with performance outcome PO3 of the traditional building character (design) code, as the proposed alteration and additions result in a building form and bulk which does not complement the predominant traditional scale of a dwelling house constructed in 1946 or earlier nearby in the street.*
 - b. *Proposal does not comply with performance outcome PO4 of the traditional building character (design) code, as the proposed alteration and additions result in a building form which does not complement the traditional building form. The Proposal does not provide traditional elements, such as an integrated lightweight veranda addressing the street, which is consistent with the building form of pre 1947 dwelling houses nearby in the street.*
 - c. *Proposal does not comply with performance outcome PO5 of the traditional building character (design) code, as it does not provide external elements and detailing which reflect traditional elements, reducing building bulk and form a transition with the external landscape.*
5. *The proposal is not considered to comply with performance outcome PO18 of the Ithaca district neighbourhood plan code, as the proposed alterations and additions result in the dwelling house not being compatible with the traditional character house scale. The additions design and siting are not considered to retain and reinforce the predominant development pattern form with the extensions at the read adversely impacting adjoining properties.*
6. *The proposal is not considered to comply with performance outcome PO19 of the Ithaca district neighbourhood plan code, as the proposed alterations and additions result in the dwelling house having a height, scale and proportions incompatible with the traditional character hoses when viewed from the visual catchment.*
7. *The proposal is not considered to comply with performance outcome PO20 of the Ithaca district neighbourhood plan code, as the proposed alterations and additions result in the dwelling house having a design and siting which creates incompatible building bulk. The proposal is considered to detract from the traditional character and built form of the precinct due to the bulk, form and scale of the dwelling house and lack of elevational treatment.*
8. *The proposal is not considered to comply with performance outcome PO23 of the Ithaca district neighbourhood plan code, as the proposed alterations and additions design and siting are not considered to reinforce the landscape character and physical setting of the locality, creating incompatible building bulk.*

Although the concurrence agency response, as detailed above, specified the particular non-compliance with regard to design and siting, it gave no direction to the Assessment Manager as whether or not it should be refused. Accordingly, this aspect was taken to be a deemed refusal pursuant to Section 286(2) of the SPA.

On or about 2 December 2016, the Assessment Manager issued the decision (Decision Notice No.0002016265) to the Applicant refusing the Building Development Application.

On or about 6 December 2016, this appeal was filed by the Assessment Manager on behalf of the Applicant seeking an order to set aside the decision (Decision Notice No. 0002016265) and replace it having considered the following:

- “(a) The codes nominated under Brisbane City Plan 2014 Table 1.7.4 have no effect;*
- (b) Declare that the private certifier be at liberty to approve the development application within the Sustainable Planning Act 2009 (Qld) s.527(1)(a) as if there were no concurrence agency requirements;*
- (c) The concurrence agency response dated 23 November 2016 set aside;*
- (d) GECON Building Development Application (BA) Decision Notice – Approved;*
- (e) The building development application be approved not subject to conditions other than those of the BA.”¹*

The Appeal notice cites two referrals:

Brisbane City Council – Concurrence Agency Referral – Design & Siting, no response, deemed refused

Brisbane City Council – Concurrence Agency Referral – Amenities & Aesthetics (ref A004516771) refused

On 7 December 2016, the Acting Registrar of the Building and Development Dispute Resolution Committees (now the Tribunal) issued a letter to the parties regarding the notice of appeal. The letter identifies that the appeal is against the Decision Notice of Mr Trevor Gerhardt (Gecon) as the Assessment Manager to refuse a building development application for alterations and additions to an existing dwelling house (class 1a). The refusal was based on the advice of Brisbane City Council as Concurrence Agency who believes the proposed building works under 1.7.4 of the Brisbane City Plan 2014 to be in a locality and of a form that may:

- (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

The letter makes no mention of design & siting.

On 20 January 2017, the parties convened at the Site for the hearing of this appeal.

On 7 February 2017, the Tribunal received written submissions from the Co-Respondent.

On 17 February 2017, the Tribunal received revised submissions from the Appellant.

Between 16 March 2017 and 7 August 2017 this appeal was held in abeyance pending formal confirmation of certain administrative matters arising as a result of objections raised by the Council.

On or about 8 August 2017, the Tribunal as it was originally constituted was re-enlivened.

In the intervening period, a number of relevant decisions have been delivered by the Queensland Planning and Environment Court and the Queensland Court of Appeal which warranted a further delay in delivering a decision in respect of the present matter and significantly impact on the decision.

¹ Submissions of the Applicant

Material Considered

9. 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 Tribunals Registrar on 7 December 2016
 - b. Further written submissions of the Appellant and Assessment Manager dated 14 February 2017;
 - c. Written submissions of Council (undated);
 - d. BDDRC Appeal 33-16
 - e. BDDRC Appeal 15-15
 - f. Verbal submissions at the hearing from all parties to the appeal;
 - g. The Brisbane City Plan 2014 (CP2014);
 - h. The Sustainable Planning Act 2009 (SPA);
 - i. The Sustainable Planning Regulation 2009 (SPR)
 - j. The Building Act 1975 (BA).
 - k. The Building Regulation 2006 (BR)
 - l. Integrated Development Assessment System (IDAS)
 - m. Gerhardt v Brisbane City Council [2015] QPEC 34
 - n. Gerhardt v Brisbane City Council [2016] QPEC 48
 - o. Gerhardt v Brisbane City Council (No. 2) [2016] QPEC 50
 - p. Brisbane City Council v Gerhardt [2016] QCA 76 (appeal of [2015] QPEC 34)
 - q. Brisbane City Council v Atkins [2017] QPEC 10
 - r. Brisbane City Council v Reynolds & Anor [2017] QPEC 12
 - s. Gerhardt v Brisbane City Council [2017] QCA 285 (appeal of [2016] QPEC 48)

Issues raised in submissions

10. The Appeal is primarily concerned with two key issues:
 - a. Whether or not the codes nominated under Brisbane City Plan 2014 Table 1.7.4 are applicable to the assessment of the current application;
 - b. Whether or not the building development application can be granted.
11. In deciding those questions, a number of complex legal issues were extensively traversed in the legal submissions of both parties, they are usefully distilled as follows:
 - a. Whether the Council's referral jurisdiction test is:
 - i. "the amenity and aesthetic impact of the building or structure if the building work is carried out" pursuant to column 3 of Item 17 of the SPR ; or

- ii. “extremely adverse effect” and “extreme conflict with the character” of the locality pursuant to column 1 of Item 17 of the SPR.
- b. Whether the matters specified in Part 3 of the Building Regulations (BR) are prescribed matters that relate to the nominated planning provisions contained in 1.7.4 (CP2014).²
 - c. Whether through the operation of s.282 of the SPA and section 46 (BA), section 282(3)(b) (SPA) would take priority in the assessment process and leave the codes nominated at section 1.7.4 (CP2014) with no capacity to be the determining benchmarks for an application for Amenities and Aesthetics because of their non-building assessment characteristics³.
 - d. With regard to the decision notice of Council:
 - i. pursuant to section 289(1) of the SPA, the refusal of the application by the Council as concurrence agency must be accompanied by the reasons for which the Council issued a refusal;
 - ii. those reasons must, pursuant to section 27B of the Acts Interpretation Act, be accompanied by a statement of the findings on material questions of fact and references to the evidence or other material upon which those findings were based;
 - iii. whether Councils reliance in the decision on planning scheme and planning scheme codes would be “clear, specific and unambiguous” such that the applicant could easily understand that the Council was directing a refusal and the basis of the refusal.
 - e. Whether the proposed construction of a double garage is building work assessable under **both** the Sustainable Planning Act 2009 (SPA) (SPA building work) and the Building Act 1975 (BA) (BA building work).
 - f. Whether the Council nominated assessment provisions are the provisions identified in section 1.7.4 of the Brisbane City Plan 2014, being the Dwelling house code and the Traditional building character (design) code (Relevant codes).
 - g. Whether the definition of “amenity” defined in City Plan 2014 Table SC1.2.3.B- Brisbane City Council administrative definitions is the same as that which should be applied by Council in 1.7.4 of CP2014.
 - h. Whether the application to Council for concurrence agency response for design & siting was required to be assessed against the performance outcomes P02, P03, P04 and P05 of the current Brisbane City Council Dwelling house (small lot) Code in circumstances where the Council initially indicated a fee for design & siting against the Queensland Development Code but subsequently indicated that the fee would be for design & siting against the Sustainable Planning Regulation 2009, Schedule 7, Table 1 design and siting item 20.

² The Applicant relies on the decision in *Gerhardt v McNeil* [2015] QDC 270 at [32] per Deveraux DCJ to support the position that assessment against the Codes cannot be made as a concurrence agency because s.46 of the BA requires the concurrence agency to assess any relevant part of the building assessment work under the building assessment provisions and the Codes in City Plan, relevant to the building development application, are not within the building assessment provisions.

³ The Applicant submitted that this position is supported by the requirements of Regulation 13 in the SPR which specifies the referral agencies and their jurisdictions for sections 250(a), 251(a) and 241(1) of the SPA

- i. Whether provisions of the Relevant codes that are qualitative statements and quantifiable standards for matters provided for under performance criteria 4 and 8 under QDC MP1.2 form part of the building assessment provisions.

Appellant's submissions

The Appellant made the following written submissions:

12. The Building Development Application is an application pursuant to section 6 of the *Building Act 1975 Qld (the Building Act)* being an application for development approval under the *Planning Act* to the extent it is for building work.⁴
13. Pursuant to column 3 of Item 17 of the SPR, the Council's referral jurisdiction test is "*the amenity and aesthetic impact of the building or structure if the building work is carried out*" and not that of "*extremely adverse effect*" and "*extreme conflict with the character*" of the locality identified in column 1 of Item 17.⁵
14. The "*extremely adverse effect*" and "*extreme conflict with the character of the locality*" are tests to be used by a local government pursuant to column 1 of Item 17 of the SPR to establish its referral jurisdiction by identifying the building work for a building or structure to which Item 17 of the SPR applies, that is, those applications for building work for a building or structure which are to be referred to the local government as a concurrence agency to consider the amenity and aesthetic impacts of that particular building work.⁶
15. That Part 3 of the Building Regulations (BR) that the codes nominated under 1.7.4 (CP2014) are not prescribed matters or aspects for local laws or local planning instruments and that there are no matters that are prescribed under a regulation that relate to the nominated planning provisions contained in 1.7.4 (CP2014)⁷
16. The Council nominated assessment provisions are the provisions identified in section 1.7.4 of the CP2014, being dwelling house code and traditional building character (design) code.⁸
17. The Council has not nominated the Traditional building character (demolition) code as an assessment provision contained in section 1.7.4 of the Brisbane City Plan 2014 as being a relevant code.⁹
18. That through the operation of s.282 of the SPA and section 46 (BA), that section 282(3)(b) (SPA) would take priority in the assessment process and leave the codes nominated at section 1.7.4 (CP2014) with no capacity to be the determining benchmarks for an application for Amenities and Aesthetics because of their non-building assessment characteristics.¹⁰
19. The codes contained at section 1.7.4 (CP2014) are planning provisions and not building assessment provisions as required by both section 46 (SA) and section 282(3)(b) (SPA) and would therefore be considered to be redundant, of no effect and lacking capacity.¹¹
20. The Appellant also submitted that pursuant to section 289(1) of the SPA, the refusal of the application by the Council as concurrence agency must be accompanied by the reasons for which the Council issued a refusal. In this respect the applicant relied on section 27B

⁴ At [3] Appellant submissions

⁵ At [10] Appellant submissions

⁶ At [11] Appellant submissions

⁷ At [16] Appellant submissions

⁸ At [18] Appellant submissions

⁹ At [19] Appellant submissions

¹⁰ At [22] Appellant submissions

¹¹ At [23] and [24] Appellant submissions

of the Acts Interpretation Act (AIA), which relevantly requires that “Reasons” must be accompanied by a statement of the findings on material questions of fact and references to the evidence or other material upon which those findings were based.¹²

21. The Appellant submitted that the Council did not identify why it has formed the view that the proposed building work is not compliant with “amenities and aesthetics” other than to reflect on planning scheme and planning scheme codes. Such reasons are submitted not to be “clear, specific and unambiguous” such that the applicant could easily understand that the Council was directing a refusal nor easily understand why the application had been refused and then decide whether or not to appeal.¹³

22. As to “amenity and aesthetic” the Appellant refers the Tribunal to the definition of “amenity” at City Plan 2014 Table SC1.2.3.B- Brisbane City Council administrative definitions:¹⁴

Amenity	The qualities of a location in regard to noise, vibration, dust, odour, air quality, lighting, daylight, glare, breezes and shade, freedom from hazard or risk of threats to health and well-being of occupants, and the uninterrupted ability to use and enjoy the land for the purpose it was designed, that may be affected by the level, time and duration of activities on nearby sites or the impacts of natural hazards, including spatial and temporal impacts.
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23. The Appellant submits that the definition of “amenity” extracted above, is the same as that which should be applied by Council in 1.7.4 of CP2014.

24. There is no corresponding definition of “aesthetic”.¹⁵

25. The Appellant did not make any substantive submissions regarding design & siting.

Respondent’s submissions

26. The Respondent made extensive legal submissions covering some 27 pages and addressing:

- a. B1 – Characterisation of the proposed work
- b. B2 - Assessable development under the Building Act 1975
- c. B3 - Assessment provisions for assessable development under the Building Act 1975
- d. B4 - Assessable development under the Sustainable Planning Act 2009
- e. B5 - Assessment provisions under the Sustainable Planning Act 2009
- f. B6 - Relationship between the assessment criteria under the Building Act 1975 and the Sustainable Planning Act 2009
- g. B7 - Assessment manager for BA building work
- h. B8 - Concurrence Agency for BA building work
- i. B9 - Assessment manager for SPA building work

¹² At [28] to [37] Appellant submissions

¹³ At [28] to [37] Appellant submissions

¹⁴ At [41] Appellant submissions

¹⁵ At [42] Appellant submissions

- j. C – SUBMISSION ON THE COMMITTEE’S DECISION IN APPEAL NUMBER 33-16
- k. D - SUBMISSION ON THE ORDERS SOUGHT
 - i. D1- Issue 1 – Effect of the codes
 - ii. D2 – Issue 2 – Granting the Building development approval
 - 1. Concurrence agency assessment
 - 2. Assessable development outside the Building assessment provisions
 - 3. Limitation of issuing a building development approval

27. The submissions have been considered in detail for the purpose of preparing this decision.

Particular aspects of the submissions of the respondent under section B1 – B9 include the following:

28. The Council submitted that the Land is subject to the following relevant zones and overlays under *Brisbane City Plan 2014 (CP2014)*:
- a. Character (infill) residential zone;
 - b. Ithaca district neighbourhood plan (Hillside Character Presinct);
 - c. Dwelling house character overlay;
 - d. Traditional building character overlay;¹⁶
29. The proposed construction of the additional storey is building work under both the *Sustainable Planning Act 2009 (SPA) (SPA building work)* and the *Building Act 1975 (BA) (BA building work)*.¹⁷
30. The assessment needs to be in accordance with both the BA and SPA.
31. The building assessment provisions in the planning scheme are identified in table 1.6.1 of CP2014 and they relevantly provide for:
- a. Traditional building character (design) overlay code (TBC Code)
 - b. Dwelling house (small lot) code (DH Code)
 - c. Ithaca district neighbourhood plan code (IDNP Code)
- (the Relevant Codes)**¹⁸
32. To determine which provisions of the Relevant Codes are applicable, they must be considered in light of column 2 of table 1.6.1 and the BA¹⁹.
33. To the extent provisions of the Relevant codes are qualitative statements and quantifiable standards for matters provided for under performance criteria 4 and 8 under QDC MP1.2 they form part of the building assessment provisions²⁰.

¹⁶ At [4] Council submissions

¹⁷ At [9] Council submissions; See the definition of “building work” in section 10 of the SPA, for building work assessable under the SPA, which includes “building and altering”. See also the definition of “building work” in section 5 of the BA, for building work assessable under the BA, which includes “building and altering”.

¹⁸ At [23] Council submissions

¹⁹ See section 13 and schedule 1 of the BA.

²⁰ At [25] Council submissions

34. The BA building work is assessable against the provisions prescribed under section 30 of the BA and including the above provisions of the Relevant codes.²¹
35. Unlike section 20 of the BA, in order for the development to be assessable it is only necessary to find a head of power which identifies the particular SPA building work as assessable development.²²
36. The only building work that is prescribed under the SPR to be assessable development is building work assessable under the BA.²³
37. The only building work that is prescribed under the SPR to be assessable development is building work assessable under the BA.²⁴ SPA building work is not assessable development under the SPR. CP2014 prescribes that the SPA building work is also code assessable development.²⁵
38. CP2014 relevantly prescribes that for code assessable development:
 - a. Development must be assessed against all the applicable codes identified in the assessment criteria column of the level of assessment tables;
 - b. Development that complies with the purpose and overall outcomes of the code complies with the code or development that complies with the performance or acceptable outcomes where prescribed complies with the purpose and overall outcomes of the code;
 - c. Development must have regard to the purpose of any instrument containing an applicable code²⁶.
39. CP2014 prescribes that the applicable codes for the SPA building work are as follows:
 - a. TBC code;
 - b. IDNP code.²⁷
40. The intention of section 78A of SPA is to ensure that a provision of a planning scheme does not seek to regulate the items in section 30(1)(b), (c), (d), (e) and (g) of the BA unless that provision is made under sections 31, 32 and 33 of the BA.²⁸
41. The criteria prescribed in section 30(1)(b), (c), (d), (e) and (g) of the BA generally relates to matters of building standards, such as matters under the *Building Code of Australia* and fire safety standards, rather than matters which are directed at planning related issues.²⁹
42. Therefore, a planning scheme can include provisions about building work, outside of those permitted under the BA, so long as the provisions of the planning scheme do not seek to regulate the matters in 30(1)(b), (c), (d), (e) and (g) of the BA.³⁰

²¹ At [27] Council submissions

²² At [29] Council submissions

²³ At [32] Council submissions; See s.231 of SPA, s.9, sch. 3, Pts 1 and 2, Table 1, Item 1 of SPR

²⁴ At [32] Council submissions; See section 231 of the SPA, section 9 schedule 3, Parts 1 and 2, Tables 1, Items 1 of the SPR

²⁵ At [32] – [36] Council submissions; See sections 5.3.1, 5.3.2, 5.3.3, Tables 5.10.21 of CP2014

²⁶ At [37] Council submissions; Section 5.3.3 of the CP2014

²⁷ At [38] Council submissions

²⁸ At [43] Council submissions

²⁹ At [44] Council submissions

³⁰ At [45] Council submissions

43. The only matters in CP2014 which seek to regulate matters in section 30(1)(b), (c), (d), (e) and (g) of the BA are those matters in Table 1.6.1 of the CP2014 which are made under sections 31, 32 and 33 of the BA.³¹
44. At best, the only provisions of the planning scheme which may fall within the scope of 78A, are those identified in section B3 of these submissions. However, given the definition of “building assessment provisions” in section 78A of the SPA even this cannot be the case as provisions of a local planning instrument are excluded.³²
45. As the remaining provisions of the Relevant codes do not relate to matters prescribed under section 30(1)(b), (c), (d), (e) and (g) of the BA, they are not subject to section 78A and are of full effect for the assessment of the SPA building work.³³
46. The assessment manager for an application administers and decides the application, but may not always assess all aspects of development for the application.³⁴
47. The assessment manager for the SPA building work is the Council.³⁵

The Council made the following submissions regarding its headings D1 – D2:

48. That the applicant is seeking a declaration that the nominated codes under CP2014 are of no effect and that for the Tribunal to make such a declaration is beyond its jurisdiction.³⁶
49. That in order to grant the building development approval, the Tribunal must be satisfied that:
 - a. the BA building work complies with the building assessment provisions, including the provisions the concurrence agency is required to assess³⁷;
 - b. that all necessary preliminary approvals have been issued for the SPA building work³⁸
50. The BA building work has been assessed against the relevant provisions of the DH code, TBC code and IDNP code which form part of the building assessment provisions and the Co-Respondent submits that the building development application conflicts with the following provisions:
 - a. PO19 of the IDNP code, in that, the building development application fails to provide for a height and scale that is proportional and compatible with the traditional character houses when viewed from the visual catchment.
 - b. AO19 of the IDNP of the code, in that, the roof geometry of 25o (additionally this is nominated on the plans to be ‘altered if required’) is less than the minimum 27.5o pitch required.
 - c. PO23 of the IDNP code, in that, the building development application fails to provide for a rear boundary setback that considers the impact on the adjoining properties at the rear of the Land.

³¹ At [46] Council submissions

³² At [47] Council submissions

³³ At [48] Council submissions

³⁴ At [53] Council submissions ; Section 247 and 312 of the SPA.

³⁵ At [62] Council submissions

³⁶ At [77] Council submissions

³⁷ section 83 (1)(c) and (d) of the BA

³⁸ At [80] Council submissions ; Section 83(1)(b) of the BA

- d. AO23 of the IDNP code, in that, the rear setback proposed in the building development application of 1.5m at the ground level and 4.5m at the upper level does not achieve the required 6m.³⁹
51. Taking into consideration the BDDRC's power under section 564(2)(e) of the SPA, the Co-Respondent submits that the above conflict could be overcome with the following amendments to the building development application:
- a. reduction in the overall length of the proposed deck to provide for the minimum 6m setback to the rear boundary;
 - b. the lower level to remain at 6m from the rear boundary;
 - c. the provision of a balcony, or window, to the southern façade of the upper level master bedroom;
 - d. the roof pitch to be conditioned to be 27.5o minimum and not altered during construction;
 - e. the building height of 9.5m maximum to be conditioned and noted on the building plans prior to approval.

Jurisdiction of the committee

52. Pursuant to section 508 of SPA, a building and development committee has jurisdiction:
- “(a) to hear and decide a proceeding for a declaration about a matter mentioned in division 3, other than a matter done for chapter 6, part 11; and*
 - (b) to decide any matter that may be appealed to a building and development committee under divisions 4 to 7; and*
 - (c) to decide any matter that under another Act may be appealed to a building and development committee.”*
53. The Tribunal is bound by the principles of *stare decisis* to follow the decisions of superior courts.
54. As identified above at paragraph [10], there are two key issues in the appeal.
55. The first ground of the appeal seeks an order that the codes nominated in table 1.7.4 of Brisbane City Plan 2014 are of no effect.
56. Her Honour Kefford J in *Brisbane City Council v Atkins* [2017] QPEC 10 and *Brisbane City Council v Reynolds & Anor* [2017] QPEC 12 determined that:
- “...relief of that nature is akin to declaratory relief that could not be granted by the committee having regard to its limited power to make declarations under sections 510 to 513 of the Sustainable Planning Act 2009...”*⁴⁰.
57. Accordingly, the first ground of appeal in this case seeks relief which is beyond the committee's jurisdiction.
58. In accordance with the decision of *Brisbane City Council v Atkins* [2017] QPEC 10 and *Brisbane City Council v Reynolds & Anor* [2017] QPEC 12, the Tribunal is required to

³⁹ At [81] Council submissions

⁴⁰ *Brisbane City Council v Atkins* [2017] QPEC 10; *Brisbane City Council v Reynolds & Anor* [2017] QPEC 12

disregard those matters contained within the appeal that could not legitimately be the subject of an appeal to the Tribunal.

59. When this appeal is construed in that light, the appeal is one that would necessarily require the Tribunal to investigate the merits on which the refusal has been issued and such investigation, would necessarily require consideration of whether or not the basis of the refusal was appropriate.
60. The second ground of appeal seeks a determination on whether or not the building development application can be granted.
61. Accordingly, any consideration of the second ground of appeal would necessarily require the Tribunal to address the question the subject of the first ground of appeal which it is precluded from doing.

Decision

62. It is clear from the Appeal documents and written submissions of the parties that the matter of primary concern to all, relates to the issue of whether or not the codes nominated under CP2014 table 1.7.4 are applicable to the assessment of the application. The codes in question have been used extensively by Council in its concurrence agency response and also by the parties in their submissions. This question filters through to every aspect of the submissions and corresponding decision to be made by the Tribunal.
63. Determination of the primary question "*Whether or not the codes nominated under Brisbane City Plan 2014 Table 1.7.4 are applicable to the assessment of the current application*" is outside the jurisdiction of the Tribunal.
64. The second ground of appeal seeks a determination on whether or not the building development application can be granted.
65. As the Tribunal is not permitted to consider whether or not the codes nominated under CP2014 Table 1.7.4 are applicable to the assessment of the current application and as the application has been assessed by Council on such a basis, any decision made by the Tribunal regarding such codes, their application and effect in respect of the current application, would also be outside the jurisdiction of the Tribunal.
66. In light of this and in accordance with prevailing case law as detailed above, the Tribunal is required to disregard any argument attending to the primary question and necessarily, any argument regarding the basis on which the current application has been assessed.
67. Accordingly, even though there are genuine submissions and arguments by both parties upon which this Tribunal would ordinarily be able to decide this appeal, the Tribunal is prevented from doing so because such a decision would necessarily require a determination of the primary question, which it is precluded from deciding for the reasons already outlined.
68. In light of the above, the Decision Notice must stand. Accordingly, pursuant to s.564 (2)(a) of the SPA, the decision appealed against is confirmed.

69. With regard to the deemed refusal in respect of design and siting, pursuant to s. 564(2)(d) of the SPA, the Tribunal orders the Assessment Manager to decide the application.

Kelly McIntyre

Development Tribunal Chair

Date: 30 June 2019

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:

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