



## Building and Development Dispute Resolution Committees—Decision

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### *Sustainable Planning Act 2009*

<b>Appeal Number:</b>	45 - 16
<b>Applicant:</b>	Professional Planning Group (PPG)
<b>Assessment Manager:</b>	Brisbane City Council (Council)
<b>Concurrence Agency:</b> (if applicable)	N/A
<b>Site Address:</b>	108 Sunset Road, Kenmore in the State of Queensland 4069 and described as Lot 3 on SP226147 – the subject site

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### Appeal

Appeal under section 527(1)(a) of the *Sustainable Planning Act 2009* (SPA) against the decision of the Assessment Manager to refuse a development application for a development permit for a material change of use and a preliminary approval for building work for a new dwelling house (3 storeys) (Proposed Development). The decision notice issued by the Assessment Manager stated the reason for the refusal was that the Proposed Development conflicted with PO2(a) of the Dwelling House Code, in part 9.3.7 of the *Brisbane City Plan 2014* (City Plan).

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<b>Date and time of hearing:</b>	23 November 2016
<b>Place of hearing:</b>	Site inspection by the Committee prior to the hearing being held off site at Building Codes Queensland Office, Mineral House, Level 16 / 41 George Street, Brisbane, Queensland
<b>Committee:</b>	Samantha Hall – Chair Chris Buckley - Member Chris Harris - Member
<b>Present:</b>	Ain Kuru – Applicant Ian Hughes – Owner of the subject site Susan Mollee - PPG Milena Mog – Brisbane City Council Maisie Tang – Brisbane City Council Mica Gibson – Brisbane City Council

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### Decision:

The Building and Development Dispute Resolution Committee (Committee), in accordance with section 564(2)(a) of the SPA **confirms** the decision of the Assessment Manager to refuse the development application the subject of the Proposed Development.

## Background

On or about 17 May 2016, the Applicant lodged a development application on behalf of the Owner with the Council for a development permit for a material change of use and a preliminary approval for building work for a new dwelling house (3 storeys) on the subject site (Proposed Development).

Interestingly, the planning report prepared by the Applicant which accompanied the development application referred to the Proposed Development as being a "2 storey dwelling house." However, at the hearing of this appeal, both the Applicant and the Council acknowledged that the proposed dwelling house comprises 3 storeys and this is uncontested.

The subject site:

1. is located at 108 Sunset Road, Kenmore and is more particularly described as Lot 3 on SP226147;
2. is burdened by Easement A, the purpose of which is unknown as it was not provided in the appeal documents but it is understood has no bearing on the issues in this appeal;
3. has an area of 588m<sup>2</sup>;
4. is located in the Emerging Community Zone in City Plan;
5. is an irregular shaped lot with front access to a sealed road (being Sunset Road) and was recently created as part of an urban residential subdivision;
6. slopes from the front to the rear of the property with an overall fall of 4.5m.

On 6 July 2016, the Council issued an information request under section 276 of the SPA, in which the Council relevantly advised that (information request):

1. it could not support the Proposed Development in its current form;
2. the Proposed Development did not comply with Performance Outcome PO2 (PO2) and Acceptable Outcome AO2 (AO2) of the Dwelling House Code of the City Plan in that:
  - (a) the proposed dwelling house did not have a maximum height of two (2) storeys as prescribed in AO2;
  - (b) the height in storeys of the proposed dwelling house was not consistent with those of the dwelling houses in the immediate vicinity as prescribed in PO2;
  - (c) three (3) storey dwellings are not supported by the Council in Emerging Community areas;
  - (d) the third storey component of the proposed dwelling house is visible from all side and rear elevations surrounding the subject site that would produce a visible degree of bulk and scale that was unacceptable and unsupported in Emerging Community areas;
3. the Applicant should amend the Proposed Development to provide a dwelling house that is a maximum of two (2) storeys and less than 9.5m high so as to be consistent with the Dwelling House Code and the dwellings in the "prevailing immediate vicinity".

By letter dated 18 July 2016, the Applicant provided a response to the Council's information request (both in the form of a draft response and also a final response), stating that the Proposed Development in its current form was compliant with PO2 of the Dwelling House Code in that:

1. it is AO2 that the Proposed Development, being three (3) storeys, did not comply with, not PO2;

2. the Proposed Development satisfied PO2 as no specific height or storey is specified in PO2, it merely requires that development have a “building height” that is “consistent with the building height of dwelling houses prevailing in the immediate vicinity”;
3. the Proposed Development is less than 9.5m high, being 8.969m at its highest point and this is consistent with all other current and proposed dwelling houses in the vicinity which are required to be under 9.5m high, with the only difference being that the Proposed Development will be three (3) storeys in the rear;
4. a site inspection of the dwelling houses in the “prevailing immediate vicinity” and of the same zoning under the City Plan was conducted, which demonstrated the height of the Proposed Development was consistent with these dwelling houses;
5. three (3) storey houses were not prohibited in the Emerging Community Zone of the City Plan;
6. the topography of the land lends itself to three (3) storey dwellings;
7. other houses will have similar bulk; and
8. design features of the proposed dwelling house will minimise the bulk.

Following the Applicant’s response to the Council’s information request, the Applicant submitted to the Council for its consideration a number of amended plans showing design changes, reduction in the size of the lower level and perspective views, on the following dates:

1. 3 June 2016;
2. 29 August 2016;
3. 1 September 2016;
4. 5 September 2016;
5. 22 September 2016;
6. 28 September 2016; and
7. 5 October 2016.

At the hearing, the Committee asked the parties which version of the plans was the version to be considered by the Committee. While it was understood the Applicant was to confirm this in writing, which did not occur, the Applicant asked the Committee to consider the appeal on the basis of the original plans lodged in the development application for the Proposed Development. The Committee will accordingly decide the appeal on the basis of those original plans.

By letter dated 1 September 2016, the Council gave the Applicant a notice of extension of decision period under section 318(2) of the SPA, extending the decision period by 20 business days.

On 7 October 2016, the Council gave to the Applicant a Decision Notice pursuant to section 334 of the SPA advising of the Council’s decision to refuse the development application for the Proposed Development for the reason that the Proposed Development conflicted with PO2(a) of the Dwelling House Code of the City Plan because:

- it failed to demonstrate how the proposed three (3) storey dwelling house was consistent with other dwelling houses prevailing in the immediate vicinity;
- in the same zone, there are no dwelling houses located within 35m of any point of the street frontage of the subject site that are of three (3) storeys building height.

On or about 20 October 2016, the Applicant filed the Form 10 – Application for appeal with the Committee’s Registrar, appealing against the Council’s refusal of the development application for the Proposed Development.

Following the hearing on 23 November 2016, the Council submitted written submissions by way of email from Milena Mog dated 23 November 2016 to the Committee’s Registrar, which reiterated the Council’s information request stating that it was the Council’s view that the Proposed Development did not comply with PO2(a) of the Dwelling House Code.

By way of email dated 24 November 2016, the Applicant provided copies to the Committee’s Registrar of the number of amended plans for the Proposed Development submitted to the Council between June and October 2016. The Applicant also provided details of grounds that the Applicant would rely upon, should the Committee decide that the Proposed Development conflicted with PO2(a) of the Dwelling House Code of the City Plan.

### **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 21 October 2016.
2. Written submission prepared by the Applicant on behalf of Ian and Christine Hughes and provided to the Committee at the hearing.
3. Written submission prepared by Milena Mog of the Council and provided to the Committees Registrar by way of email dated 24 November 2016, with attached plans and photos (sent by separate emails).
4. Email from Ain Kuru of the Applicant to the Committees Registrar dated 24 November 2016 attaching various sets of amended plans submitted to the Council for feedback during the application process and a list of grounds pursuant to section 326(1)(b) of the SPA.
5. *Sustainable Planning Act 2009* (SPA).
6. Brisbane City Plan 2014 (City Plan).

### **Findings of Fact**

The Committee makes the following findings of fact:

- 1. The application is for a material change of use for a *dwelling house*; its level of assessment is *code assessable* pursuant to the SPA and the City Plan.**

The basis for this finding is:

- a) A *dwelling house* is defined in Schedule 1 (Definitions) of the City Plan as “A residential use of premises for one household that contains a single dwelling. The use includes outbuildings and works normally associated with a dwelling and may include a secondary dwelling”. The Committee finds this is the correct definition applying to the Proposed Development.
- b) Within the Emerging Community Zone, the zoning of the subject site, the use of *dwelling house* is stated in table 5.5.20 (Emerging Community Zone) of the City Plan to be code assessable “If not on a small lot, where not complying with all self-assessable acceptable outcomes”.

- c) The subject site is not a small lot, because at 588 m<sup>2</sup>, it is not “A lot which is:(a) less than 450m<sup>2</sup>; or (b) a rear lot of less than 600m<sup>2</sup> excluding an access way”, as defined in Schedule 1 of the City Plan. It is agreed between the parties and accepted by this Committee that the proposed dwelling house does not comply with all self-assessable acceptable outcomes of the relevant code.

**2. The code relevant to this appeal is the Dwelling House Code of the City Plan.**

The basis for this finding is that:

- a) For Code assessment, section 5.3.3 of the City Plan provides that “development must be assessed against all the applicable codes identified in the assessment criteria column”.
- b) The only code listed in the assessment criteria of table 5.5.20 (Emerging Community Zone) of the City Plan as it applies to a dwelling house, is the Dwelling House Code.

**3. The decision making powers within the SPA set out the rules governing all forms of assessment including code assessment.**

The basis for this finding is:

- a) Section 326(1)(b) of the SPA, relevantly states that “*The assessment manager’s decision must not conflict with a relevant instrument unless— (b) there are sufficient grounds to justify the decision, despite the conflict,*”.
- b) Grounds is defined in Schedule 3 of the SPA as:

*“for sections 326(1)(b) and 329(1)(b) —  
 1 Grounds means matters of public interest.  
 2 Grounds does not include the personal circumstances of an applicant, owner or interested party.”*

**4. The relevant provisions of the Dwelling House Code are PO2 and AO2.**

The basis for this finding is:

- a) the agreed information put before the Committee by the parties;
- b) the Committee’s review of the Dwelling House Code; and
- c) an extract from the Dwelling House Code of PO2 and AO2, which is as follows:

<p><b>PO2</b>          Development has a <a href="#">building height</a> that:          (a) is consistent with the building height of <a href="#">dwelling houses</a> prevailing in the immediate vicinity;          (b) does not unduly overshadow adjoining <a href="#">dwelling houses</a> and their associated private open space in terms of access to sunlight and daylight.</p> <p>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.</p>	<p><b>AO2</b>          Development in the:          (a) <a href="#">Low density residential zone</a>, <a href="#">Character residential zone</a>, 2 storey mix zone precinct of the <a href="#">Low–medium density residential zone</a>, 2 or 3 storey mix zone precinct of the Low–medium density residential zone, <a href="#">Rural residential zone</a>, <a href="#">Environmental management zone</a>, <a href="#">Rural zone</a> or <a href="#">Emerging community zone</a> results in a maximum <a href="#">building height</a> of 9.5m and:          (i) 2 <a href="#">storeys</a>; or          (ii) 1 storey if the development also</p>
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	<p>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>(b) Up to 3 storeys zone precinct of the <a href="#">Low-medium density residential zone</a> or in the <a href="#">Medium density residential zone</a> results in a maximum building height of 11.5m 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>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.</p>
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**5. The proposed development does not comply with AO2(a) as it applies to the Emerging Community Zone.**

The basis for this finding is:

- a) AO2(a) of the Dwelling House Code of the City Plan provides that for development in the Emerging Community Zone, building height must be 9.5m and 2 storeys (or 1 storey if meeting specific criteria).
- b) However, the parties agreed at the hearing that whilst the Proposed Development is under 9.5m in height, it is three (3) storeys in construction.
- c) *Building height* is defined in Schedule 1 (Definitions) of the City Plan as:
 

*“If specified:*

  - (a) *in metres, the vertical distance between the ground level and the highest point of the building roof (apex) or parapet at any point, but not including load-bearing antenna, aerial, chimney, flagpole or the like;*
  - (b) *in storeys, the number of storeys above ground level; or*
  - (c) *in both metres and storeys, both (a) and (b) apply.”*
- d) AO2(a) of the Dwelling House Code of the City Plan therefore specifies building height in both metres and storeys, so both must be complied with.
- e) On that basis, the Proposed Development conflicts with both the specified building height in metres and in storeys and so the Proposed Development does not comply with AO2(a).

6. The assessment that is required when an acceptable solution is not met, is to determine if the Proposed Development meets the corresponding performance outcome. Non-compliance with the acceptable solution does not necessarily give rise to conflict with the planning scheme.

The basis for this finding is:

- a) The Council on its website under the heading, *How to use Brisbane City Plan 2014*, provides the following informal guidance about codes,
- “..there are often acceptable outcomes adjacent to each performance outcome, located in the right hand column. These are established ways to achieve the compliance with the code. If your proposal does not exactly meet the acceptable outcome, you will need to demonstrate how the proposal meets the performance outcome. There is no ‘relaxation’ of an acceptable outcome. If an acceptable outcome is not met, you must address the performance outcome”.*
- b) This is established planning practice and part of the accepted decision-making rules within Queensland.

7. The assessment of the Proposed Development against PO2(a) is determinative of conflict with the City Plan.

The basis for this finding is as follows:

- a) PO2(a) of the Dwelling House Code of the City Plan requires that “building height” be “consistent with the building height of dwelling houses prevailing in the immediate vicinity”.
- b) *Building height* is defined in Schedule 1 (Definitions) of the City Plan as:
- “If specified:*
- (a) in metres, the vertical distance between the ground level and the highest point of the building roof (apex) or parapet at any point, but not including load-bearing antenna, aerial, chimney, flagpole or the like;*
- (b) in storeys, the number of storeys above ground level; or*
- (c) in both metres and storeys, both (a) and (b) apply.”*
- c) AO2(a) of the Dwelling House Code of the City Plan specifies building height for development in the Emerging Community Zone in both metres and storeys. However, PO2(a) of the Dwelling House Code of the City Plan only makes reference to “building height” determined by consistency with other dwelling houses in the immediate vicinity, but does not specify it by either metres or storeys.
- d) Given that the corresponding acceptable outcome for PO2(a), being AO2(a), specifies building height by reference to both metres and storeys, the Committee finds that both components of the height of the Proposed Development are determinative of compliance with PO2(a). The consequence of this is that **both** storeys, and height in metres, are critical to a finding or otherwise, of conflict. Put another way, it is found that compliance with one component does not excuse non-compliance with the other.
- e) Section 1.3.2 of the City Plan identifies that a “Note” forms part of the City Plan. Accordingly, the *Note* in PO2 directs how the term ‘*prevailing in the immediate vicinity*’ is to be determined.
- f) On this basis, it is found that the prevailing height of dwellings within 35 metres of the subject site that are in the Emerging Community Zone, is 2 storeys. Neither of

the parties provided the Committee with heights in metres of any nearby buildings, but as identified above, the Committee has determined that non-compliance with one component of building height is enough to conclude there is conflict with PO2(a) of the Dwelling House Code of the City Plan.

#### **8. There are no sufficient grounds to justify approval despite the conflict.**

The basis for this conclusion is:

- a) Section 326(1)(b) of the SPA, relevantly provides that the decision of an Assessment Manager must not conflict with a relevant instrument unless there are sufficient grounds to justify the decision, despite the conflict.
- b) So, in this appeal, the decision of the Committee must not conflict with PO2(a) of the Dwelling House Code of the City Plan unless there are sufficient grounds.
- c) Grounds as defined in Schedule 3 of the SPA means matters of public interest and does not include the personal circumstances of an Applicant, owner or interested party.
- d) Further guidance about what are “sufficient grounds” is provided in *Statutory Guideline 05/09 – Sufficient Grounds for Decisions that Conflict with a Relevant Instrument*. This document identifies the following as being sufficient grounds:
  - (i) that the relevant instrument:
    - a. is out of date;
    - b. is incorrect;
    - c. inadequately addresses development;
    - d. does not anticipate specific or particular development;
  - (ii) that there is an urgent need for the proposal.
- e) By way of email dated 24 November 2016, the Applicant provided the grounds being relied upon to justify any conflict, should the Committee find conflict with PO2(a) of the Dwelling House Code of the City Plan.
- f) However, the Committee considers that none of the 8 grounds provided by the Applicant would be sufficient grounds.
- g) In the circumstances of the facts of this appeal, the Committee found it difficult to otherwise identify a matter of public interest; and the Proposed Development clearly has a party to which personal interests apply.
- h) Accordingly, the Committee finds that there are no sufficient grounds to justify approval of the Proposed Development despite the conflict with PO2(a) of the Dwelling House Code of the City Plan.

#### **Reasons for the Decision**

The Proposed Development is for a material change of use for a dwelling house, which is subject to code assessment pursuant to the SPA and the City Plan.

When assessing a code assessable development application, the SPA relevantly provides that the Assessment Manager’s decision must not conflict with a relevant instrument, which includes the City Plan, unless there are sufficient grounds to justify the decision despite the conflict.

The code relevant to this appeal is the Dwelling House Code of the City Plan and the relevant provisions of the Dwelling House Code are PO2 and AO2.



The Proposed Development does not comply with AO2(a) of the Dwelling House Code of the City Plan because the building height of the Proposed Development is 3 storeys and AO2(a) requires that the maximum building height for development within the Emerging Community Zone is 9.5m in height and 2 storeys.

When assessing a code assessable development application, non-compliance with an acceptable outcome does not necessarily result in conflict with the planning scheme but instead requires assessment of the development against the corresponding performance outcome.

PO2(a) of the Dwelling House Code of the City Plan is the corresponding performance outcome for AO2(a). The Committee finds that the prevailing height of dwellings within 35 metres of the subject site that are in the Emerging Community Zone, is 2 storeys. As the Proposed Development is 3 storeys, it would conflict with PO2(a) of the Dwelling House Code of the City Plan as it would not be consistent with the building height of dwelling houses prevailing in the immediate vicinity.

The Committee finds that the grounds provided by the Applicant would not be sufficient grounds for the purposes of section 326(1)(b) of the SPA, to justify an approval of the Proposed Development despite its conflict with PO2(a) of the Dwelling House Code of the City Plan.

On this basis, the Committee upholds the Council's decision to refuse the development application the subject of the Proposed Development.

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**Samantha Hall**  
**Building and Development Committee Chair**  
**Date: 31 January 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:

The Registrar of Building and Development Dispute Resolution Committees  
Building Codes Queensland  
Department of Housing and Public Works  
GPO Box 2457  
Brisbane QLD 4001  
**Telephone (07) 1800 804 833 Facsimile (07) 3237 1248**