



## Building and Development Dispute Resolution Committees—Decision

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### *Sustainable Planning Act 2009* *Planning Act 2016*

<b>Appeal Number:</b>	41 - 16
<b>Applicant:</b>	Anthony Shea
<b>Assessment Manager:</b>	Trevor Gerhardt
<b>Concurrence Agency:</b> (if applicable)	Brisbane City Council (Council)
<b>Site Address:</b>	60 Gladstone Rd Highgate Hill, Qld 4101, and described as Lot 52 on RP 11689, the subject site.

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### Appeal

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

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<b>Date and time of hearing:</b>	29th May 2017 at 1.30 pm
<b>Place of hearing:</b>	On-site at 60 Gladstone Rd, Highgate Hill, Brisbane.
<b>Committee:</b>	Mr Henk Mulder - Chair Ms Lauren Turner - Member Mr John O'Dwyer - Member Mr Don Grehan - Member
<b>Present:</b>	Mr. Trevor Gerhardt - Assessment Manager and agent for the Applicant. Angus - Applicant representative Phil Smith - Applicant representative  Ms. Marcia Thompson - Council representative Ms. Milena Mog - Council representative

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### Decision:

The Development Tribunal (Tribunal), in accordance with section 564(2)(a) of the SPA confirms the decision of the Assessment Manager to refuse the Application.

## **Background:**

1. The subject site is a 599m allotment located at 60 Gladstone Rd Highgate Hill Qld 4101, where demolition to recent alterations and the addition of a Carport was proposed on 13 September 2016.
2. Council as a concurrency agency gave a response on 27 September 2016 for 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.
3. The Applicant through the Assessment Manager made application for appeal to the BDDRC on 18 October 2016.
4. A Committee was formed and a hearing was completed on 30 November 2016.
5. A decision had been pending at the time of a request on 2 February 2017 from Council to not issue the decision as similar matters were the subject of a Planning and Environment Court appeal, affecting a significant number of different appeals.
6. A new Committee was formed 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.
7. A hearing was held on site after a site visit on 29 May 2017.
8. 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.
9. Consideration for how the proposal may prove acceptable was discussed and a revised set of drawings was sought from the Applicant.
10. Despite repeated requests no revised drawings were provided, and the committee have proceeded on the basis of the existing application material.

## **Material Considered**

The material considered in arriving at this decision comprises:

11. Letter from the Assessment Manager dated 13 September 2016 making Application for a concurrency response to Brisbane City Council;
12. Acknowledgement Notice from the Assessment Manager, to the Applicant confirming receipt of the application dated 13 September 2016;
13. IDAS Form 1 and Form 2 Building work development permit application details; The following drawings:
  - Site, Drawing Number BA01, dated August 2016 by unknown
  - Plan, Drawing Number BA02, dated August 2016 by unknown
  - Lower, Drawing Number BA03, dated August 2016 by unknown
  - Frame Brace, Drawing Number BA04, dated August 2016 by unknown
  - Section Elevations Drawing Number BA05, dated August 2016 by unknown
14. Concurrence Agency Response from Council dated 27 September 2016 instructing Assessment Manager to refuse Development Application for Building Work;

15. Assessment Manager Decision Notice to Applicant, dated 6 October 2016, refusing the alterations and additions as directed by Council for Development Application No: 0002016256, with accompanying conditions and information regarding appeals;
16. Form 10 – Appeal Notice, grounds for appeal and correspondence accompanying the appeal lodged with the Committees Registrar on 11 October 2016;
17. Letters to the Assessment Manager and Council confirming BDDRC Committee dated 7 November 2016;
18. Letters to the Applicant and Council dated between 22 November - 28 November 2016 confirming a hearing date of 30 November 2016;
19. Council undated written submission for the hearing, provided via email 29 November 2016;
20. Drawings provided by the Applicant on 2 December 2016 to the Registrar for the committee as a consequence of the site hearing 30 November, which show the setting out of a dutch gable to the carport roof, with demolition of a post-1946 bathroom;
21. Appeal Chair's letter to Council dated 11 February 2017 advising decision issuance as soon as possible;
22. Appeal Chair's letter to CE, DHPW dated 15 March 2017 advising feasibility for proceeding to a Decision in the Appeal;
23. Appeal Chair's letter to Assessment Manager - acting on behalf of the Applicant - dated 15 March 2017 advising of the consideration for amenity and aesthetics and pathways for a conclusion;
24. New committee established in DHPW letter of 11 April 2017 with section 554B(2)(a) SPA , and sent to the Assessment Manager and Brisbane City Council.
25. A site review and hearing on site was undertaken on 29 May 2017.
26. Verbal submissions were made from all parties to the appeal;
27. Requests from the Committee to the Assessment Manager for amended drawings as discussed at the hearing were made in email supplied by the Registrar on 15 June and 3rd July, and 20th July 2017.
28. Responses from the Assessment Manager dated 6 July and 21st July 2017 specifically seeking a decision using the original plans as supplied with the original Form 10.
29. Planning and Environment Court - Brisbane City Council *v Reynolds & Anor* [2017] QPEC 012 (17/352) Kefford DCJ dated 10 March 2017 (**[2017] QPEC 012**)
30. The *Brisbane City Plan 2014* (**CP2014**);
31. The *Sustainable Planning Act 2009* (**SPA**);
32. The *Sustainable Planning Regulation 2009* (**SPR**);
33. The *Building Act 1975* (**BA1975**);
34. The *Building Regulation 2006* (**BR2006**);
35. The *Planning Act 2017* (**PA 2017**)

## **Findings of Fact**

The Tribunal makes the following findings of fact:

### **A. Subject Site**

36. The subject site is a 599m<sup>2</sup> allotment located at 60 Gladstone Rd Highgate Hill Qld 4101. It is zoned CR2 Character (Infill housing). The purpose of the Character residential zone code is to provide for a particular character of a predominantly residential area.
37. The subject site is located in the West End—Woolloongabba District Neighbourhood Plan and is not in a precinct.
38. The allotment is at a bend on a wide, downhill route that is a significant throughway at the south of the city. It is significant as a part of the history of an inner-city suburb. The site falls significantly downhill from the street boundary and parking off street is inherently difficult.
39. The allotment has an existing dwelling, two storeys in height, with characteristic qualities of early last century timber construction. The residence maintains a single storey appearance at the street level.
40. The proposed alterations and additions comprise extending the carport floor area at the street, whilst removing post-1946 additions and revising the work at the street alignment with a new carport roof.
41. The streetscape in view and the neighbourhood of the vicinity establish a variety of heights and scales of residences, including a range of materials. There are no carports at the street it was noted, and although entry porticos are apparent, they can be seen to have been built with a development of the detail between materials and junctions.

### **B. The Application**

42. The Application was referred to the Council as a Concurrence Agency triggered under the SPR, Schedule 7, Item 17 on 13 September 2016.
43. 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.
44. 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:**

45. The hearing was undertaken on site, after the site inspection that commenced at 1.30pm on 29 May 2017. The site conditions were that of a construction site with work proceeding for the decking and demolition to the area in question.
46. The appeal information was sought from the Applicant's representatives and is as described under the heading 'The Application', above.
47. The hearing was then moved to the opposite streetside footpath to discuss the surrounding streetscape, buildings and solutions existing.
48. The Tribunal discussed gaining a revised set of drawings that established changes to the proposed extension. The Assessment Manager elected to supply drawings that demonstrated a dutch gable that ensured a less dominating roof structure on the street boundary, and which could reflect some of the existing gable detailing for barge roll, and battened screen.

49. Council representatives indicated their agreement for a changed roof and amended drawing, as discussed.
50. The Tribunal elected to await receipt of the drawings, however, they were subsequently never provided. The Assessment Manager requested the application be based on the original Form 10 application and accompanying drawings in his email of Thursday, 20 July 2017, to the registrar, Development Tribunals.

**The Council’s position**

51. The Concurrence Agency Response from Council considered the proposed building work is in conflict with Strategic outcomes set out in the City Plan, being Theme 2(1)(c) and Theme 5(g)(4) where the changes proposed affect the built form of the pre-1946 dwelling and the traditional setting of the building in its streetscape as the proposal detracts from, rather than positively contributes to the setting.
52. Council confirmed the issues that had been raised to date at the original hearing.
53. Council discussed the relevancy of the CP2014 codes, and that the refusal was based on the **Traditional building character (design) overlay code** which established the qualitative and quantitative outcomes which Council asserted were not achieved, in their direction for a refusal.
54. In particular, the Council’s position is that the proposal did not comply with **PO4** and **PO5** (below):

<b>8.2.22 Traditional building character (design) overlay code</b>
<b>Table 8.2.22.3—Performance outcomes and acceptable outcomes</b>
<b>Performance outcomes</b>
<p><b>PO4</b> Development has a building form which complements the traditional building form and traditional elements, detailing and materials of a <a href="#">dwelling house</a> constructed in 1946 or earlier nearby in the street.</p>
<p><b>PO5</b> Development provides external elements and detailing which: (a) reflect traditional elements and detailing and materials; (b) reduce building bulk; (c) form a transition with the external landscape.</p>

55. The proposal was therefore considered by Council 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.

**The Applicant’s position**

56. 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.

- 57. 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.
- 58. The Applicant considers that as **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, the codes should not be considered.
- 59. The Applicant considers the Traditional building character (design) overlay code is not a Building assessment provision and must be disregarded.
- 60. 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**

<b>Table 1—For building work assessable against the Building Act</b>		
<b>Column 1 Application involving</b>	<b>Column 2 Referral agency and type</b>	<b>Column 3 Referral jurisdiction</b>
<p><b>17</b> Building work for a building or structure if it is</p> <ul style="list-style-type: none"> <li>(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</li> <li>(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"> <li>(i) have an extremely adverse effect on the amenity, or likely amenity, of the locality; or</li> <li>(ii) be in extreme conflict with the character of the locality</li> </ul> </li> </ul>	<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”*

- 61. The CP2014 Codes contained in Table 1.7.4 (below) are considered by the Applicant to have no relevancy.
- 62. 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 <b>(e) Character residential zone and zone precincts</b> (f) Low–medium density residential zone and zone precincts (g) Medium density residential zone (h) Emerging community zone	<a href="#">Dwelling house code</a> <a href="#">Dwelling house (small lot) code</a>
Land in the Traditional building character overlay	<a href="#">Traditional building character (design) code</a>
Land in a neighbourhood plan area	A relevant neighbourhood plan code to the extent provided

63. The Applicant considers a lack of explanatory detail from Council exists in their concurrence agency response for these issues of the amenity and character, as it pertained to the direction of a refusal for the Assessment Manager.

#### Jurisdiction

64. 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 the amenity and aesthetic impact of a building or structure. Therefore, the Tribunal is lawfully established.

#### Reasons for the Decision

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.

The Tribunal has considered the performance outcomes of the **Traditional building character (design) overlay code** and considers the proposed development (as amended during the Appeal) is in conflict with those provisions in relation to aesthetics and amenity.

In particular, the Tribunal considers that the proposed development does not:

- a. Have a building form which complements the traditional building form and traditional elements, detailing and materials of a dwelling house constructed in 1946 or earlier nearby in the street.
- b. Provide external elements and detailing which:
  - (i) reflects traditional elements and detailing;
  - (ii) reduces building bulk; or

- (iii) forms a transition with the external landscape.
- c. Further, the Tribunal, despite several requests, did not receive an amended set of drawings, and has been directed by the Applicant to base their decision on the original drawings as supplied in the application, that is, as a hipped carport roof.
- d. An alternative application shown to the Tribunal showed drawings that would establish an overarchingly plain resolution for the carport at the boundary, within the streetscape. However, the Assessment Manager directed the Tribunal to not consider these drawings and to continue the appeal on the drawings the subject of the appeal. This can be shown in emails between the building Tribunal and the Assessment Manager on the 10 and 20 July, 2017.
- e. Therefore, as the first and only carport in the vicinity on the street boundary and noting the conflicts with the **Traditional building character (design) overlay code**, particularly the lack of greater character and quality of detailing, the Tribunal considers that the proposal would have an extremely adverse effect on the streetscape.

The Committee considers the Council direction for refusal was in accordance with SPA 2009 s288(2) which states:

288 Limitation on concurrence **agency's** power to refuse application

- (2) To the extent a local *government's* concurrence agency jurisdiction is about assessing the amenity and aesthetic impact of a building or structure, the concurrence agency may only tell the assessment manager to refuse the application if the concurrence agency considers—
  - (a) the building or structure, when built, will have an extremely adverse effect on the amenity or likely amenity of its neighbourhood; or
  - (b) the aesthetics of the building or structure, when built, will be in extreme conflict with the character of its neighbourhood.

The Committee confirms the decision of the Assessment Manager, as directed by the Concurrence Agency to refuse the proposal.

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**Henk Mulder**  
**Building and Development Committee Chair**  
**Date: 22 December 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:

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

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