



## Development Tribunal – Decision Notice

---

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

<b>Appeal Number:</b>	13 - 17
<b>Appellant:</b>	Bartosz Kubiak
<b>Assessment Manager:</b>	Trevor Gerhardt
<b>Concurrence Agency:</b> (if applicable)	Brisbane City Council
<b>Site Address:</b>	209 Lancaster Road Ascot Brisbane Qld 4007 and described as Lot 4 on RP 83032— the subject site

---

### **Appeal**

Appeal under section 527 of the *Sustainable Planning Act 2009* (SPA), against the decision of the Assessment Manager to refuse a Building Development Application at the direction of the Council as Concurrence Agency for matters related to the amenity and aesthetic impact of the building or structure.

---

<b>Date and time of hearing:</b>	Appeal heard and decided by Tribunal through written submissions
<b>Place of hearing:</b>	N/A
<b>Tribunal:</b>	Caroline Treacy – Chair John Panaretos – Member Lauren Turner – Member Don Grehan - Member
<b>Submissions:</b>	Brisbane City Council – June 2017 Trevor Gerhardt Private Building Certifier – 14.6.2017

---

### **Decision:**

The Development Tribunal (Tribunal) in accordance with section 564 of the SPA sets aside the decision of the Assessment Manager to refuse the application and makes a new decision to approve the proposed application for a Duplex subject to the following conditions and directions:

1. All other Development Application requirements must be met prior to a Building Development Approval being granted and the commencement of any assessable work onsite;
2. The proposed development must be completed strictly in accordance the Plans and Specifications submitted to the Tribunal as part of this Appeal without amendment;

3. All building work shall comply with the Building Act 1975 and the Conditions of this Decision including any amendments or conditions subsequently imposed by the Assessment Manager.
4. Unless noted otherwise, the Condition time, requisite stages of inspection, requisite certificates of design, compliance or other aspects together with any specific elemental conditions and details of any applicable self-assessable codes or further development approval required are to be nominated in writing by the Assessment Manager prior to the commencement of work. Such details are to be provided to the Applicant, Builder and Council.

**Directions:**

- (a) The Applicant must provide the Assessment Manager with the Building Certifiers copy of the QBCC Home Warranty insurance documentation prior to the commencement of works.
- (b) The Applicant must provide the Assessment Manager with evidence of payment of the Q-Leave Levy (if applicable) prior to the commencement of works.
- (c) The Applicant must submit engineering specifications, including but not limited to framing, bracing and tie-down details together with details of the requisite fire rated construction to the Assessment Manager for approval prior to the commencement of works.
- (d) The determination of building classification and fire separation are the responsibility of the Assessment Manager.
- (e) The Applicant and Council are reminded that the Conditions of this Decision are the Conditions of a Development Approval for Building Works and attach to the land binding the owner, the owner's successors in title and any occupier of the land

Please be advised that you may elect to lodge an appeal/declaration about this matter in the Planning and Environment Court (the Court). The Court appeal period starts again from the date you receive this Decision Notice which should be attached to the Court appeal lodgement documentation.

The following link outlines the steps required to lodge an appeal with the Court:

<http://www.courts.qld.gov.au/courts/planning-and-environment-court/going-to-planning-and-environment-court/starting-proceedings-in-the-court>

**Background**

General:

1. The subject site is located at 209 Lancaster Road Ascot, in Brisbane on Lot 4, RP 83032 and is noted on the proposed drawings as having a total site area of 643 square metres.
2. An existing development is located on the subject site incorporating three attached dwelling units.
3. The appointed Assessment Manager for the project was engaged as the Private Certifier for alterations, additions and partial demolition of a Class 1(a) building.
4. The Queensland Building Construction Commission's (QBCC) licence search facility shows that Mr Gerhardt holds a Building Certifier Level 1 licence that is endorsed to issue building development approvals under the *Building Act 1975*.

5. After its establishment, an initial Building and Development Dispute Resolution Committee (Committee) conducted a hearing, but pursuant to the reasoning of Kefford DCJ in the decision of the Planning and Environment Court, *Brisbane City Council v Reynolds & Anor [2017] QPEC 12*, the Chief Executive dissolved the Committee and established a new Committee on or about 11 April 2017 to rehear the appeal, limited to *'amenity and aesthetics issues, with an architect as chairperson'*. The *Planning Act 2016* (PA) commenced on 3 July 2017 and section 309 of the PA had the effect of converting the Committee into a Development Tribunal.
6. The application for a Development Permit for Building Works was lodged with the Assessment Manager on 28 April, 2016, and sought approval for a class 1 (a) building (dual occupancy) located at 209 Lancaster Road, Ascot. The application was referred to the Council as Concurrence Agency on or about the same date for consideration of Amenity and Aesthetics pursuant to the SPA and SPR.
7. On or about 1 June, 2016, the Council issued a Concurrence Agency response directing the Assessment Manager to refuse the application as the Council considered that the building work will:
  - 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, and*
  - c. *the applicant has not demonstrated that the building work for the dual occupancy complies with all the relevant acceptable outcomes of the traditional building character (design) code of CP2014."*
8. On or about 1 June, 2016, Council also notified the Assessment Manager that the Applicant was required to obtain a development approval in the form of a development permit for a MCU for a dual occupancy dwelling.
9. On or about 11 August, 2016, the Assessment Manager issued the Decision Notice to the Applicant refusing the development application.
10. On or about 16 August, 2016, the Applicant lodged a Form 10 Notice of Appeal with the Committees Registrar, against the decision of the Assessment Manager.
11. In accordance with the abovementioned court decision, the declarations sought by the Applicant as nominated in the Grounds to Appeal letter dated 17 August, 2016, are beyond the scope of this appeal. The issues to be considered are limited to amenity and aesthetics only.
12. On the date of the (then) Committee's inspection of the premises, 1<sup>st</sup> June 2017, the proposed building work had not been commenced.
13. In accordance with section 562 of the Sustainable Planning Act 2009 (SPA), the appeal was agreed to be decided by written submissions received and transmitted on 14/6/17.
14. No responses to submissions were received.

#### Planning Framework:

The applicable Planning Framework under Brisbane City Plan 2014 (City Plan) is summarised in the following:

1. The site is a standard sized Lot (i.e. not a 'Small Lot') zoned CR2 (Character Infill Housing), in a Streetscape Hierarchy Overlay (SHO), as well as a Dwelling House Character Overlay (DHO) and covered by the Traditional Building Character Overlay (TBCO).
2. Under the Sustainable Planning Regulations 2009 (SPR), Schedule 7 Table 1 Item 17, and Table 1.7.4 of the City Plan, the application must be referred to Council as Concurrence Agency for an 'amenity and aesthetics' assessment, since the proposal fails to comply with Acceptable Outcomes of the TBCO.
3. The jurisdiction of the referral agency is confirmed through Sections 251 and 254 of the SPA as part of the IDAS provisions, and the relevant City Plan codes are given effect and form part of the building assessment provisions pursuant to section 30(1)(a) of the Building Act.
4. The bounds of Council's jurisdiction are established by the Regulations as follows:

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

5. Table 1.7.4 of City Plan declares that building work for “a building or structure which is a single detached class 1(a)(i) building, class 1(a)(ii) building comprising not more than 2 attached dwellings”... 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.
6. In this case, the acceptable outcomes of the Traditional Building Character (Design) Code which are relevant to the concurrence agency response are as follows:

**AO1.2**

*Development for a building which is not on a rear access lot is set back from any road alignment, excluding eaves, awnings, stairs and garage, within 20% of the average front setback of the nearest residential buildings constructed in 1946 or earlier fronting the same street.*

*Note—Additional buildings by way of infill development may be set further back on this site, subject to meeting other code requirements. Where the site contains a building constructed in 1946 or earlier, it should be retained at the front of the site and any new infill placed behind/beside. Sliding a building constructed in 1946 or earlier back with infill at the front of the site is not consistent with desired traditional setting outcomes.*

**AO4.1**

*Development includes a solid core with attached or integrated lightweight verandah or balcony structure addressing the street.*

**AO5**

*Development provides external elements such as lightweight verandahs and stairs, eaves, overhangs, sunhoods, lattice screens, balustrades and batten panels which:*

- (a) reflect those of dwelling houses constructed in 1946 or earlier nearby in the street;*
- (b) are sufficient to cast shadows;*
- (c) provide three-dimensional effects.*

*Refer to [Figure d](#).*

**AO6.1**

*Development uses traditional materials consistent with the predominant traditional materials of the dwelling houses constructed in 1946 or earlier fronting the same street*

**AO6.3**

*Development ensures that:*

- (a) for [dwelling houses](#) lightweight materials predominate;*
- (b) if masonry is used, it is rendered or painted and used in conjunction with other more lightweight materials, in order to define the upper and lower levels.*

**AO7.1**

*Development provides roof forms which are one or more of a combination of pyramids, hips or gables of similar pitch and proportions to those of dwelling houses constructed in 1946 or earlier nearby in the street.*

Tribunal Jurisdiction - MCU:

7. Although outside the jurisdiction of this appeal, it is also noted that section 83(1)(a) of the Building Act requires any necessary Development Approval for an MCU under CP2014 be granted prior to any approval of a Building Development Application.

**Material Considered**

The material considered in arriving at this decision comprises:

1. Submissions from both parties including that from Council made prior to the appeal consideration dated 14<sup>th</sup> June, 2017;
2. Planning and Environment Court decision: *Brisbane City Council v Reynolds & Anor* [2017] QPEC 12;
3. Submission made by the Assessment Manager prior to appeal consideration dated 26<sup>th</sup> September 2016;

4. Submission made by BCC prior to appeal consideration as received on 19<sup>th</sup> September 2016;
5. Grounds of Appeal letter from the Assessment Manager to the Committees Registrar dated 17<sup>th</sup> August, 2016;
6. Concurrence Agency advice dated 1<sup>st</sup> June, 2016;
7. The Brisbane City Plan 2014 (City Plan);
8. The *Sustainable Planning Act 2009* (SPA);
9. The Sustainable Planning Regulation 2009 (SPR);
10. The *Building Act 1975* (BA); and
11. The Building Regulation 2006 (BR)

## **Findings of Fact**

The Tribunal makes the following findings of fact:

1. The role of the Tribunal is limited to deciding whether those parts of the building work subject to appeal have:
  - a) an extremely adverse effect on the amenity, or likely amenity of the locality, or
  - b) are in extreme conflict with the character of the locality
2. SPR Schedule 7, Table 1, Item 17 invokes the jurisdiction of Council as a 'concurrence agency' for the purposes of SPA and the BA.
3. Codes as referenced in Table 1.7.4 of the City Plan – Traditional Building Character (Design) Code and the Dwelling House Code – apply to assessment of the building development application.
4. Those parts of the building work subject to assessment under Council's referral agency jurisdiction are related only to Amenity and Aesthetic in relation to these Codes.
5. The Tribunal has assessed the application and finds that the proposal does not conflict with the Acceptable Outcomes of the Dwelling House Code.
6. The proposal does not conflict with the Acceptable Outcomes of the Traditional Building Character (Design) Code.
7. There is no evidence of an MCU approval for the subject development.

## **Jurisdiction**

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**

1. The Tribunal does not find the proposed building work to be in extreme conflict with the character of the locality as the Tribunal finds that the proposed building work does not conflict with the Acceptable Outcomes in the Traditional Building Character (Design) Code.
2. The purpose of the Traditional Building Character (Design) Code is to assist in determining the suitability of the development in the Traditional Building Character Overlay.
3. The Tribunal considers that suitability of the proposal is determined by a compatible form, scale and detail and compliance with the Acceptable Outcomes.
4. Further, the materials are similar in nature and therefore considered sufficiently in context with the surrounding dwellings in the street.
5. A Material Change of Use (MCU) Development Approval is considered to be a condition precedent to a Building Development Approval for the proposed development. The subject of this appeal is however restricted to the consideration of Amenity and Aesthetic

provisions of the Codes as referenced in Table 1.7.4 of the City Plan so a decision relates only to this, however it is considered sufficient that the conditions and directions provided as part of the decision note that all other Development Application requirements must be met.

---

**Caroline Treacy**  
**Development Tribunal Chair**  
**Date: 19/02/18**

## **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:

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

**Telephone (07) 1800 804 833 Facsimile (07) 3237 1248**