



Building and Development Dispute Resolution Committees—Decision

Sustainable Planning Act 2009

Appeal Number:	25-16
Appellant:	Peter Atkins
Assessment Manager:	Trevor Gerhardt
Concurrence Agency:	Brisbane City Council (Council)
Site Address:	27 Elystan Road, New Farm (Lot 2 on RP51612)

Appeal

This is an appeal under section 526(a) of the *Sustainable Planning Act (SPA)* in relation to the direction by the Concurrence Agency (**Council**) to Mr Gerhardt, acting as the Assessment Manager, to refuse the building development application for a metal roof awning on the subject property (**Building DA**).

Date and time of hearing:	By written submissions
Place of hearing:	n/a
Committee:	Robert Laidely – Chair Chris Harris – Member
Present:	n/a

DECISION

- 1 Based on the reasons for decision set out in this document, the Committee finds:
 - (a) the only potential trigger for the Council's referral jurisdiction (noting that the Building DA was limited to applying for a metal awning) is under item 19 of the *Sustainable Planning Regulation (SPR)*; and
 - (b) even if that referral jurisdiction was triggered (noting that it is not overtly clear from the plans provided), the Committee agrees with the Council's most recent assessment that the Building DA should be approved.¹
- 2 The Committee orders under section 564(1) that:²
 - (a) the Building DA decision notice dated 18 July 2016 is set aside; and

¹ It being implied that it otherwise meets the relevant performance criteria.

² Per *Leon Fink Holdings Pty Ltd v The Australian Film Commission and Others* (1979) 141 CLR 672, a provision such as 564(2) does not limit the orders that can be made under an associated provision such as 564(1).

- (b) the Assessment Manager is to re-issue a decision notice for the Building DA as if the Council had no concurrence agency requirements.

BACKGROUND

- 3 On 5 May 2016 the Appellant engaged a private certifier, Mr Gerhardt, to assess the Building DA. The Building DA sought the approval of a metal roof awning to an existing dwelling at 27 Elystan Road, New Farm.
- 4 The subject property is identified in the Council's *City Plan 2014 (City Plan)* and mapping information services as:
 - (a) having an area of 506m²;
 - (b) being in the LMR2 (Low medium density residential (2 or 3 storey mix)) Zone;
 - (c) being covered by the dwelling house character overlay;
 - (d) being covered by the traditional building character overlay;
 - (e) being in the New Farm and Teneriffe Hill neighbourhood plan and the Low-medium density living precinct – NPP-002.
- 5 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.
- 6 By letter dated 10 June 2016 the Council provided its response to Mr Gerhardt's referral of the Building DA for concurrence agency assessment which relevantly stated:

...

Council, as a concurrence agency, hereby directs you, as the assessment manager for the relevant building development application, to refuse the application.

The reasons for the refusal are –

 - (a) *the building work for the extension to the dwelling house will have an extreme adverse effect on the amenity or likely amenity of the locality;*
 - (b) *the building work for the extension to the dwelling house will be in extreme conflict with the character of the locality; and*
 - (c) *the applicant has not demonstrated that the building work for the extension to the dwelling house complies with all relevant acceptable outcomes of the Traditional building character (design) overlay code of CP2014.*

...
- 7 The Appellant lodged the Appeal with the Building Development Committee Registry on 19 July 2016. The Appellant's grounds of Appeal and written submissions in the appeal raise several legal arguments as to why the Appeal should be allowed. The Council's written submissions also address several points of law, but ultimately accepted that the Building DA should be approved.
- 8 The issues in this appeal had a number of issues in common with the Building and Development Committee Appeal 33-16. It was determined that, in order to ensure all appeals dealing with such issues were decided consistently, the relevant Committees should decide Appeal 33-16 first and then any related appeals thereafter. A copy of the decision in Appeal 33-16 is attached and is referenced below in this decision.

MATERIAL CONSIDERED

- 9 The material considered in arriving at this decision comprises:
- (a) the Form 10 – Appeal Notice lodged by the Appellant and its attachments;
 - (b) the Appellant’s written submissions;
 - (c) the Council’s written submissions; and
 - (d) other material as referenced in the reasons below.

FINDINGS OF FACT

10 The Committee’s findings of fact are as provided in the reasons below.

REASONS FOR DECISION

Nature of committee hearing

11 While not expressly stated, as it is for the PEC³, the statutory context governing Committee appeals demonstrates that such an appeal is a rehearing on the merits.⁴ That intention is crystallised in the powers given to the Committees in making their appeal decision:

564 Appeal decision

- (1) *In deciding an appeal the building and development committee may make the orders and directions it considers appropriate.*
- (2) *Without limiting subsection (1), the building and development committee may–*
 - (a) *confirm the decision appealed against; or*
 - (b) *change the decision appealed against; or*
 - (c) *set aside the decision appealed against and make a decision replacing the decision set aside; or*
 - (d) *for a deemed refusal of a development application–*
 - (i) *order the assessment manager to decide the application or request by a stated time; and*
 - (ii) *if the assessment manager does not comply with the order under subparagraph (i) – decide the application; or*
 - (e) *if the application is for building work – with the consent of the appellant, vary the application so that the building and development committee is satisfied–*
 - (i) *the building, when erected, will not have an extremely adverse effect on the amenity or likely amenity of the building’s neighbourhood; and*
 - (ii) *the aesthetics of the building, when erected, will not be in extreme conflict with the character of the building’s neighbourhood.*
- (3) *If the building and development committee acts under subsection (2)(b), (c), (d)(ii) or (e), the committee’s decision is taken, for this Act, other than this*

³ Section 495 of the SPA.

⁴ For a discussion about the nature of appeal rights see *Builder’s Licensing Board v Sperway Constructions (Syd) Pty Ltd* (1976) 135 CLR 616; *Allesch v Maunz*(2000) 203 CLR 172; *Pointon v Redcliffe Demolitions Pty Ltd* [2002] QDC 131; *Fox v Percy* [2003] HCA 22; *De Tournouer v Chief Executive, Department of Environment and Resource Management* [2009] QCA 395.

division, to be the decision of the entity that made the decision being appealed.

- (4) *The chairperson of the building and development committee must give all parties to the appeal written notice of the committee's decision.*

...

- (5) *The decision of the building and development committee takes effect –*
- (a) *if a party to the proceeding does not appeal against the decision at the end of the period during which the committee's decision may be appealed; or*
 - (b) *if an appeal is made to the court against the committee's decision – subject to the decision of the court, when the appeal is finally decided or withdrawn.*

- 12 Were the Committee's decision not a rehearing on the merits, and noting that Committees have no inherent powers, the legislation would likely limit the powers of the Committee to sending the decision back to the relevant decision maker to be decided according to law. Further, there would be no need to have a provision which deems certain Committee decisions to be decisions of the decision maker at first instance. The Committees' role in the Appeals is therefore to 'stand in the shoes' of the relevant decision maker and determine what the Committee considers is the correct and preferable decision. Even though circumstances may exist where the parties themselves agree on a given outcome, the Committee must be satisfied that any resulting decision it makes is lawful.

Statutory interpretation principles

- 13 Paragraphs 23 to 29 of the decision for Appeal 33-16 set out relevant principles of statutory interpretation. The Committee has decided this Appeal taking account of those principles.

Building work

- 14 Paragraphs 30 to 35 of the decision for Appeal 33-16 set out relevant matters in respect of building work under the SPA (**SPA building work**) and building work under the Building Act (**BA building work**). This includes the finding that a building development application under the Building Act is an application for development approval under the SPA to the extent it is for BA building work.

Assessable development

- 15 Paragraphs 36 to 50 of the decision for Appeal 33-16 set out relevant matters in respect of assessable development, including that:
- (a) all development under SPA is exempt development unless a relevant instrument places it within one of the other SPA categories of development;
 - (b) it is an offence to carry out assessable development without an effective development permit;
 - (c) there are four statutory limitations which restrict a planning scheme's ability to regulate development (**Limitations 1 to 4**);
 - (d) Limitation 3 provides that, to the extent a planning scheme is inconsistent with a regulation's categorisation of development, the planning scheme is of no effect,⁵ and

⁵ The only exception being that where the planning scheme declares development to be self-assessable and the regulation prescribes that development to be assessable development, the codes identified in the planning scheme for the development are not applicable codes, but must be complied with.

- (e) Limitation 4 provides that any provision of a planning scheme that is about BA building work is of no effect unless that provision is incorporated into the building assessment provisions under section 32 of the Building Act.

City Plan

16 Paragraphs 51 to 68 of the decision for Appeal 33-16 discuss the interaction between City Plan and section 32 of the Building Act. Reference is made to section 1.6 of the City Plan, which relevantly provides:

1.6 Building work regulated under the planning scheme

(1) Section 78A of the Act states that a local planning instrument must not include provisions about building work to the extent the building work is regulated under the building assessment provisions, unless permitted under the Building Act 1975.

(2) The building assessment provisions are listed in section 30 of the Building Act 1975.

Editor's note—The building assessment provisions are stated in section 30 of the Building Act 1975 and are a code for the integrated development assessment system for the carrying out of building assessment work or self-assessable work (see also section 31 of the Building Act 1975).

(3) This planning scheme, through Part 5, regulates building work in accordance with sections 32 and 33 of the Building Act 1975.

Editor's note—The Building Act 1975 permits planning schemes to:

- regulate, for the Building Code of Australia (BCA) or the Queensland Development Code (QDC), matters prescribed under a regulation under the Building Act 1975 (section 32). These include variations to provisions contained in parts MP 1.1, MP 1.2 and MP1.3 of the QDC such as heights of buildings related to obstruction and overshadowing, siting and design of buildings to provide visual privacy and adequate sight lines, on-site parking and outdoor living spaces. It may also regulate other matters, such as designating land liable to flooding, designating land as bushfire prone areas and transport noise corridors;
- deal with an aspect of, or matter related or incidental to building work prescribed under a regulation under section 32 of the Building Act 1975;
- specify alternative boundary clearances and site cover provisions for Class 1 and 10 structures under section 33 of the Building Act 1975;
- Refer to Schedule 3 of the Regulation to determine assessable development and the type of assessment.

(4) Table 1.6.1 identifies the building assessment provisions in the planning scheme.

Building Act 1975 (BA) and Building Regulation 2006 (BR)	Description	Building assessment provisions in planning scheme
Section 32(a) BA and section 12 BR	Designation of a bushfire prone area for the BCA or QDC	Section 1.7.1
Section 32(a) BA and section 13 BR	Designation of a natural hazard management area (flood) for the BCA or QDC	Section 1.7.2 (2)
Section 32(b) BA and sections 13(1)(a), 13(1)(b)(i), 13(1)(b)(iv) and 13(1)(b)(v) BR	Declaration within the natural hazard management area (flood) of the defined flood event, a freeboard that is more than 300mm, and the finished flood floor levels of habitable rooms	Section 1.7.2 (2)
Section 32(b) BA and	Qualitative statements and	Dwelling house (small

<i>section 10 BR</i>	<i>quantifiable standards for matters provided for under performance criteria 4, 5, 7, 8 and 9 under QDC MP 1.1 for a single detached Class 1 building or a Class 10 building or structure located on the same allotment as a single detached Class 1 building.</i>	<i>lot) code Traditional building character (design) overlay code A neighbourhood plan code to the extent provided</i>
<i>Section 32(b) BA and section 10 BR</i>	<i>Qualitative statements and quantifiable standards for matters provided for under performance criteria 4 and 8 under QDC MP 1.2 for a single detached Class 1 building or a Class 10 building or structure located on the same allotment as a single detached Class 1 building.</i>	<i>Dwelling house code Traditional building character (design) overlay code A neighbourhood plan code to the extent provided</i>
<i>Sections 32(c) and 33 BA</i>	<i>Alternative provisions to QDC boundary clearance and site cover provisions for particular buildings</i>	<i>Dwelling house code Dwelling house (small lot) code Traditional building character (design) overlay code A neighbourhood plan code to the extent provided</i>

Editor's note—A decision in relation to building work that is assessable development under the planning scheme should only be issued as a preliminary approval. See section 83(b) of the Building Act 1975.

Editor's note—In a development application the applicant may request preliminary approval for building work. The decision on that development application can also be taken to be a referral agency's response under section 271 of the Act, for building work assessable against the Building Act 1975. The decision notice must state this.

- 17 As was the case for Appeal 33-16, this Appeal also required consideration of those City Plan provisions sought to be incorporated into the building assessment provisions. The application of those subsections is respectively addressed in paragraphs 55 to 60 and paragraphs 61 to 67 of decision for Appeal 33-16. In line with that reasoning the Committee finds:
- (a) in respect of the dwelling house code, PO2/AO2 and PO3/AO3 of the dwelling house code are incorporated as building assessment provisions under section 32(b) of the Building Act and no provisions of the dwelling house code are incorporated as QDC boundary clearance and site cover provisions; and
 - (b) in respect of the traditional building character (design) overlay code, the following are incorporated into the building assessment provisions through the traditional building character (design) overlay code as alternate QDC boundary clearance and site cover provisions:
 - (i) P01 and AO1.1 as qualitative statements and AO1.2 as a quantifiable standard; and
 - (ii) PO2 and its AO's as qualitative statements.

Levels of assessment / Assessment manager / Referral agencies

18 Paragraphs 89 to 125 of the decision for Appeal 33-16 address issues relating to the levels of assessment that apply to building work, the role of the assessment manager and referral agencies and when a referral agency's jurisdiction is triggered for a building development application. The reasoning in those paragraphs is adopted in this Appeal and results in the following findings.

Item 17

19 The subject property is in the LMR2 zone rather than the character residential zone (as was the case for Appeal 33-16). The LMR2 zone is, however, also included in AO2 of the dwelling house code. Given, however, that this application seeks only the approval of the metal awning (and not the other building works evidently being carried out at the property in at least May 2016), no referral assessment is triggered by the Building DA failing to comply with AO2 and AO3.

20 As to the traditional building character (design) overlay code, the 1946 aerial imagery on Council's website clearly shows the house existing on the subject land in 1946. The metal awning the subject of the Building DA, however, cannot properly be said to relate to AO1.1 or AO1.2 of the traditional building character (design) overlay code. The Committee therefore finds that the Council's referral jurisdiction is not triggered by that overlay code.

Item 19

21 Item 19, Table 1 of Schedule 7 of the SPR relevantly provides that, where MP 1.2 of the QDC⁶ applies and the proposed building or structure does not include an acceptable solution, then the local government has jurisdiction to determine whether the proposed building or structure complies with the performance criteria.

22 It is difficult in this case to determine exactly whether the proposed awning fails to comply with the acceptable solutions in MP1.2. No doubt the Council and the Committee would have been assisted by clearer plans showing relevant measurements etc... and submissions from the Appellant which more squarely addressed these practical issues. The Committee, however, agrees with the implication in the Council's submissions that the relevant performance criteria are met even if one of the acceptable solutions is not.

Item 20

23 Item 20, Table 1 of Schedule 7 of the SPR effectively provides that, where an alternative provision is incorporated into the building assessment provisions and the proposed building or structure is not of a quantifiable standard for a relevant qualitative statement, then the local government is given referral jurisdiction to determine whether the proposed building or structure complies with the qualitative statement.

24 The Committee has already set out its findings in respect of what provisions of City Plan have been incorporated into the building assessment provisions as alternate QDC boundary clearance and site cover provisions. Per the reasons in the decision for Appeal 33-16, applying this in the context of item 20 is problematic and the Committee finds that AO1.1 and PO2 and its AOs do not have any quantitative standards through which item 20 of Schedule 7 of the SPR can trigger the Council's referral jurisdiction. AO1.2, which is quantifiable, does not apply to the metal awning the subject of the Building DA. The Council's referral jurisdiction is therefore not triggered for PO1 of the traditional building character (design) code.⁷

⁶ The QDC is defined by reference to section 13 of the Building Act.

⁷ See paragraphs **Error! Reference source not found.** to **Error! Reference source not found.** of these reasons.

25 The Committee therefore finds that no referral jurisdiction is triggered for the Building DA through item 20 of the SPR.

Item 21

26 Item 21, Table 1 of Schedule 7 of the SPR effectively provides that, where a planning scheme provision is incorporated into the building assessment provisions through section 10 of the Building Regulation, and the proposed building or structure is not of a quantifiable standard for a relevant qualitative statement, then the local government is given referral jurisdiction to determine whether the proposed building or structure complies with the qualitative statement. Given the findings already made about the applicability of the dwelling house code acceptable solutions to the metal awning applied for, the Committee finds that no referral jurisdiction is triggered under item 21 of Schedule 7 of the SPR for the Building DA.

Item 25

27 Item 25 has no application in this Appeal.

Item 26

28 Item 26 does not confer referral jurisdiction on the Council for the Building DA because the subject building work is not associated with a material change of use.⁸

COMMITTEE'S DECISION

29 Based on the above reasons the Committee finds:

- (a) the only potential trigger for the Council's referral jurisdiction is under item 19 of the SPR; and
- (b) even if that referral jurisdiction was triggered, the Committee agrees with the Council's assessment that the Building DA should be approved.⁹

30 The Committee therefore orders under section 564(1) that:¹⁰

- (a) the Building DA decision notice dated 18 July 2016 is set aside; and
- (b) the Assessment Manager is to re-issue a decision notice for the Building DA as if the Council had no concurrence agency requirements.

Robert Laidely
Building and Development Committee Chair
Date: 15 February 2017

⁸ See paragraphs 157 to 160 of Appeal 33-16.

⁹ It being implied that it otherwise meets the relevant performance criteria.

¹⁰ Per *Leon Fink Holdings Pty Ltd v The Australian Film Commission and Others* (1979) 141 CLR 672, a provision such as 564(2) does not limit the orders that can be made under an associated provision such as 564(1).

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