



## Development Tribunal – Decision Notice

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### Planning Act 2016

<b>Appeal Number:</b>	33 - 17
<b>Appellant:</b>	Darryl McLennan
<b>Assessment Manager:</b>	Dan Oliver – Building Certification Consultants
<b>Concurrence Agency:</b> (if applicable)	Brisbane City Council (Council)
<b>Site Address:</b>	45 Ernest Street, Camp Hill and described as Lot 65 and 66 on RP 13109 – the subject site

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### Appeal

Appeal under section 527 of the Sustainable Planning Act 2009 (SPA) against a decision notice of the Assessment Manager to refuse alterations and additions to a dwelling house, being of a building Class 1a. Council as the Concurrence Agency directed the Assessment Manager to refuse the building as the proposed building work was deemed to not comply with the Dwelling House Code or the Low Medium density residential design code, and was contrary to the Traditional building character (design) overlay code.

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<b>Date and time of hearing:</b>	3 November 2017 at 1.00pm
<b>Place of hearing:</b>	Level 16, 41 George Street Brisbane
<b>Tribunal:</b>	Mr Henk Mulder – Chair Ms Deanna Heinke – Member Mr Chris Buckley - Member
<b>Present:</b>	Mr Darryl McLennan – Appellant Ms Milena Mog - Council representative

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### Decision:

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

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

1. The subject site contains two allotments forming an 817m<sup>2</sup> residential site located at 45 Ernest Street, Camp Hill. The site is situated at the corner of Albert Street and forms a triangular shaped corner site. It has a distinct fall away from the Ernest Street frontage to the rear boundary of 4.5 metres at 1:9, or 1.0 metre in height every 9 metres in length.
2. The land is zoned MLMR2 Low medium density residential (2 or 3 storey mix) under the *City Plan 2014* (CP2014).
3. The subject site is located in the Dwelling house character overlay and the Traditional building character overlay (Neighbourhood Character sub-category), and is not within a Neighbourhood Plan.
4. The existing dwelling appears as a simple Federation style cottage and has been the subject of earlier building work to the rear. In the Ernest Street streetscape, the dwelling remains as original with its single storey elevation and high pitched roof behind.
5. The existing dwelling presents as two levels along the Albert Street frontage and steps down with the site fall to the rear boundary. The regular tiled roof lines of hips and ridges with detailed fascia boards add to the appearance of a federation styled building with dark red brick and roof tile, and white painted glazing using multiple transoms to a curved wall. The ground floor area at the rear consists of storage and off-street parking under the existing dwelling, with a pool at the lowest end of the site near the boundary.
6. The dwelling surrounding the subject site in Ernest Street are a mix of older and recently constructed residential dwellings which are one or two storeys in building height. Dwellings on the low side of Ernest Street tend to be single storey in building height, in contrast with the higher side which is composed of large two storey dwellings.
7. Brisbane City Council (Council) confirmed a properly made application of 5 April 2017. The application sought a Dwelling House extension under the Traditional building character overlay, leading to the development criteria used in the Dwelling house code.
8. Council's Decision Notice dated 27 June 2017, advised the following grounds for refusal:

### **The Delegate/Council refused the application for the following reasons:**

Having considered the application detailed above, and in accordance with the relevant assessment criteria of the *Brisbane City Plan 2014* and the *Sustainable Planning Act 2009*, I refuse the application based on the following grounds.

1. The proposal is contrary to the Dwelling house code as outlined below:
  - a) The proposal does not comply with PO2 of the code as it results in a Dwelling house that is three storeys in height (and two storeys where AO2(a)ii applies) and not consistent with the prevailing height and design of dwelling houses in the immediate vicinity.
2. The proposal is contrary to the Low medium density residential zone code as outlined below:
  - a) The proposal does not comply with Overall Outcome 5b of the code. The proposed dwelling house extensions would not result in a building height and bulk that responds to the nature of adjoining dwellings, or that responds to the sloping, orientation and frontage characteristics of the site.
3. The proposal is contrary to the Traditional building character (design) overlay code as outlined below:
  - a) The proposal does not comply with PO1 and PO2 of the code as it would result in a garage that is not setback consistently with the remainder of the street and that dominates the street frontage. The proposed garaged is setback too close to the Albert Street frontage and not integrated into the form of the dwelling house.
  - b) The proposal does not comply with Overall Outcome 2a of the code as the proposed dwelling extensions do not reflect or strengthen the traditional character of the area through compatible form or scale.
9. The Owner, through the agency of the Applicant and designer, lodged an appeal with the Tribunal on 7 August 2017.

10. Building Certification Consultants as building certifier issued a Development Application decision notice on 13 September 2017 refusing the proposed alterations to the existing Class 1a dwelling.
11. As a result of the hearing the Tribunal sought an opportunity to receive amended plans from the Applicant which would reduce the effect of the garage at the boundary with a minimum setback of 1 metre, and modification of the scheme to better respond to issues of height. The applicant provided amended plans to the Development Tribunal Registrar. Council and the Development Tribunal received the amended plans on 9 November 2017.
12. On 20 November 2017 Council provided a response to the amended plans and advised of an unchanged position:

“...whilst there have been minor changes to the roof form the overall bulk and scale remains essentially the same, thus Council’s position on this appeal remains the same.

The proposed extension to the dwelling house is inconsistent with the prevailing height (two story where A02 (a) ii applies) and the design of dwelling houses in the immediate vicinity. The proposed dwelling extensions results in a building that does not respond to the slope, orientation and frontage characteristics of the site. In addition, the proposal does not reflect nor strengthen the traditional character of the area through compatible form or scale.”

### **Material Considered**

The material considered in arriving at this decision comprises:

13. ‘Form 10 – Appeal Notice’, grounds for appeal and correspondence accompanying the appeal lodged with the Tribunals Registrar 7 August 2017.
14. Council Assessment Manager Decision Notice, Development Application no: A004618922, dated 27 June 2017, refusing the alterations and additions;
15. Development Permit for Building Works Form 6 Decision Notice, reference 0023358, Building Certification Consultants.
16. The following drawings:
  - Site Plan, Floor Plan level 1, Drawing Number D1703-1C 1of7, by McLennan Domestic Design dated 30/3/17; 18/4/17; 28/4/17; 18/5/17; 26/5/17 (x2 versions); 16/6/17
  - Floor Plans levels 1, 2 and Attic, Drawing Number D1703-1C 2of7, by McLennan Domestic Design dated 30/3/17; 18/4/17; 28/4/17; 18/5/17; 26/5/17 (x2 versions); 16/6/17
  - Floor Plans level 2 and 3, Drawing Number D1703-1C 3of7, by McLennan Domestic Design dated 30/3/17; 18/4/17; 28/4/17; 18/5/17; 26/5/17 (x2 versions); 16/6/17
  - Street Elevation and cross section, Drawing Number D1703-1C 4of7, by McLennan Domestic Design dated 30/3/17; 18/4/17; 28/4/17; 18/5/17; 26/5/17 (x2 versions); 16/6/17
  - Existing side and rear Elevation, Drawing Number D1703-1C 5of7, by McLennan Domestic Design dated 30/3/17; 18/4/17; 28/4/17; 18/5/17; 26/5/17 (x2 versions); 16/6/17

- Proposed and Existing Elevation to Albert St., Drawing Number D1703-1C 6of7, by McLennan Domestic Design dated 30/3/17; 18/4/17; 28/4/17; 18/5/17; 26/5/17 (x2 versions); 16/6/17
- North and Rear Elevation, Drawing Number D1703-1C 7of7, by McLennan Domestic Design dated 30/3/17; 18/4/17; 28/4/17; 18/5/17; 26/5/17 (x2 versions); 16/6/17
- Setback Plans at Albert Street to neighbouring dwellings, no identification – presented by the Applicant at the Tribunal hearing.
- Photographic collage demonstrating proposed heights with existing dwellings presented by Applicant at the Tribunal hearing.

17. Development Application Lodgement Form dated 30 March 2017.
18. IDAS Form 5 – Material change of use assessable against a planning scheme.
19. IDAS Form 6 – Building or operational work assessable against a planning scheme.
20. Neighbour's statements comprising five neighbours all nominating support for the proposal.
21. Verbal submissions at the hearing from all parties to the appeal.
22. Documentation provided by the Applicant to the Registrar after the Tribunal meeting, as sought at the meeting.
23. Written submission from Council provided subsequent to the hearing in response to the receipt of amended plans from the Applicant.
24. The *City Plan 2014* (CP2014).
25. The *Planning Act 2016* (PA).
26. The *Building Act 1975*(BA).
27. The *Sustainable Planning Act 2009* (SPA)

## **Findings of Fact**

The Tribunal makes the following findings of fact:

28. The subject site is an 817m<sup>2</sup> residential allotment located at 45 Ernest Street Camp Hill. It is situated at the corner of Albert Street forming a triangular shaped corner site. The level of the land at the rear of the 40 metre long site is 4.5 metres below the main Ernest Street frontage level.
29. The existing dwelling on the subject site presents as a single story dwelling to the Ernest Street frontage of the site.
30. The subject site is zoned LMR2 Low medium density residential (2 or 3 story mix) under *CP2014*.
31. An application for an Extension to a Dwelling House was submitted by the Applicant on 30 March 2017 and accepted by Council as having been properly made on 5 April 2017.
32. The site is subject to the Dwelling House Code, the Low-medium density residential zone code and the Traditional Building Character overlay (Neighbourhood Character).

33. The proposed extensions are alterations and additions that establish a level over the existing rear two story component of the existing dwelling and attic, including three dormer windows to a raking wall line. The existing second story component of the dwelling is also proposed to have new habitable floor area and outdoor living spaces.
34. In Ernest Street there is a mix of older and recently constructed residential dwellings which are one or two storeys in building height. Dwellings on the low side of Ernest Street tend to be single story in building height, in contrast with the higher side which is composed of large two story dwellings.
35. There is a wide range of materials being utilised in the vicinity, including brick, tile, render, timber weatherboard, and corrugated sheet. The most recent development of two detached dwellings located on the opposite side of Ernest Street from the subject site was identified by the Applicant as having a three story component. The Tribunal accepted the justification from Council that the third story is both small in area and transitional in design between two different two story parts of the dwellings over a sloping site.
36. The appeal relates critically to the Performance Outcome 2 (PO2) and Acceptable Outcome 2 (AO2) of the Dwelling House Code as a substantial part of the proposed development is more than two storeys in height.

<p><b>PO2</b></p> <p>Development has a <b>building height</b> that:</p> <p>(a) is consistent with the building height of <b>dwelling houses</b> prevailing in the immediate vicinity;</p> <p>(b) does not unduly overshadow adjoining <b>dwelling houses</b> 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></p> <p>Development in the:</p> <p>(a) Low density residential zone, Character residential zone, 2 storey mix zone precinct of the Low– medium density residential zone, 2 or 3 storey mix zone precinct of the Low– medium density residential zone, Rural residential zone, Environmental management zone, Rural zone or Emerging community zone results in a maximum <b>building height of 9.5m and:</b></p> <p>(i) 2 <b>storeys</b>; or</p> <p>(ii) (ii) 1 storey 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>(b) Up to 3 storeys zone precinct of the <b>Low– medium density residential zone</b> or in the <b>Medium density residential zone</b> 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;</p>
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	which vary according to the height of the building.
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37. At the time the application was considered by Council “building height” was defined in the CP2014 as follows:

Building height	<p>If specified:</p> <p>(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;</p> <p>(b) in storeys, the number of storeys above ground level; or</p> <p>(c) in both metres and storeys, both (a) and (b) apply.</p>
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**Assessment of the Codes and Overlay**

38. The essential issues of the Appeal are based on an assessment of section 9.3.7 Dwelling House Code of the CP2014, and the Table 9.3.7.3 therein with the Performance Outcome PO2 and Acceptable Outcome AO2.

39. The proposed building work that is the subject of the application for development approval constitutes a significant component that amounts to a three story building.

40. The Tribunal accepts the proposed development is not compliant with Acceptable Outcome AO2(a) on the basis that the new work constitutes a three story building.

41. When an acceptable solution is not met, the assessment must determine if the proposal meets the corresponding performance outcome. Non-compliance with the acceptable solution does not necessarily give rise to conflict with the planning scheme.

42. Council provides the following informal guidance about codes when it describes how to use City Plan 2014:

“..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”. This is established planning practice and part of the accepted decision-making rules within Queensland.

43. In considering PO2 four parts can be described: An initial sentence; paragraphs (a) and (b) and a Note. As the Note is not an Editor’s Note, it is considered part of the planning scheme and has to be given weight.

**PO2**

Development has a **building height** that:

- (a) is consistent with the building height of **dwelling houses** prevailing in the immediate vicinity;
- (b) does not unduly overshadow adjoining **dwelling houses** and their associated private open space in terms of access to sunlight and daylight.

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.

- 44. The proposed development is consistent with PO2 (b) as it would not unduly overshadow adjoining premises.
- 45. In the initial sentence the term “building height” was considered. This is defined in CP2014 as follows:

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.

- 46. The initial sentence seeks to qualify the meaning of “building height” by ascribing what height means when it is in the context of height in metres and/or height as storeys. Building height as described in PO2 does not specify metres or storeys. This is undertaken in regard to an Acceptable Outcome.
- 47. PO 2 (a) requires the building height:

(a) is consistent with the building height of dwelling houses prevailing in the immediate vicinity;

and

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.

- 48. The building height prevailing in the immediate vicinity of the subject site is one and two story. The proposal as set out in the documents supplied by the Applicant to the Registrar after the Tribunal meeting demonstrates that the streetscape is essentially unchanged to the subject site, with the single story elevation remaining, and roof to the rear of the street elevation. At the side boundary to Albert Street the neighbouring dwelling is a large dwelling unlike most of its neighbours for its scale of roof and façade elements with materials.
- 49. The Applicant sets out in the documents discussed at the Tribunal hearing and in the appeal submission, the prevailing heights to each neighbor and to elsewhere in the street, some not in the immediate vicinity. These descriptions were not challenged by Council

representatives, and in combination with observations from the site meeting, the Tribunal has considered these descriptions applicable, as they apply to the neighbouring sites.

### **Reasons for the Decision**

50. The issues raised by Council for the Low Medium density residential design code, and the Traditional building character overlay (Neighbourhood Character sub-category), are considered to have been satisfied in the proposal, though no elaboration is deemed necessary from the Tribunal based on the assessment against the Dwelling house code criteria.
51. The Dwelling house code Acceptable Outcome AO2 specifies whether building height is considered in metres or storeys. In the same code, Performance Outcome PO2 does not specify building height in metres or storeys. Instead with PO2 (b) as having been satisfied, PO2(a) can be used to determine building height, for its consistency with similarly zoned buildings in the immediate vicinity.
52. The use of the term building height has been considered by the Tribunal to be assessed against those buildings in the immediate vicinity, that is, within 35 metres of any point of the street frontage of the subject site. Whilst there are buildings in this vicinity that are consistent with the proposal, the Tribunal is not satisfied that more than 50% of the dwelling houses within the vicinity of the street frontage have a consistent height with the proposal.

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**Henk Mulder**  
**Development Tribunal Chair**  
**Date: 1 March 2018**



## **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**