



## Development Tribunal – Decision Notice

---

### Planning Act 2016

<b>Appeal Number:</b>	<b>06 – 17</b>
<b>Appellant:</b>	Brenden Edser
<b>Assessment Manager:</b>	Trevor Gerhardt
<b>Concurrence Agency:</b> (if applicable)	Brisbane City Council
<b>Site Address:</b>	40A Walnut Street Wynnum Qld 4178 and described as Lot 466 on SP 33003 and Lot 1 on RP816646

---

### Appeal

Appeal under section 527 of *Sustainable Planning Act 2009* (SPA) against the Decision Notice of the Assessment Manager to refuse the alterations and additions to an existing Class 1a dwelling. Brisbane City Council (Council) as the Concurrence Agency directed the Assessment Manager to refuse the building work as it did not comply with the performance outcomes of the Brisbane City Plan 2014, Dwelling House Code 9.3.7, Table 9.3.7.3, Performance Outcome P02.

---

<b>Date and time of hearing:</b>	23 May 2017 at 2.30pm
<b>Place of hearing:</b>	The subject site – 40a Walnut Street Wynnum Qld 4178 and described as Lot 466 on RP33003 and Lot 1 on RP816646 and Level 16, Mineral House, 41 George Street Brisbane
<b>Tribunal:</b>	Mr Henk Mulder – Chair Ms Lauren Turner – Member Mr John O’Dwyer – Member Mr Richard Prout - Member
<b>Present:</b>	Mr Trevor Gerhardt – Appellant Ms Marcia Thompson – Council representative

---

### Decision:

The Development Tribunal (Tribunal), in accordance with section 564(2)(c) of the SPA **sets aside** the decision of the Assessment Manager to refuse the alterations and additions to the existing Class 1a dwelling, and makes a new decision that no approval of the application be granted until a higher order approval for a Code Assessment – Preliminary Approval for Building Work, is granted.

## Background

The subject site consists of two allotments (Lot 466 on RP 33003, (412 m<sup>2</sup>) and Lot 1 on RP81646, (56 m<sup>2</sup>)) with a combined area of 468 m<sup>2</sup> located at 40a Walnut Street, Wynnum and is zoned CR1 Character (Character) under Council's Brisbane City Plan 2014 (BCP2014).

The subject site is located in the Traditional Building Character overlay (Neighbourhood Character), and whilst within the Wynnum-Manly neighbourhood plan the subject site is not in a precinct or sub-precinct.

The existing dwelling on the site was assessed and approved by Council on 29 June 2015 as a Material Change of Use (Code Assessment) for a new dwelling house under the Traditional Building Character Overlay. The dwelling was assessed as a three level two storey dwelling house i.e. no floor or walls on the ground floor level with the natural ground level retained.

A Form 21 (Final inspection certificate) was issued by a private building certifier on 15 July 2015 for the dwelling and a Council issued a confirmation of plans as generally in accordance dated 15 July 2015.

In January 2017 the property owner lodged a development application for building work with the Assessment Manager for alterations and additions to the existing dwelling establishing new floor area at the ground level of 145m<sup>2</sup> and then concomitantly a dwelling of three storeys.

The proposed development did not comply with Acceptable Outcome A02(a) of the BCP2014, Dwelling House Code 9.3.7, Table 9.3.7, as such the application required referral to the Council as a Concurrence Agency.

The referral triggers as set out in the referral letter from the Assessment Manager to the Council were under the *Sustainable Planning Regulation 2009* (SPR) Schedule 7, Table 1 (For building work assessable against the Building Act), namely:

- (a) Item 17, being the amenity and aesthetic impact of the building or structure of the building work is carried out; and
- (b) Items 19, 20, and 21, all being Design and Siting.

The Council issued a concurrency response on 25 January 2017 only pursuant to its jurisdiction under SPR Schedule 7, Table 1, Item 17 (Amenity and Aesthetics) directing the Assessment Manager to refuse the application.

The Assessment Manager issued a Development Application Decision Notice on 17 February 2017 refusing the proposed alterations and additions to the existing Class 1a dwelling.

The Applicant, through the agency of the Assessment Manager, lodged an appeal with the Building and Development Dispute Resolution Committee (Committee) on 20 February 2017.

## Material Considered

The material considered in arriving at this decision comprises:

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 20 February 2017;

2. Letter from the Applicant dated 20 February 2017, to the Committee, providing justification as to why the alterations and additions to the dwelling should be approved;
3. Assessment Manager Decision Notice, Development Application No: 0002017207, dated 17 February 2017, refusing the alterations and additions as directed by Council;
4. The following drawings:
  - Ground Floor Plan, Drawing Number A-1, dated 12/16/2016 by FrameSteel Pty Ltd;
  - Floor Plans, Drawing Number A-2, dated 12/16/2016 by FrameSteel Pty Ltd;
  - Floor Plans, Drawing Number A-3, dated 12/16/2016 by FrameSteel Pty Ltd;
  - Floor Plan (East Elevation), Drawing Number A-4, dated 12/16/2016 by FrameSteel P/L;
  - Floor Plan (West Elevation), Drawing Number A-5, dated 12/16/2016 by FrameSteel P/L
  - Floor Plan (North Elevation), Drawing Number A-6, dated 12/16/2016 by FrameSteel P/L
  - Floor Plan (South Elevation), Drawing Number A-7, dated 12/16/2016 by FrameSteel P/L
5. IDAS Form 1 - Application Details, IDAS Form 2 - Building work requiring assessment against the *Building Act 1975*;
6. Acknowledgement Notice from the Assessment Manager, Trevor Gerhardt, Private Building Certifier, to the Applicant confirming receipt of the application dated 11 January 2017;
7. Assessment Manager letter to Council making Application for concurrence agency response, dated 11 January 2017;
8. Concurrence Agency Response from Council dated 25 January 2017 instructing Assessment Manager to refuse Development Application for Building Work;
9. Assessment Manager letter to Applicant advising refusal of Development Permit dated 17 February 2017, with accompanying conditions and information regarding appeals;
10. Applicant's Form 10 application for Appeal to the Committee dated 17 February 2017 with accompanying Grounds for Appeal attached dated 20 February 2017, and Attachments;
11. Emails from Council and Assessment Manager dated 12 January 2017, 1st February 2017, and 6 February 2017 discussing fee for Design and Siting concurrence referral;
12. Photograph of the subject site provided by Applicant;
13. BDDRC Appeal 33-16
14. BDDRC Appeal 15-15
15. Verbal submissions at the hearing from all parties to the appeal;
16. Letter from Council to the Manager, BDDRC, promoting a lapsed application and improperly constituted appeal application;
17. Written submissions provided at the hearing;
18. Applicant's Report, Original Plans, and Plans in Accordance for DA A004144778, Decision by Delegate of Council on Development Application (which accepted the development complied with the siting and design requirements) and Decision by Delegate of Council on Referral Agency Response (which determined that the proposed – now existing structure did

not have an extremely adverse effect on the amenity and was not in extreme conflict with the character of the locality in response to an Aesthetics and Amenity referral) being the scheme at Walnut Street approved in 29 June 2015, as sought by the Committee at the Hearing;

19. The *Brisbane City Plan 2014* (**CP2014**);
20. The *Sustainable Planning Act 2009* (**SPA**);
21. The *Sustainable Planning Regulation 2009* (**SPR**)
22. The *Building Act 1975* (**BA1975**).
23. The *Building Regulation 2006* (**BR2006**)
24. Integrated Development Assessment System (**IDAS**)

## **Main Issues Raised by the Parties to the Appeal**

### **Council**

The Council raise two main issues in its submissions to the Committee namely:

1. **Lapsing** - At the Hearing Council advised that two concurrence agency responses were sought, being Siting and Design, which required a fee, and Amenity and Aesthetics, which had no fee attached Council advised that as no fee was paid for the siting and design concurrence application, the Appeal was rendered invalid as the application had lapsed.

The Committee queried the internal process for assessing the two issues and Council confirmed the applications were reviewed separately due to the fee differentiation. Council continued to formalise their response for aesthetics and amenity, as after 10 business days it would have been considered a deemed approval if they had not responded.

Council advised that currently this would be seen as a single concurrence response application, despite separate sections within Council undertaking the reviews required.

Council emailed the Assessment Manager on 12 January 2017 to advising that the fee had not been paid for the design and siting referral. In response the Assessment Manager, described difficulty in making payments to Council for application fees in general.

2. **Code Assessment** – Council also contended that the alterations and additions to the existing Class 1a dwelling constituted a three storey building as per the CP 2014, as such required a separate Preliminary Approval for Building Work (Code Assessment) pursuant CP 2014 to be assessed by Council.

Therefore, as the building development application involves assessable development, in which Council is not a concurrency agency and as per Section 83 (General restrictions on granting building development approval) of the *Building Act 1975* (BA), the Assessment Manager cannot issue a Development Approval for Building Work until under the Planning Act, all necessary development permits are effective for the development.

As such a private certifier cannot lawfully grant a building development approval in the form of a development approval.

### **Applicant**

The Applicant raises three main issues in its submissions to the Committee namely:

1. That the codes nominated under the BCP2014 Table 1.7.4 have no effect;
2. That pursuant to section 288(2) of the Sustainable Planning Act 2009, the Council, as Concurrency Agency, has over-stepped its authority and had no jurisdiction to refuse the proposed development using the wording in the decision, as it relates to an Acceptable

Outcome and a Performance Outcome in the BCP2014 and not the wording used in Section 288 of the SPA; and

3. The Committee should declare that the certifier be at liberty to approve the development application within the *Sustainable Planning Act 2009*, s. 527(1)(a) as if there were no concurrence agency requirements.

## Findings of Fact

The Tribunal makes the following findings of fact:

1. The subject site consists of two allotments with a combined area of 468 m<sup>2</sup> located at 40a Walnut Street, Wynnum and is zoned CR1 Character (Character) under the BCP2014. The subject site is located in the Traditional Building Character overlay (Neighbourhood Character), and whilst within the Wynnum-Manly neighbourhood plan the subject site is not in a precinct or sub-precinct.
2. The subject site is a long rectangular block facing north-west with a two-street frontage including Walnut Street to the north-west and Penfold Parade to the south-east. The site has little change in level along its 41.0 metre length with a nominal 0.5 metre cross-fall to its 11.5 metre width. The allotment has an existing dwelling, with the Final inspection certificate (Form 21) from the private building certifier at the time establishing a final stage inspection date of 15/07/2015. There is Council development approval for a three level, two storey dwelling house at the subject site dated 29/06/2015, and a Council confirmation of plans as generally in accordance dated 15/07/2015.
3. The existing dwelling has two storeys above the ground level, and 2.60 metres ceiling height at the ground floor. The existing dwelling form carries from a 6.0 metre front setback to a 4.0 metre rear setback and has an outline 31.0 metres long and 7.3 metres wide. The roof has a single ridge line at 9.5 metres high, a gable to each end of the full length roof.
4. External wall materials vary between weatherboards and rendered finishes along the lengths to the existing floor levels, with currently exposed concrete masonry walls at the ground level. The building outline has a number of recesses along the external wall line.
5. The Council approved plans set out a batten screen from the level of the ground up to the underside of the first floor above the ground, signifying non-habitable use, for the whole of the perimeter of the building.
6. A carport is also shown in the approved drawings between the dwelling and the Walnut Street frontage, which is unbuilt.
7. There is no plan information in the approval drawings of 29/06/2015 for building on the ground level underneath the lowest floor level, and there are no building cross sections to assist any further understanding of the building works in the approval. Levels denoted in the elevations shown in the approved drawings do not refer to floor levels, and ambiguity exists between the existing dwelling floor levels with the levels in the approved plans.
8. The proposed alterations and additions comprise filling in at the ground level to provide new habitable area below the existing, matching the levels over recesses from the front, rear and side setbacks.
9. A concrete floor slab with stepped edges for thresholds and waste outlets for bathroom and general wet area drainage has been built in at the ground level, to date. A ceiling height has in the order of 2600mm available above the existing ground level slab, with metal battens and floor joists currently exposed. A number of structural and partition walls from concrete masonry have been built, including for a garage.

10. The streetscape in Walnut Street and its neighbourhood vicinity consists of predominantly older and modest residential dwellings of timber cladding and metal sheet roofs, with some newer residences using brick and cement rendered finishes under roofing tiles. None that were observed by the Committee are more than two storeys, in the streetscape by the Walnut St frontage. The predominant older and more established character of the vicinity can be seen to have been modified with newer buildings establishing a broader mix of type and style of dwelling, including subdivisions and dwellings built across shorter sites rather than along the lengths of the allotments.

## **The Application Process**

1. In January 2017 the property owner lodged a development application for building work with the Assessment Manager for alterations and additions to the existing dwelling establishing new floor area at the ground level of 145m<sup>2</sup> and then concomitantly a dwelling of three storeys. The property owner supplied the drawings as the proprietor of FrameSteel Pty Ltd;
2. The proposed development did not comply with Acceptable Outcome A02(a) of the BCP2014, Dwelling House Code 9.3.7, Table 9.3.7 which states the following:

### *Development in the:*

- (b) *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 building height of 9.5m and:*
  - (i) 2 storeys; or
  - (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
3. The Assessment Manager referred the application for building work to the Council on 11 January 2017 along with plans detailing the proposed development. The referral agency responses requested by the Assessment Manager were under the Sustainable Planning Regulation 2009 (SPR) Schedule 7, Table 1 (For building work assessable against the Building Act), namely:
  - (c) Item 17, being the amenity and aesthetic impact of the building or structure if the building work is carried out; and
  - (d) Items 19, 20, and 21, all being Design and Siting.
4. In the cover letter setting out the application material provided to the Concurrence Agency, the Assessment Manager noted “no fee applicable”. Council provided a copy of emails from February 2017 at the Hearing showing a request for payment of fees for the Design and Siting application, for which the Applicant responded with a request for forms and amounts.
5. The Council issued a concurrency response on 25 January 2017 against SPR Schedule 7, Table 1, Item 17 amenity and aesthetics directing the Assessment Manager to refuse the application for the following reasons:

*The proposed building work will have an extremely adverse effect on the amenity or likely amenity of the locality as:*

- *The proposal is not considered to comply with the Acceptable Outcome A02 of the Dwelling house code as the proposal will result in a 3 storey dwelling house within*

*the Character (Character) Zone. The maximum number of storeys prescribed for dwelling house within the Character (Character) Zone is 2 storeys;*

- *The proposal is not considered to comply with Performance Outcome P02 of the Dwelling house code, as it will result in a 3 storey dwelling house which is inconsistent with the prevailing building height of dwelling houses in the immediate vicinity. In interpreting P02, 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. There are no dwelling houses within 35m of any point of the street frontage of the subject site which are 3 storeys in height.*

6. The Assessment Manager issued a Development Application Decision Notice on 17 February 2017 refusing the proposed alterations and additions to the existing Class 1a dwelling;
7. The Applicant, through the agency of the Assessment Manager, lodged an appeal with the Committee on 20 February 2017.
8. The Applicant’s written submission to the Committee and verbal submission at the hearing related to section 288(2) (Limitation on concurrence agency’s power to refuse application) of the Sustainable Planning Act 2009 (SPA) 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.*

9. The Applicant stated: That pursuant to section 288(2) of the *Sustainable Planning Act 2009*, the Council, as Concurrence Agency, has over-stepped its authority and has no jurisdiction to refuse the proposed development using the following wording, as it relates to an Acceptable Outcome and a Performance Outcome in the Brisbane City Plan 2014 and not the wording used in Section 288 of the SPA namely:

*The proposed building work will have an extremely adverse effect on the amenity or likely amenity of the locality as:*

- *The proposal is not considered to comply with the Acceptable Outcome A02 of the Dwelling house code as the proposal will result in a 3 storey dwelling house within the Character (Character) Zone. The maximum number of storeys prescribed for dwelling house within the Character (Character) Zone is 2 storeys;*
- *The proposal is not considered to comply with Performance Outcome P02 of the Dwelling house code, as it will result in a 3 storey dwelling house which is inconsistent with the prevailing building height of dwelling houses in the immediate vicinity. In interpreting P02, 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. There are no dwelling houses within 35m of any point of the street frontage of the subject site which are 3 storeys in height.*

### **Concurrence Agency Response**

1. The Committee finds that the Council has only provided a Concurrence Agency Response in relation to the amenity and aesthetics referral as only this part of the

application was properly referred and required to be referred (further discussion on this issue is set out below).

2. The Committee finds that, in relation to the amenity and aesthetics referral, the Council has undertaken its concurrence agency assessment according to the law<sup>1</sup>.
3. The Committee is of the opinion that the Council has complied with the requirements of Section 288 (2) of SPA in providing its Concurrence Agency Response.
4. In addition to its assessment against the relevant codes, the Council's response then provides additional justification as to why the Council has come to this conclusion based on its qualitative statement and quantifiable standard. It is noted that there is nothing under provisions of the BA or SPA that prevents a concurrence agency from providing additional justification/clarification for its decision.

### **Lapsing**

The Committee considers that there was no need for a siting and design referral to be made to the Council. Therefore, as there was no lawful trigger for design and siting, the Applicant was not required to pay a fee and consequently the application did not lapse.

It is noted that the subject site consists of two allotments namely:

- Lot 466 on RP 33003, title area 412 m<sup>2</sup>; and
- Lot 1 on RP 816646, title area 56 m<sup>2</sup>.

The proposal is for building work on one allotment which would not match the minimum setback from a side boundary for a dwelling over 4.5 m in height as per the Queensland Development Code MP 1.1 (Design and Siting Standards for Single Detached Housing – on Lots under 450m<sup>2</sup>) (QDCMP1.1), being 1.00 m.

However, the Committee has taken the view that the appeal is triggered under the SPA, where section 245 takes the subject land as all the land in the application and an assessment considers and a decision applies to all of that land in combination. This assessment is supported by Council with the pre-existing development approval for the existing three-level dwelling on the same parcel of two lots.

### **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.

### **Code Assessment**

Pursuant to section 563 of the SPA, the Committee has considered and given weight to legislative amendments made to the SPA after the application was made as the Committee considered it was appropriate to do so.

The Committee agrees with the Council's position that the proposed development does not comply with Acceptable Outcome A02(a) of the BCP2014, Dwelling House Code 9.3.7, Table 9.3.7, as the building work constitutes a three storey building. Therefore the development requires a separate Preliminary Approval for Building Work (Code Assessment) pursuant BCP 2014 to be assessed by Council before this current application can be decided.



This is confirmed by Table 5.10.9 (Dwelling house character overlay) of the BCP2014 tables of assessment and the editor's notes in development code 9.3.7 (Dwelling house code) of the BCP2014.

It should further be noted that Acceptable Outcome A02(a) of the BCP2014, Dwelling House Code 9.3.7, Table 9.3.7, is not an alternative provision to the QDC MP1.1 as such it cannot be assessed as a concurrency agency advice.

### **Reasons for the Decision**

The Committee is of the opinion that the proposed development does not comply with Acceptable Outcome A02(a) of the BCP2014, Dwelling House Code 9.3.7, Table 9.3.7, as the building work constitutes a three storey building, as such it requires a separate Preliminary Approval for Building Work (Code Assessment) pursuant BCP 2014 to be assessed and approved by the Council before this current application can be decided.

The Committee therefore cannot decide the matter given a higher order approval is required.

---

**Henk Mulder**  
**Development Tribunal Chair**  
**Date:**

## **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**