

PLANNING AND ENVIRONMENT COURT OF QUEENSLAND

CITATION: *Brisbane City Council v Atkins* [2017] QPEC 10

PARTIES: **BRISBANE CITY COUNCIL**
(appellant)

v

PETER ATKINS
(respondent)

FILE NO/S: 607 of 2017

DIVISION: Planning and Environment

PROCEEDING: Appeal against the decision of the Building and Development Committee of 15 February 2017

ORIGINATING COURT: Brisbane

DELIVERED ON: *Ex tempore* reasons given 6 March 2017

DELIVERED AT: Brisbane

HEARING DATE: 6 March 2017

JUDGE: Kefford DCJ

ORDER: **1. The appeal be allowed.**

2. The decision of the Committee dated 15 February 2017 be set aside.

3. The building development application be approved subject to an approval package containing the conditions and approved plans attached to the decision notice dated 18 July 2016.

CATCHWORDS: PLANNING AND ENVIRONMENT – BUILDING WORK – EXISTING RESIDENTIAL DWELLING - Where a building development application is made to a private certifier (class A) under the *Building Act 1975* seeking a development permit for building work – Where the building work is assessable development, required to be assessed against the building assessment provisions under the *Building Act 1975* – Where a decision to refuse as directed by Council as concurrence agency was appealed to the Building and Development Committee - Whether the appeal to the Building and Development Committee was only an appeal about a referral agency’s response concerning the amenity and aesthetic impact of a building or structure – Whether the Chairperson of the Committee was an architect – Whether the

decision of the Committee should be set aside on the basis the Committee was not properly constituted

Sustainable Planning Act 2009 (Qld), s 288, s 479, s 480, s 496, s 502

Architects Act 2002 (Qld), s 9, s 10, s 103

COUNSEL: Michael A Williamson and Mitchel J Batty for the appellant
Paul Smith for the respondent (direct brief)

SOLICITORS: Brisbane City Legal Practice for the appellant

HER HONOUR: This is an appeal under section 479 of the *Sustainable Planning Act* 2009 against a decision of the Building and Development Committee about a development application for building works on land situated at 27 Elystan Road, New Farm. The right of appeal is limited to challenging the committee's decision on the ground of excess of jurisdiction or error of law pursuant to section 479 of the *Sustainable Planning Act*.

The matter comes before me by way of an application in pending proceeding filed on the 27th of February 2017 that seeks an order that an issue raised in paragraph 16 of the notice of appeal be determined by way of a preliminary point. That issue is one going to the jurisdiction of the Building and Development Committee, namely whether it was lawfully constituted under section 502(2) of the *Sustainable Planning Act* to hear and decide the appeal at first instance.

By way of background, on the 5th of May 2016 the respondent engaged a private certifier to assess and decide a building development application for the approval of a metal roof awning to an existing dwelling in respect of land located at 27 Elystan Road, New Farm.

It is accepted that the appellant was a concurrence agency for the development application. The respondent's private certifier, as assessment manager for the development application, requested a concurrence agency response from council. On 10 June 2016 the council, in its capacity as a concurrence agency, gave a response to the respondent's private certifier requiring the development application to be refused.

The concurrence agency response states that the council's delegate considered that the building work for the extensions to the dwelling house 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.

The reasons for refusal stated in the concurrence agency response mirrors section 288(2) of the *Sustainable Planning Act*, which is in the following terms:

- (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,*
 - (b) *the aesthetics of the building or structure, when built, will be in extreme conflict with the character of its neighbourhood.*

On 18 July 2016 the respondent's private certifier acting as assessment manager issued a decision notice to the respondent. The decision notice has two distinct parts. First, it contains conditions of approval and approved plans. Second, the notice records that the development application was refused and attached the council's concurrence agency response.

On 19 July 2016 the respondent commenced an appeal in the registry of the committee against the refusal. The appeal appears in the affidavit of Ms Lerga filed on 17 February

2017. The grounds of appeal in the appeal to the building and development committee contain matters which may not legitimately be the subject of an appeal to the building and development committee. As much was conceded by counsel for the respondent during the hearing. Those matters include matters such as declarations that the codes nominated under Brisbane city plan 2014, table 1.7.4 have no effect and that the certifier be at liberty to approve the development application within the *Sustainable Planning Act 2009*, section 527(1)(a), as if there were no concurrence agency requirements.

It was accepted, as I've mentioned, by counsel for the respondent that the committee has no relevant declaratory jurisdiction and, to the extent that the appeal to the committee seeks declarations or determinations of that nature, the appeal was seeking declaration on matters that were outside the jurisdiction of the committee. It was also accepted by the respondent that, properly construed, the appeal contained matters which constitute a challenge about a referral agency's response concerning the amenity and aesthetic impact of a building or structure.

On 27 July 2016 the acting registrar of the committee formally notified the parties that the chief executive established a committee for the appeal comprising Mr Robert Laidley as chairperson and Mr Chris Harris as a member of the committee. The letter of 27 July 2016 advising the parties as to the committee established to hear and decide the appeal described the nature of the proceedings before it as follows:

The appeal is against the Decision Notice of Trevor Gerhardt as the Assessment Manager refusing building works for a metal roof awning to an existing house (10a). The refusal was based on the advice of Brisbane City Council as Concurrence Agency who advise that the building work for the extensions to the dwelling house will [sic] (a) will 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.

Section 502(2) of the *Sustainable Planning Act* provides that, "if the committee is to hear only an appeal about a referral agency's response concerning the amenity and aesthetic impact of a building or structure, its chairperson must be an architect".

In determining whether an appeal is only about a referral agency's response concerning the amenity and aesthetic impacts, I consider it appropriate to disregard those matters contained within the appeal that could not legitimately be the subject of an appeal to the building and development committee. They are matters which were conceded by the respondent as matters not legitimately the subject of an appeal. When the appeal is construed in that light, the appeal is one that is only an appeal about a referral agency's response concerning the amenity and aesthetic impact of a building or structure. Again, as much was conceded by the respondent.

The chairperson of the committee established by the chief executive was Mr Robert Laidley. Section 502(2) of the *Sustainable Planning Act* required that the chairperson of the committee be an architect. The *Architects Act 2002* provides for the registration of architects. Pursuant to that Act, an architect is defined as a person registered as an architect under the Act. Section 9 of the *Architects Act 2002* provides when an applicant is eligible for registration as an architect. Section 10 provides when an applicant is qualified for registration as an architect. An applicant can only be registered as an architect in Queensland if the applicant has appropriate qualifications and has successfully

completed the architectural practice examination (or another examination if approved by the board).

The board must keep a register of the persons who are architects as defined. The register may be kept in electronic form.

Under section 103 of the *Architects Act 2002*, the register must be kept open for inspection and provided upon request. Pursuant to section 103(2), the register may be made available on the board's website.

The council's affidavit material contains a copy of the online version of the current register of architects. It reveals that Mr Robert Laidley is not a registered architect. He is not included in the current register of architects for the board of architects of Queensland. There is no contest between the appellant and respondent about this issue. The respondent accepts that Mr Laidley is not a registered architect in Queensland and therefore not an architect for the purposes of section 502 of the *Sustainable Planning Act*. As such, the committee established by the chief executive did not include an architect as the chairperson.

In circumstances where the appeal was only about a referral agency's response concerning the amenity and aesthetic of a building or structure and section 502(2) of the *Sustainable Planning Act* mandates that the chairperson be an architect, the committee established by the chief executive was not properly constituted and consequently did not have power to hear and determine the appeal at first instance.

Having regard to those matters and section 480 of the *Sustainable Planning Act 2009* and section 496 of the *Sustainable Planning Act 2009*, together with the fact that the council has indicated that with respect to the merits it is satisfied that an approval ought be given, I am satisfied that it is not necessary that the matter should be dealt with by a building and development committee. I am satisfied that it is appropriate in the circumstances to allow the appeal, set aside the decision of the building and development committee made on the 15th of February 2017 and approve the development application subject to conditions. I will ask that the parties provide a form of order that contains those conditions that were in the decision notice and provide it to my associate.