PLANNING AND ENVIRONMENT COURT OF QUEENSLAND

CITATION:	*Amos v Brisbane City Council* [2017] QPEC 33
PARTIES:	**AMOS** (appellant) **v** **BRISBANE CITY COUNCIL** (respondent)
FILE NO/S:	4658 of 2016
DIVISION:	
PROCEEDING:	Appeal
ORIGINATING COURT:	Planning and Environment Court of Queensland
DELIVERED ON:	22 May 2017, ex tempore
DELIVERED AT:	Brisbane
HEARING DATE:	22 May 2017
JUDGE:	Everson DCJ
ORDER:	**Appeal allowed. Matter to be remitted to a differently constituted Building and Development Committee for determination.**
CATCHWORDS:	ENVIRONMENT AND PLANNING – APPEAL – Appeal from a decision of a Building and Development Committee – Whether procedural fairness was denied – Whether it was lawful for the committee to rely on evidence not given to the appellant *Building Act 1975* (Qld) s 248 *Sustainable Planning Act 2009* (Qld) ss 561, 564(2)(c) *Kanda v Government of Malaya* [1962] AC 322 *Re Kevin v Minister for Capital Territory* (1979) 2 ALD 238
COUNSEL:	P G Jeffery for the appellant
SOLICITORS:	Keller Nall & Brown for the appellant Brisbane City Legal Practice for the respondent

[1] This is an appeal from a decision of a Building and Development Committee.

[2] The committee conducted a hearing on 12 July 2016 in the absence of the appellant or anyone representing him, concerning relevantly, an appeal by the appellant against an enforcement notice issued by the respondent dated 19 March 2009 which alleged that a dwelling owned by the appellant situated at 247 Lancaster Road, Ascot ("the dwelling"), was dangerous and in a dilapidated condition.

[3] The committee found that it was appropriate to issue the appellant with a fresh enforcement notice, pursuant to section 564(2)(c) of the *Sustainable Planning Act 2009* ("SPA"). In doing so the committee was satisfied on the evidence before it, that the dwelling was dangerous, pursuant to section 248 of the *Building Act 1975* (Qld). Such a finding enables an enforcement notice to be given in the absence of a show cause notice.

[4] The appellant appeals the decision of the committee on a number of grounds. The first two grounds concern allegations that the appellant was "denied natural justice and/or procedural fairness" by the committee.

[5] The first ground is that the committee failed to adjourn the hearing of the appeal, despite it being notified in writing by the appellant on 10 July 2016 that he would be away, recuperating from a health problem. In this regard, there was no express application for an adjournment and there was no contemporaneous medical evidence relied upon to implicitly seek an adjournment of the hearing. Although the hearing had been adjourned on a number of previous occasions on medical grounds, the only evidence produced in support of these adjournments was of a general nature, listing a number of medical conditions from which the appellant was suffering. In the circumstances, this does not constitute a denial of natural justice or procedural fairness on the part of the committee.

[6] The second ground is that the committee failed to provide the appellant with copies of documents required by him to finalise his submissions and that it considered evidence which he was not privy to. It is clear that the committee relied upon a number of photographs of the dwelling in order to determine that it was dangerous. These photographs had not been provided to the appellant. There is merit in this particular ground. It is interrelated with another ground that the committee erred in considering evidence which was stale and/or irrelevant. The principal evidence relied upon by the committee was an engineering report of Alex Milanovic & Associates, a firm of consulting civil and structural engineers, dated 12 August 2010. It was almost six years old by the time the hearing of the committee took place. It called into question aspects of the structural integrity of the dwelling but stopped short of expressing a view consistent with it being clearly dangerous. The closest it went to making such an assertion was the observation that: "the rear timber stairs and landing are of structural concern and require detailed inspection and repairs to ensure safe use".

[7] In its decision the committee was critical of the lack of evidence placed before it to support a conclusion that the dwelling was dangerous. At paragraph 107 of its reasons, the committee stated:

> "On balance, the Committee finds that the presentation of the Lancaster building as an abandoned house … in combination with

> the dangerous elements identified by the relevant engineering report and the recent photos all fall in favour of a finding that the building is dangerous and that an enforcement notice should issue to the Appellant on that basis. Both parties could have assisted the Committee more by providing evidence of a contemporary professional inspection as to safety issues and, if necessary, having the relevant expert available to answer the Committee's questions. But, as stated, the balance of the evidence falls in favour of a finding that the Lancaster building contains elements that are dangerous as that term is used in section 248 of the Building Act."

[8] Of material relevance in reaching this conclusion was the observation at paragraph 103 of its reasons, that photographs provided to the committee by the respondent showed "there is obviously broken stair (sic) at the rear of the property that would likely require care if those stairs were used".

[9] These photographs had not been shown to the appellant, who as noted earlier, was neither present nor represented at the hearing.

[10] It is clear from the foregoing that this photographic evidence tendered to the committee was relied upon by it in making the pivotal finding that the dwelling was dangerous. Given the heightened onus that applies in making such a determination, the finding is somewhat surprising. However, a more fundamental issue for determination is whether it was permissible for the committee to have regard to this photographic evidence in the circumstances. On behalf of the respondent, Mr Cartledge emphasises the nature of the committee's jurisdiction, pursuant to Section 561 of SPA. It is in the following terms:

> "**561 Conduct of Hearings**
> (1) in conducting a hearing, the building and development committee–
> (a) need not proceed in a formal way; and
> (b) is not bound by the rules of evidence; and
> (c) may inform itself in the way it considers appropriate; and
> (d) may seek the views of any person; and
> (e) must give all persons appearing before it reasonable opportunity to be heard; and
> (f) may prohibit or regulate questioning in the hearing."

[11] Mr Cartledge submits that the failure to provide the relevant photographic evidence to the appellant did not amount to procedural unfairness because he was well aware of the issues and had been given a reasonable opportunity to respond to them. Effectively, he submits that the photographic evidence merely made the committee aware of the state of the dwelling in circumstances where this was well known to the appellant.

[12] As a starting point it is important to note the fundamental obligation to disclose material that is to be considered by a tribunal such as the committee. In *Judicial Review of Administrative Action*, 5th Ed, Lawbook Co, 2013, the authors state at [8.190]:

> "Parties appearing before a tribunal providing adversarial adjudication can usually expect to have access to all material that will be considered by the decision-maker."

[13] This observation is consistent with the famous quote of Denning LJ, as he then was, in *Kanda v Government of Malaya* [1962] AC 322 at 337 that: "if the right to be heard is to be a right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him".

[14] A consistent approach is also evident in the context of a proceeding before a tribunal pursuant to section 33(1) of the *Administrative Appeals Tribunal Act 1975* (Cth). Relevantly this provision stated that the Tribunal "is not bound by the rules of evidence but may inform itself on any matter in such manner as it thinks appropriate". In *Re Kevin v Minister for Capital Territory* (1979) 2 ALD 238 at 242, Senior Member Todd observed:

> "No tribunal can, without grave danger of injustice, set them [the rules of evidence] on one side and resort to methods of inquiry which necessarily advantage one party and necessarily disadvantage the opposing party. In other words, although rules of evidence as such do not bind, every attempt must be made to administer 'substantial justice'".

[15] On the facts before me, it is clear that the committee had regard to photographic evidence which was placed before it, which was not given to the appellant. This evidence was pivotal in the finding of the committee that the dwelling was dangerous. In these circumstances, the appellant was denied procedural fairness by the committee.

[16] I therefore allow the appeal on this ground, and order that the matter be remitted to a differently constituted committee for determination.