

PLANNING AND ENVIRONMENT COURT OF QUEENSLAND

CITATION: *Hawke v Brisbane City Council* [2021] QPEC 16

PARTIES: **AARON HAWKE**
(appellant)
v
BRISBANE CITY COUNCIL
(respondent)

FILE NO: 2196 of 2020

DIVISION: Planning and Environment Court

PROCEEDING: Hearing of an Appeal

ORIGINATING COURT: Planning and Environment Court of Queensland at Brisbane

DELIVERED ON: 24 March 2021

DELIVERED AT: Brisbane

HEARING DATE: 17 and 18 March 2021

JUDGE: RS Jones DCJ

ORDER: **1. The Appeal is allowed.**
2. I will hear from the parties, if necessary, as to any consequential orders.

CATCHWORDS: PLANNING AND ENVIRONMENT – APPEAL AGAINST REFUSAL OF CODE ASSESSABLE DEVELOPMENT APPLICATION – where proposed development involved demolition of a pre-1947 house – where central issue was whether the subject house contributed to the traditional building character of that part of the street within the Traditional building character overlay

LEGISLATION: *Planning Act 2016* (Qld) s 45, 60
Planning and Environment Court Act 2016 (Qld) s 43

CASES: *Abeleda & Anor v Brisbane City Council & Anor* [2020] 48 QLR 7; [2020] QCA 257
Ashvan Investments Unit Trust v Brisbane City Council [2019] QPELR 793; (2019) QPEC 16
Brisbane City Council v YQ Property Pty Ltd [2020] 48 QLR; [2020] QCA 253
Leach & Ors v Brisbane City Council [2011] QPELR 609; [2011] QPEC 55
Lynch v Brisbane City Council [2011] QPELR 314; [2010] QPEC 137

Mariott v Brisbane City Council [2015] QPELR 910; [2015] QPEC 45

Unterweger v Brisbane City Council [2012] QPELR 335; [2011] QPEC 134

Wilhelm v Logan City Council [2020] QCA 273

COUNSEL: Mr K Wylie for the appellant
Mr B Rix for the respondent

SOLICITORS: Nicholsons solicitors for the appellant
Brisbane City Legal Practice for the respondent

Introduction

[1] This proceeding was concerned with an appeal against the decision of the Council (the respondent) not to approve code assessable development for the demolition of a pre-1947 house. For the reasons set out below, the orders of the court are:

1. The appeal is allowed.
2. I will heard from the parties, if necessary, as to any consequential orders.

The site and its surrounding locality

[2] The subject house is located at 478 Flinders Parade, Brighton on land more properly described as Lot 58 on Registered Plan 13070. On or about 7 May 2020, under the Brisbane City Plan 2014 (CP2014), the appellant lodged his development application. It is agreed between the respective heritage architects that the version of CP2014 in force at the time of the lodgement of the development application was version 19-00/2019.

[3] Under the CP2014, the subject land included within the Character residential (Character) zone was situated within the Traditional building character overlay and within the Sandgate district neighbourhood plan area. There was no dispute that the subject house was in fact a pre-1947 house for the purposes of all of the relevant provisions of CP2014. The heritage architects Mr Elliot, relied on by the appellant, and Mr Kennedy relied on by the respondent, agreed that in respect of the Sandgate district neighbourhood plan code, Part 7.2.19.1(3)(a) relevantly provided:

“The overall outcomes for the neighbourhood plan are:

- (a) Sandgate’s identity is its Bayside location. The character of the district will continue to be reflected in traditional

architectural features such as ‘timber and tin’ housing. Low-medium intensity residential development is located close to transport and services and public housing is integrated into residential areas.”

- [4] It was agreed that to this end, the neighbourhood plan code is taken to be achieved by the application of the relevant overlay and the corresponding overlay code. Insofar as the relevant zoning is concerned, it was also agreed that in relation to the Character residential zone code, Part 6.2.1.5(4)(a) relevantly provided:

“Development location and uses overall outcomes are:

- (a) Development provides for low density suburban and inner-city living through the development of predominantly one or two-storey dwelling houses comprising primarily of existing houses built in 1946 or before and infill housing that incorporates any housing built in 1946 or before...”

- [5] There was also agreement that the relevant assessment code at the time of the application was the Traditional building character (demolition) overlay code (the demolition code). Thankfully, within that code the only applicable Performance Outcome (PO) was PO5(c) which provided that permissible demolition development would involve a building which did not contribute to the traditional building character of that part of the street within the Traditional building character overlay. The applicable Acceptable Outcomes (AO) were limited to AO5(c) and AO5(d) which provided as follows:

“AO5 Development involves a building which:

- (c) if demolished, would not result in a loss of traditional building character; or
 (d) is in a section of the street within the Traditional building character overlay that has no traditional character.”

- [6] Insofar as the relevant overlay is concerned the only overall outcomes relevant to this appeal are 2(a) and 2(d) which relevantly provide:

“(2) the purpose of the code will be achieved through the following overall outcomes:

- (a) Development protects residential buildings constructed in 1946 or earlier that individually or collectively contribute to giving the areas in the Traditional building character overlay their traditional character and traditional building character.

...

- (d) Development protects a residential building or a part of a building constructed in 1946 or earlier where it forms a part of a character streetscape comprising residential dwellings constructed in 1946 or earlier nearby in the street within the Traditional building character overlay.

The issues in dispute

- [7] In determining the outcome of this proceeding the parties posed five questions or issues that needed to be determined. They are:
1. Whether the proposed development should be approved, as a consequence of compliance with *Traditional building character (demolition) overlay code* Performance Outcome PO5(c), because the subject building does not contribute to the traditional building character of that part of the street within the Traditional building character overlay.
 2. Whether the proposed development should be approved, as a consequence of compliance with *Traditional building character (demolition) overlay code* Acceptable Outcome AO5(d), because the subject building is in a section of the street within the Traditional building character overlay that has no traditional character.
 3. Whether the proposed development should be approved, as a consequence of compliance with *Traditional building character (demolition) overlay code* overall outcome 2(a), because the development protects residential buildings constructed in 1946 or earlier that individually or collectively contribute to giving the areas in the Traditional building character overlay their traditional character and traditional building character.
 4. Whether the proposed development should be approved, as a consequence of compliance with *Traditional building character (demolition) overlay code* overall outcome 2(d), because the development protects residential building or a part of a building constructed in 1946 or earlier where it forms a part of a character streetscape comprising residential dwellings constructed in 1946 or earlier nearby in the street within the Traditional building character overlay.
 5. If non-compliance with the above provisions be established whether, in the Court's discretion, the development application ought nonetheless be approved,

on the basis that the streetscape surrounding the proposed development has evolved from that intended by the Traditional building character overlay.

- [8] During his opening, Mr Wylie, counsel for the appellant, advised the court that his client no longer pressed his case concerning the character of the street insofar as compliance with AO5(c) was concerned.¹

The statutory regime

- [9] Pursuant to s 43 of the *Planning and Environment Court Act 2016 (PECA)*, an appeal such as this is by way of a hearing anew and, pursuant to s 45(2) of that Act it is for the appellant to satisfy the court that the appeal ought be allowed. As the subject development application is one that requires code assessment, s 45(3) of the *Planning Act 2016* requires that assessment must be carried out **only**:

- “(a)(i) against the assessment benchmarks in a categorising instrument for the development; and
- (ii) having regard to any matters prescribed by regulation for this sub-paragraph.”

- [10] Pursuant to s 60(2) of the *Planning Act*, the manager has the discretion to approve a development application *even if the development does not comply with some of the assessment benchmarks*”. There have been a number of cases both in this Court but, more importantly in the Court of Appeal, that make it clear that since the introduction of ss 45 and 60 of the *Planning Act* and the abolition of the so-called two-tiered test under s 326(1)(b) of the *Sustainable Planning Act 2009*, a broad planning discretion has been conferred upon the decision-maker, and in this instance, the court.² In *YQ Property Pty Ltd*, Justice Henry with the other members of the court agreeing said:³

“The ultimate decision called for when making an impact assessment under s 45 and s 60 of the *Planning Act* is a broad, evaluative judgment. It will be recalled that while s 45(5)(a) requires the assessment must be carried out against assessment benchmarks, s 45(5)(b) gives the assessment manager broad warrant to have regard to any other matter.

¹ T1-6 at lines 29 – 40.

² *Abeleda & Anor v Brisbane City Council & Anor* [2020] 48 QLR, *Brisbane City Council v YQ Property Pty Ltd* [2020] 48 QLR and *Wilhelm v Logan City Council* [2020] QCA 273.

³ At [59] and [60].

The reservation of the decision-maker of that element of discretion in carrying out an impact assessment fits with s 60(3) of the *Planning Act*.”

- [11] Clearly His Honour there is referring to the assessment of a development application requiring impact assessment. That said, in *YQ Property Pty Ltd* Henry J, unsurprisingly I would respectfully observe, made it clear that the broader planning discretion also applied to code assessable development.⁴ That said of course the discretion must be exercised judicially and, as Judge Williamson QC said in *Ashvan*,⁵ while the introduction of the *Planning Act*, coupled with the express deletion of a test of the type contemplated pursuant to s 326 of the *Sustainable Planning Act*, conferred a broad planning discretion, that did not mean the discretion admitted of an unbridled opportunity to approve or refuse development appeals.

The expert evidence

- [12] Mr Elliot and Mr Kennedy agreed that for the purpose of the relevant evaluation of the Traditional building Character, the study area should be limited to that section of Flinders Parade bounded by Fourteenth Avenue to the south and Fifteenth Avenue to the north. Within that section of Flinders Parade, it is uncontroversial that four pre-1947 houses still remain.⁶ There is also one house, the providence of which is uncertain however, insofar as it might contribute to the streetscape it is more consistent with a pre-1947 form of construction than the more modern recent residential development.⁷
- [13] According to Mr Kennedy, that house visually strengthened the traditional character of this precinct.⁸ That I am able to accept. However, despite Mr Rix’s valiant attempt to convince me otherwise, I am unable to accept that the house referred to as the house on “*green posts*” adds to or supports the traditional character of the street. That is so for two reasons. First, I accept Mr Elliot’s evidence to the effect that, notwithstanding some of its physical features, it did not present as being representative of traditional character. His opinion about that was not shaken by either the cross examination or the evidence of Mr Kennedy. The second reason is

⁴ *Brisbane City Council v YQ Property Pty Ltd* [2020] 48 QLR at [62].

⁵ *Ashvan Investments Unit Trust v Brisbane City Council* [2019] QPELR 793.

⁶ At 464, 468, 478 and 486 Flinders Parade.

⁷ Situated at 472 – 474 Flinders Parade as shown in Exhibit 3, Figures 23 at p 21 and 33 at p 26.

⁸ Exhibit 2 at p 17, para 20.2.

that the house was not one that was relied on by Mr Kennedy in his assessment of the character of this precinct. Had Mr Kennedy considered that house to be a relevant consideration, I am sure he would have referred to it in either the joint expert report (JER) or his court report.

- [14] In or about late 2006/early 2007 and late 2009/early 2010, two pre-1947 houses were demolished. The one at 466 Flinders Parade was demolished because it had been substantially altered from its original form and it had been demonstrated that the house was structurally unsound and could not reasonably be capable of being made structurally sound.⁹ The second was that located at 484 Flinders Parade where the house was described as having no traditional architectural features and was not considered to be a good example of traditional timber and tin design and construction.¹⁰
- [15] Since 1964, the character of this section of Flinders Parade has changed dramatically. The large vacant block on the corner of Flinders Parade and Fourteenth Avenue was subdivided and two new large modern houses were then constructed thereon. An existing vacant parcel of land was developed with a more modern form of design and construction. Another larger lot was subdivided and developed with a large and modern house and, as already mentioned, two pre-1947 houses were demolished and replaced with large modern houses. The net result of all of this was that this section of Flinders Parade now comprises of 13 dwellings of which only four have been definitively identified as pre-1947 houses.¹¹ There is the indeterminate dwelling situated on 472 – 474 Flinders Parade,¹² otherwise the balance of this precinct comprises of post 1946 houses, six of which are very large and of modern design and construction.
- [16] The development of this section of Flinders Parade, at least since 1964, has resulted in not only more modern forms of development being the dominant form but it has also resulted in the four existing pre-1947 houses being separated from each other. The two pre-1947 houses located towards the south are separated by only one large modern form of development however, the two to the north are separated by three

⁹ See Exhibit 8.

¹⁰ See Exhibit 9.

¹¹ See Exhibit 5.

¹² Exhibit 3, Figure 33 at p 26.

modern houses, two of which are extremely large and dominate the lots on which they are constructed.¹³ In this context, the subject dwelling itself sits between two large modern houses. The dominating form of those modern residences adjoining the subject are represented in a number of photographs.¹⁴

[17] It was Mr Elliot's opinion that:¹⁵

“The subject house is an isolated, lower quality example of pre-1947 residential construction located within a section of the subject streetscape otherwise predominated by prestige bayside residences of contemporary design, materiality and detailing, such that the relevant streetscape cannot be fairly said to have any traditional character but is more accurately characterised as being a modern bayside promenade. Further, the retention of an isolated representation of traditional building character within an otherwise predominantly modern part of the streetscape is not considered to represent a concerning, meaningful or significant loss of any traditional building character within the relevant portion of Flinders Parade in Brighton.”

[18] Before proceeding further, I do not consider Mr Elliot's characterisation of the subject dwelling being a “*lower quality example*” to be of any particular relevance. As the photographs reveal the four remaining pre-1947 houses in this section of Flinders Parade are, relatively speaking, quite modest.¹⁶ This can be contrasted with some of the magnificent examples of pre-1947 and earlier houses located, in particular, to the south of the precinct which is the subject of this investigation. Mr Elliot's reference to a “*modern bayside promenade*” is discussed below.

[19] According to Mr Kennedy, while accepting that this precinct could probably be described as having a “*mixed character*,” nonetheless, it could not be said that this section of the street had no traditional character.¹⁷ Indeed, it was his opinion that the subject house “*makes an important contribution to the traditional building character in this section of Flinders Parade. It is prominent in the street and displays obvious traditional building character. It is one of four pre-1947 houses that together with a large house at 472-474 collectively impart traditional character to this section of Flinders Parade.*”¹⁸ The reference to “*prominence*” is no more

¹³ See Exhibit 2, Figures 15 and 16 at p 18. See also Figure 11 at page 14.

¹⁴ Eg: Exhibit 5 at Figure 3, Exhibit 3 at p 19 and Figure 56 at p 33. See also Exhibit 2 at p 14.

¹⁵ Exhibit 3 at p 35. Also Exhibit 2 at p 4, para 16.

¹⁶ See Exhibit 5.

¹⁷ Exhibit 2 at p 17, para 20.2.

¹⁸ Ibid at p 19, para 21.2.

than a reference to the house being situated, as are all the other houses in the street, close to the front boundary.

[20] The agreed list of issues revealed there are two determinative issues. First, whether it could be reasonably said that this precinct displays traditional building character and, if it does, does the subject house contribute to that character. The more fundamental issue was, as put to Mr Elliott by Mr Rix, counsel for the respondent, this case “*is really about (is) the character of the street, not about the house.*”¹⁹

[21] As I have already observed, it was Mr Elliot’s opinion that the real character of this precinct was that of a “*modern bayside promenade.*” In his court report he identified six features which, in his opinion, supported that conclusion. They were:²⁰

1. Post-1946 construction and large, contemporary dwellings are the key observable elements within the relevant part of the flinders parade streetscape.
2. The few remaining examples of traditional character buildings are now significantly outnumbered numerically by the proliferation of post-1946 residential development either replacing demolished pre-1947 houses or improving other land holdings in the street previously undeveloped by the end of 1946.
3. The few remaining examples of pre-1947 houses within the relevant part of the street are of lower quality construction in terms of their respective representation of traditional building character, which has also been further eroded through unsympathetic post-1946 additions having been made to several of these buildings.
4. The few remaining example of pre-1947 houses are physically separated from the extant examples of pre-1947 houses situated elsewhere in the relevant part of the street such that each character house now appears as an isolated, anomalous element interspersed with an otherwise modern

¹⁹ T1-21 at lines 27-37.

²⁰ Exhibit 3 at p 29.

residential streetscape and consequently inconsistent with the prevailing modern bayside promenade visual character of this street.

5. The physical and visual separation of the few remaining pre-1947 houses within this part of the street limit the ability of a casual observer to associate the segregated examples of traditional character buildings as components of a broader traditional character streetscape when only one side of flinders parade is actually improved with residential development; and
6. The few remaining examples of pre-1947 houses are visually overwhelmed by the scale of a contemporary housing on adjoining properties that are now identifiable as the predominant built form when assessing the extant visual character of this part of the street.

Discussion

[22] I do not accept that this precinct presents as a modern bayside promenade. It is, as Mr Kennedy described it, of a mixed character, including the presence of four pre-1947 houses.

[23] Turning to the six features identified by Mr Elliot, while I do not consider the fact that the four remaining houses are of a “*lower quality*” to be particularly persuasive, there is some merit in the second element of Mr Elliot’s third feature. As the photographs reveal, save for the house at 486 Flinders Parade, the balance display a number of unsympathetic physical alterations. Of itself though, this is far from being a determinative consideration.

[24] As to the second feature, it was uncontroversial that cases such as this are not to be decided purely on the basis of numbers. As was observed by Judge Bowskill QC (as Her Honour then was) quoting from s 2.1 of the relevant policy concerned with traditional and building character,²¹ “*what gives an area (or street) “traditional character” is a combination of traditional building form and roof styles, traditional elements, detailing and materials, traditional scale and traditional setting.*”²² To a similar effect, Judge Searles spoke of the term “*character*” as being defined by an

²¹ Exhibit 6 at p 26.

²² *Mariott v Brisbane City Council* [2015] QPELR 910 at [75].

aggregate of features. In *Leach & Ors v Brisbane City Council*,²³ His Honour observed:

“Accepting that a street may exhibit more than one character as I have said, does that mean that the “street” identified for the purpose of interpretation of the Demolition Code can have more than one character? I think not. The term “character” is defined as - “the aggregate of features and traits that form the individual nature of some person or thing” (underlining in the definition). A street may well contain houses of various styles. But to determine the visual character of the street, it seems to me one character has to be identified reflecting the aggregate of its features or traits as above defined. P1 speaks of the character of the street not the character of various segments of the street. Put another way, in determining the street’s character for the purposes of P1, the task is to consider the visual character of the street as a whole, not the character of houses or groups of houses in isolation. The evidence of Mr Macdonald coupled with the inspection of the subject site leaves me in little doubt that his evidence is to be preferred to that of Mr Veal on the issue of the character of Orleigh Street, notwithstanding its status in 1946 as evidenced by the photograph in evidence. The street has in my view moved well away from the traditional character it manifested in 1946. Today its character is of a modern nature notwithstanding there remain a small number of houses of a traditional building character two of which are the subject houses.”

[25] Returning then to the remaining features of this section of Flinders Parade identified by Mr Elliot, there is no doubt that the visual presence is dominated by the recent large modern form of housing. It is also the case that the demolition of two pre-1947 houses and the development of modern houses has left the four remaining houses being physically isolated from each other. As Mr Kennedy had to accept, any contribution these houses made to the character of the street was on an individual

²³ [2011] QPELR 609 at [34] – [35].

basis.²⁴ That is, there was no cohesive presentation of pre-1947 constructions to the street.

[26] The dominance of the modern structures also limits the ability to observe or take in at least three of the four remaining houses. Leaving aside any impairment from the trees, any person walking along the esplanade would be able to readily see the remaining pre-1947 houses. However, as Mr Elliot pointed out, for any person walking north or south on the western side of Flinders Parade, the visibility of those houses is limited by the surrounding larger developments. That is particularly so for the subject house.²⁵

[27] I do not consider the pre-1947 house located on the corner of Flinders Parade and Fifteenth Avenue to be relevant to this topic. Being on a corner block, it is clearly more visible than the other three houses.

[28] On balance, while I do not consider Mr Elliot's assessment of the precinct being a "*modern bayside promenade*" to be an entirely accurate description, there can be no doubt that since 1964 through to today, the character has changed to one being dominated by larger modern structures.²⁶ Further, the manner in which these modern houses have been introduced has also caused the remaining pre-1947 houses to become isolated from each other.

[29] It is of course well recognised that the traditional character of a street does not have to be "*pristine*,"²⁷ and that "*in determining the street's character...the task is to consider the visual character of the street as a whole, not the character of the house or group of houses in isolation.*"²⁸ However, in this case there is no room for doubt that for the purposes of CP2014, while the four remaining houses retain many, if not most, of the traditional features such as building form, material, detailing and scale, their setting has been dramatically and invariably changed.

[30] Also in this regard, while it cannot be said in absolute terms for the purposes of AO5(d) that the street has no traditional character, to adopt the language of Judge Searles in *Leach*, its character is now one of a modern nature notwithstanding the

²⁴ T1-46 at lines 24-36.

²⁵ For example, see Exhibit 3, Figure 20 at p 19.

²⁶ See s 2.1 of the Traditional Planning Policy. Exhibit 6 at p 76.

²⁷ *Unterweger v Brisbane City Council* [2012] QPELR 335 at [10].

²⁸ *Leach & Ors v Brisbane City Council* [2011] QPELR 609 at [34].

existence of the four remaining houses, even taking into account the houses at 472 – 474 Flinders Parade. To perhaps put it another way, it no longer has sufficient character “*to be reasonably described as having traditional character.*”²⁹

[31] In *Lynch v Brisbane City Council*,³⁰ Judge Robin QC said that it is relevant to enquire whether the street in question has been robbed of its traditional character by redevelopment. In this case, the answer to that question is yes.

[32] Having decided that the street no longer has a sufficient level of traditional character for the purposes of the AO5(d), two consequences follow. First, the appeal must be allowed. Second, it is unnecessary to consider whether the subject house makes a positive contribution of the street character.

[33] Accordingly, the orders of the Court are:

1. The appeal is allowed.
2. I will heard from the parties, if necessary, as to any consequential orders.

²⁹ *Marriot v Brisbane City Council* [2015] QPELR 910 at [74].

³⁰ [2011] QPELR 314.