

PLANNING AND ENVIRONMENT COURT OF QUEENSLAND

CITATION: *Hunter Family Capital Pty Ltd ACN 604 208 175 v Brisbane City Council* [2022] QPEC 14

PARTIES: **HUNTER FAMILY CAPITAL PTY LTD ACN 604 208 175**
(Appellants)

v

BRISBANE CITY COUNCIL
(Respondent)

FILE NO/S: 1888 of 2021

DIVISION: Planning and Environment Court

PROCEEDING: Appeal against refusal

ORIGINATING COURT: Planning and Environment Court of Queensland, Brisbane

DELIVERED ON: 10 May 2022

DELIVERED AT: Brisbane

HEARING DATE: 23 and 24 February 2022, with further submissions received 11 March 2022

JUDGE: McDonnell DCJ

ORDER: **1. The respondent's decision to refuse the application is set aside.**
2. The appeal is adjourned to enable the parties to agree upon appropriate conditions.

CATCHWORDS: PLANNING AND ENVIRONMENT – APPEAL – appeal against refusal of the removal of a building constructed in 1946 or earlier in the Traditional Building Character Overlay – whether the proposed development complies with AO5 Traditional Building Character (Demolition) Overlay Code in City Plan 2014 – whether the proposed development complies with PO5 of the Traditional Building Character (Demolition) Overlay Code – if the proposed development does not comply with PO5 or AO5 of the Traditional Building Character (Demolition) Overlay Code should the court exercise its discretion

CASES: *Beauchamp v Brisbane City Council* [2019] QPELR 37

Bilalis v Brisbane City Council [2017] QPEC 42

Delta Contractors (Aust) Pty Ltd v Brisbane City Council

[2018] QPEC 41

Klinkert v Brisbane City Council [2018] QPELR 941

Lonie v Brisbane City Council [1998] QPELR 209

Marriott v Brisbane City Council [2015] QPELR 910

Taylor & Anor v Brisbane City Council [2020] QPEC 5

Traspunt No. 14 Pty Ltd v Moreton Bay Regional Council
[2021] QPEC 4

Unterweger v Brisbane City Council [2012] QPELR 335

Williams v Brisbane City Council [2021] QPEC 26.

LEGISLATION: *Planning Act 2016* (Qld) ss 45, 60

Planning and Environment Court Act 2016 (Qld) s 43, 45, 46

COUNSEL: M Batty for the appellant

K Buckley for the respondent

SOLICITORS: Connor O’Meara for the appellant

City Legal – Brisbane City Council for the respondent

Introduction

- [1] The appellant wishes to demolish a pre-1946 dwelling on land situated at 11 Dickson Terrace, Hamilton. In April 2021, it made a code assessable development application for a development permit to authorise the demolition. The application was assessed against documents including the Traditional Building Character (Demolition) Overlay Code in Brisbane CityPlan 2014 (the TBC Overlay Code). The respondent issued a decision notice dated 24 June 2021, refusing the application. This is an appeal against that refusal.

Statutory assessment framework

- [2] The court stands in the shoes of the assessment manager and considers the application anew.¹ The appellant bears the onus in the appeal.²

¹ *Planning and Environment Court Act 2016* (Qld) ss 43, 46(2) (‘PECA’).

² *Ibid* s 45(1)(a).

- [3] Code assessment must be carried out against only the assessment benchmarks in a categorising instrument and any matters prescribed by the *Planning Regulation 2017 (Qld) (the Regulation)*.³
- [4] Under s 60 of the *Planning Act 2016 (Qld) (the Planning Act)*, the court in deciding the appeal must approve the application if it complies with all assessment benchmarks.⁴ The court may approve the application even if it does not comply with some benchmarks,⁵ and may refuse it only if compliance with assessment benchmarks cannot be achieved by imposing conditions.⁶ Thus, a discretion exists to approve a code assessable application that does not comply with all assessment benchmarks.

Planning instruments

- [5] Brisbane CityPlan 2014 is the relevant categorising instrument. The version in force when the development application was properly made is V 20.00/2020 (the Scheme).
- [6] Pursuant to the Scheme the land:
- (a) is included in the CR1 Character Residential Zone; and
 - (b) is included in an area regulated by both the Heritage overlay⁷ and the Traditional building character overlay (TBC Overlay).⁸
- [7] The TBC Overlay is governed by the TBC Overlay Code. The purpose of the TBC Overlay Code is to:
- (a) Implement the policy direction in the Strategic Framework;
 - (b) Provide for the assessment of the suitability of building work for, relevantly, the demolition of a building or structure if any part of the building or structure was substantially constructed in 1946 or earlier, in the Traditional building character overlay.⁹

³ *Planning Act 2016 (Qld)* s 45(3).

⁴ *Ibid* s 60(2)(a).

⁵ *Ibid* s 60(2)(b).

⁶ *Ibid* s 60(2)(d).

⁷ Ex 8, Heritage Overlay Map, p 124.

⁸ Ex 8, Traditional Building Character Overlay Map, p 130.

⁹ Ex 8, p 64, s 8.2.21.2 (1).

- [8] The policy direction of the Strategic Framework informs the planning purpose behind the relevant provisions of the TBC Overlay Code. That is, to protect pre-1946 dwellings and ensure future development maintains traditional building character housing. The respondent submits these matters are relevant to the exercise of discretion pursuant to s 60(2)(b) of the *Planning Act*.
- [9] Compliance with the TBC Overlay Code for the purpose of the assessment of the suitability of building work for the demolition of a building can be achieved by the development application complying with the purpose, overall outcomes and the performance outcomes or acceptable outcomes of the code.¹⁰

Issues in the appeal

- [10] The parties agreed that the appeal can be determined on the basis of the following agreed list of issues:

1. Whether the proposed development complies with AO5 of the TBC Overlay Code.
2. Whether the proposed development complies with PO5 of the TBC Overlay Code.

If the proposed development does not comply with either PO5 or AO5 of the TBC Overlay Code, the parties agree that the court should consider Question 3.

3. If the proposed development does not comply with PO5 or AO5 of the TBC Overlay Code, should the proposed development nonetheless be approved in the exercise of the court's discretion?¹¹

- [11] The respondent accepted that the assessment benchmarks in AO5 and PO5 are the central provisions in dispute. While it did not concede that the proposed development complies with Purpose 1(a), OO2(a), OO2(d) and OO2(e) of the TBC Overlay Code, Ms Buckley accepted that if the appellant demonstrated compliance with either of AO5(d) or PO5(c) that it was likely also to demonstrate compliance with the purpose and at least OO2(a) and OO2(d). However, Ms Buckley submitted that the court should have regard to these assessment benchmarks in the exercise of its discretion, as they speak to the seriousness of the policy position within the Scheme. The respondent did not pursue non-compliance with OO2(h) in the appeal.

¹⁰ Ex 9, p 29, s 5.3.3(4)(c).

¹¹ Ex 2.

- [12] In their joint report, the experts agreed that only PO5(c) and AO5(d) were relevant.¹² However, the parties agreed that whether the house represented traditional building character was a threshold issue in the appeal, and AO5(c) was a live issue at the hearing.

PO5	AO5
<p>Development involves a building which:</p> <p>(a) does not represent traditional building character; or</p> <p>(b) is not capable of structural repair; or</p> <p>(c) does not contribute to the traditional building character of that part of the street within the Traditional building character overlay.</p>	<p>Development involves a building which:</p> <p>(a) has been substantially altered or does not have the appearance of being constructed in 1946 or earlier; or</p> <p>(b) an engineering report prepared by a Registered Professional Engineer Queensland which certifies that the building is structurally unsound and not reasonably capable of being made structurally sound; or</p> <p>(c) if demolished will not result in the loss of traditional building character; or</p> <p>(d) is in a section of the street within the Traditional building character overlay that has no traditional character.</p> <p>Note – for the purpose of this code, comparative analysis of an existing dwelling constructed in 1946 or earlier against the current timber framing standards is not considered to demonstrate ‘structurally unsound’.</p>

- [13] The overall outcomes of the TBC Overlay Code relevant in this appeal are:

OO2(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 dwelling constructed in 1946 or earlier nearby in the street within the Traditional building character overlay.

¹² Ex 3, p 3, paras 11, 12.

- (e) Development retains a residential building constructed in 1946 or earlier that reflects the traditional building character other than ‘timber and tin’ architecture.

The site

[14] The land is improved by a single pre-1947 dwelling constructed in about 1936. The house is not a ‘timber and tin’ house. It was featured in a contemporary newspaper article in the Courier Mail during March 1937, in which its style was described as ‘modern’.¹³ The house is situated on the southern side of Dickson Terrace, between its intersection with Toorak Road and the proposed road.

[15] Mr Elliott and Mr Kennedy, both heritage architects, prepared a joint report.¹⁴

[16] They agreed that the house:

- (a) is a pre-1947 building;
- (b) is a residential building;
- (c) is not a heritage place;
- (d) is not a commercial character building;
- (e) is not rooming accommodation; and
- (f) is reasonably assumed to have been constructed after 1910.¹⁵

[17] It was common ground between the experts that the house comprises pre-1947 construction that is typically afforded demolition protection under the TBC Overlay.¹⁶

[18] For reasons including the steep grade of the Dickson Terrace carriageway, the experts sensibly identified and agreed for the purpose of their analysis that the relevant part of Dickson Terrace was from its intersection with Toorak Road in the west to where the carriageway splits into a separated road,¹⁷ as depicted on Figure 1 of Exhibit 4¹⁸ (Relevant Section of Dickson Terrace).

¹³ Ex 3, p 9, para 19.

¹⁴ Ex 3.

¹⁵ Ex 3, p 2, para 8.

¹⁶ Ex 3, p 3, para 19.

¹⁷ Ex 3, p 5, para 17.

¹⁸ Ex 4, p 4.

- [19] The entry to Dickson Terrace from its intersection with Toorak Road is marked by large modern houses positioned on each corner. The casual observer progressing along the street will notice on the northern side two vacant blocks of land, then a large modern house and two post-1946 houses comprising a large three storey reproduction Victorian Villa and a smaller reproduction villa. The next house on the northern side is the pre-1947 Local Heritage Place not mapped in the TBC Overlay. Following that is a grand house outside the Relevant Section of Dickson Terrace. It cannot be appreciated from Dickson Terrace as it is hidden by a large masonry wall.¹⁹ Some of this wall is within the Relevant Section of Dickson Terrace.
- [20] On the southern side of the road, after the modern house at the entrance to the street, is the subject house, followed by two pre-1947 interwar houses, the proposed road and a third pre-1947 interwar house. Views of the house are significantly filtered by vegetation as one progresses along Dickson Terrace.²⁰
- [21] Dickson Terrace is on the side of a hill, with the northern side of the road high, and the southern side lower.
- [22] The TBC Overlay covers the whole of Dickson Terrace, except the Local Heritage Place located at 18-22 Dickson Terrace, and the proposed road. As the site shares a rear boundary with both State and locally significant heritage places, pursuant to the Heritage Overlay, the site is mapped as Heritage Adjoining. However, the experts agreed that this did not raise any additional considerations for this appeal.²¹

Prior approval and vegetative screening

- [23] The respondent granted planning approval for the demolition of the house on 14 August 2009.²² On 30 March 2011, the relevant period was extended to 14 September 2012.²³ The experts acknowledged that the prior approval and extension of time were assessed against a previous iteration of the respondent's planning scheme, being City Plan 2000.²⁴

¹⁹ Ex 3, p 21, para 22.2(c).

²⁰ Mr Kennedy, T1-53, ll 15.

²¹ Ex 8, p 2, para 3.

²² Ex 5.

²³ Ex 6.

²⁴ Ex 8, p 10, para 20.

- [24] The appellant did not contend that the Council is estopped or otherwise bound by its previous decision but submitted that it is a further relevant factor which supports the appeal being allowed.
- [25] The respondent submitted that the approval and subsequent extension should be afforded no weight as the Scheme provisions have changed since the approval and extension were granted, this appeal is by way of hearing anew and nothing in AO5(c) invites assessment of previous approvals for demolition.
- [26] The appellant said that the views of the house are largely obscured by vegetation. It urged that there was no particular warrant to ignore vegetation when it forms part of the setting of the building, when assessing its contribution or assessing the effect of the loss occasioned by demolition.²⁵
- [27] The respondent's position was that it should not be accepted that the vegetation significantly diminishes the contribution of the house because:
- (a) the vegetation is contained wholly within the land²⁶ and therefore could be managed and controlled by a sympathetic owner;
 - (b) that the overgrown vegetation is of more recent origin when compared with the publicly available Google Street-View images from 2007 to 2019;²⁷
 - (c) In the absence of vegetation, all of the identified traditional building character elements of the house could be seen from and make a contribution to Dickson Terrace; and
 - (d) Even with the current extent of the vegetation in front of the house, some of the traditional character elements can be seen from and make a contribution to Dickson Terrace.²⁸
- [28] I was referred to *Williams v Brisbane City Council*.²⁹ In that case Rackemann DCJ conclusion regarding the loss occasioned by the demolition of the house was fortified by his consideration of the impact of the vegetation between the house and the front property boundary.

²⁵ *Williams v Brisbane City Council* [2021] QPEC 26, [37].

²⁶ Accepted by Mr Elliott, T1-20, 1 39 and T1-19, 1 44.

²⁷ Ex 11.

²⁸ T1-20, 11 23 – 25.

²⁹ [2021] QPEC 26, [33].

- [29] The experts both expressed concern that the owners of buildings with traditional character should not be able to avoid the operation of the TBC Overlay Code by allowing vegetation to grow in front of such a building. There is no suggestion that the appellant has acted in that way in the present circumstances.
- [30] Mr Kennedy said that a full appreciation of the traditional building character of the house is restricted in part by vegetation,³⁰ but considered it to be of recent origin. Mr Elliott considered that the dense vegetation in front of the house significantly diminished any visual contribution made by the house.³¹
- [31] I accept that care needs to be taken in considering the contribution of a house to traditional character where vegetative screening is in place. There was limited evidence about how long the vegetation had been in place. The dynamic nature of the vegetation is apparent from Exhibit 11 and the photographs the experts selected for the purposes of their joint report.³²
- [32] I am prepared to accept the respondent's position for the purpose of this consideration, and I have therefore assumed that there is no vegetative screening in front of the house and there was no prior approval (or extension of time of that approval) for the demolition of the house. However, ultimately whether they are assumed to exist or not does not matter. The important question is whether the house has the traditional building character, and I have found for the reasons below, that to the extent that it does, any traditional building character is weak.

Does the house have traditional building character?

- [33] The respondent urged that the court should find that the house has traditional building character based on a proper construction of the Scheme and the Traditional Building Character Planning Scheme Policy (the TBC Policy).
- [34] Guidance on the elements that comprise traditional character and traditional building character for the purposes of an assessment under the TBC Overlay Code can be found in the TBC Policy.³³ This is confirmed by the purpose of the TBC Policy.³⁴

³⁰ Ex 3, p 29, para 23.2.

³¹ Ex 3, p 27, para 23.1(b).

³² Ex 3, Figures 35 – 38.

³³ Ex 8, p 64, TBC Overlay Note 2 to s 8.2.21.1.

[35] The TBC Policy provides that traditional character of areas and traditional building character of buildings, within the TBC Overlay, is a combination of one or more of the following elements:

- (a) Traditional building form and roof styles;
- (b) Traditional elements, detailing and materials;
- (c) Traditional scale; and
- (d) Traditional setting.³⁵

[36] The TBC Policy recognises that the predominant traditional building character of dwelling houses constructed in 1946 or earlier is the ‘Queensland vernacular’, which usually comprises (among other things) a core with attached or integrated verandas raised above on timber supports and with roof forms of medium pitched pyramids, hips or gables.³⁶

[37] While the term ‘traditional building character’ is generally associated with ‘timber and tin’ houses, Overall Outcome 2(e) of the TBC Overlay Code makes it clear that the term also applies to pre-1947 buildings other than those constructed of ‘timber and tin’. This is recognised in the TBC Policy which provides:

2.2(3) Other traditional building character forms exhibit overseas architectural influences on Brisbane’s residential design. These forms occurred primarily during the inter-war period and are often influenced by but not limited to art deco, Spanish mission, Californian bungalow and Georgian.

...

2.3(4) Whilst ‘timber and tin’ are the predominant materials of the older suburbs, the presence of other distinctive traditional building character forms, such as Spanish mission, and the variety of materials highlights the overseas influence on residential design in Brisbane and is an integral part of the traditional building character. These styles usually incorporate face-brick or rendered walls on the exterior and have a base material of fibro, masonry or concrete with a tile or tin roof.

³⁴ Ex 8, p 108, s 1.2.

³⁵ Ex 8, p 108, s 1.2.

³⁶ Ex 8, p 108, s 2.2.(1).

[38] Relying upon these provisions of the policy, Mr Kennedy was of the view that the house was an ‘other style’ occurring during the interwar period. He drew no support for his opinions from ss 2.3(1), (2) or (3) of the TBC Policy.

[39] He said that the house is properly characterised as a 1930’s ‘modern style’ interwar traditional character house.³⁷ He relied upon the presence of what he described as the hallmarks of early interwar functional or modern houses including asymmetrical geometric massing with horizontal emphasis, simple geometric shapes and material, corner windows, horizontal cantilevered window hoods and stairs expressed by vertical windows.³⁸

[40] At one point he suggested that a modern-style house like this was loosely described in the TBC Policy as art deco,³⁹ but later resiled from this.⁴⁰

[41] Mr Kennedy acknowledged that:

- (a) the features of the house upon which he relied in concluding that the house has traditional building do not appear in the TBC Policy or the Scheme;⁴¹ and
- (b) to reach his conclusion that the house has traditional building character it is necessary to look beyond the TBC Policy.⁴² He had reference to his own 1989 thesis⁴³ and a book not in evidence in drawing his conclusions.

[42] Mr Elliott acknowledged:

- (a) that the house was intact⁴⁴ and relatively unchanged from its original construction;⁴⁵
- (b) the TBC Policy specifically recognises other traditional building forms; and
- (c) the features of the house identified by Mr Kennedy.

³⁷ Ex 3, p 24, para 22.2(d).

³⁸ Ex 4, p 7, para 4.6.

³⁹ T1-46, ll 14-15.

⁴⁰ T1-47, ll 5 – 6.

⁴¹ T1-49, l 25.

⁴² T1-49, ll 40 – 45.

⁴³ Ex 4, Attachment B.

⁴⁴ T1-33, l 12.

⁴⁵ T1-33, l 15.

- [43] However, Mr Elliott did not agree that those features readily align with traditional building character.⁴⁶ Rather, he considered they indicate the house was ahead of its time, with many of the features not expected by him in a house until the 1950s, readily contrasting with traditional design attributes of a traditional house constructed in the same era.⁴⁷
- [44] In considering the character of the house he observed:
- ‘It is difficult to reconcile the heralding of the subject house as a notable example of ‘modern’ architecture – as identified in a contemporary newspaper article published soon after its construction – with the traditional built form, materiality and detailing of Queensland’s distinctive range of character house typologies that are generally afforded demolition protection under the Respondent’s planning scheme when situated within the mapped areas of the overlay and through the corresponding operation of the overlay code itself.’ (References omitted.)⁴⁸
- [45] The parties agreed that the TBC Policy is a guide and is not to be applied inflexibly.⁴⁹ The TBC Policy underpins the protection of traditional building character. It is the starting point for any assessment, being the public document ratified by the Council, which guides development assessment. I do not accept that a policy could or should provide an exhaustive list of building characteristics which contribute to identifying traditional building character. It is a question of fact and degree whether traditional character or traditional building character are present.
- [46] I accept that, properly constructed, the TBC Policy envisages the protection and retention of other than ‘tin and timber’ houses and further that there is a category of ‘other’ houses of traditional building character afforded protection.
- [47] In relation to this ‘other’ category the TBC Policy recognises overseas architectural influences on the other categories of traditional building character forms of residential design in Brisbane.⁵⁰ There was no evidence to suggest that overseas architectural influences are applicable in the present consideration.
- [48] While I accept that other styles of houses may be afforded protection by the TBC Policy, I am not satisfied that this house is one so protected.

⁴⁶ T1-33, l 44.

⁴⁷ Ex 3, p 27, para 23.1(a).

⁴⁸ Ex 3, p 33, para 27.1.

⁴⁹ *Klinkert v Brisbane City Council* (2018) QPELR 941, [57].

⁵⁰ Ex 8, p 108-109, para 2.2(3), 2.3(4).

[49] Due to the inconsistent nature of Mr Kennedy's evidence in this respect, I prefer the evidence of Mr Elliott.

[50] This is a modern style house, with features indicative of a later era, rather than being reflective of its time of construction. While the house exhibits some examples of traditional building character, they are weak. Thus, I find that to the extent the house displays traditional building character, if it does at all, it is weak or limited.

Does the proposed development comply with AO5 of the TBC Overlay Code?

[51] In considering AO5(c) the court has previously recognised that the relevant test is whether demolition of the building would result in a loss of traditional building character that is meaningful or significant.⁵¹

[52] The court has previously observed that it is appropriate to:

- (a) examine that area 'where the dwelling is visible and may be said to contribute to the character of that part of the street included in the relevant overlay';⁵² and
- (b) not have regard to post-1946 houses which are sympathetic to traditional building character in measuring the 'loss'.⁵³

[53] Therefore, in this analysis, no regard is had to the reproduction villas.

[54] An appreciation of the contribution of the house to the Relevant Section of Dickson Terrace should be approached from the perception of an average person walking along the street looking about.⁵⁴

[55] Mr Kennedy considered the southern section of Dickson Terrace comprising the four interwar houses was the appropriate context within which to analyse whether demolition of the house would result in a loss of traditional character.⁵⁵

[56] The other three interwar houses are described by Mr Kennedy as:

⁵¹ *Taylor & Anor v Brisbane City Council* [2020] QPEC 5, relying upon *Marriott v Brisbane City Council* [2015] QPELR 910, 918, [32]; *Beauchamp v Brisbane City Council* [2019] QPELR 37, [36].

⁵² *Taylor & Anor v Brisbane City Council* [2020] QPEC 5, [20].

⁵³ *Marriott v Brisbane City Council* [2015] QPELR 910, [66].

⁵⁴ *Bilalis v Brisbane City Council* [2017] QPEC 42, [59]; *Lonie v Brisbane City Council* [1998] QPELR 209, 212.

⁵⁵ T1-61, ll 2 – 3.

- (a) No. 17 (adjoining the subject house) a Georgian revival style house;
- (b) No. 19 a Spanish mission style house; and
- (c) No. 25 a Mediterranean style house.⁵⁶

[57] Mr Kennedy opined that the traditional building character of all four interwar houses is obvious from the footpath at each point of entry and that all four contribute to the traditional character of the limited section of the street which he considered.⁵⁷

[58] I consider the area of Mr Kennedy's consideration to be too narrow. In adopting this approach, he failed to examine 'where the dwelling is visible and may be said to contribute to the character of that part of the street included in the relevant overlay' and gave no explanation for his departure from the study area agreed by the experts. I find the Relevant Section of Dickson Terrace is the area to be examined for this purpose.

[59] When pressed to consider this provision having regard to the Relevant Section of Dickson Terrace, Mr Kennedy maintained demolition of the house would result in an unacceptable loss of traditional character.⁵⁸

[60] Mr Elliott was not as firm in his classification of the other three interwar houses. Due to the lack of traditional design attributes of the house, Mr Elliott concluded that it never did and realistically cannot make a meaningful visual contribution to a traditional character streetscape.⁵⁹ He did not agree that should the court find the house has traditional building character, its demolition would be a meaningful or significant loss.⁶⁰

[61] As indicated by Mr Kennedy, the four interwar houses have different styles. For this reason, they do not present as a cohesive group. Nor are they cohesive in terms of setting or form. Further, any contribution they make to the character of the street is overwhelmed by the large-scale contemporary buildings.

⁵⁶ Ex 3, p 24, para 22.2(g).

⁵⁷ Ex 3, p 29, para 23.2(b).

⁵⁸ T1-61, ll 24 – 26.

⁵⁹ Ex 3, p 27, para 23.1.

⁶⁰ T1-36, l 4.

- [62] I am satisfied that traditional building character is not a defining feature of the Relevant Section of Dickson Terrace as it is dominated by the large, modern post-1946 buildings.
- [63] Due to the lack of cohesion, that the streetscape is dominated by non-character buildings lacking sympathetic character and design, and the limited traditional building character demonstrated by the house, I find that the loss of this house would not be a meaningful or significant loss.
- [64] For these reasons I am satisfied that the appellant has demonstrated compliance with AO5(c).
- [65] AO5(d) of the TBC Overlay Code provides that the development is acceptable if it involves a building which is in a section of the street within the TBC Overlay that has no traditional character.
- [66] The experts disagreed about whether the house is in a section of the street within the TBC Overlay that has no traditional character.⁶¹ One of the reasons for this disagreement is that in undertaking their assessment the experts considered different sections of Dickson Terrace.
- [67] Mr Kennedy is critical of Mr Elliott for considering dwellings outside the Relevant Section of Dickson Terrace in his analysis.⁶² However, I am satisfied that in oral evidence Mr Elliott considered the Relevant Section of Dickson Terrace.⁶³
- [68] To support his opinion that the house is in a section of the street within the TBC Overlay that has traditional character, Mr Kennedy considered only the southern side of the street containing the four interwar houses which he considered to be of traditional character.⁶⁴
- [69] The respondent submitted that it was open to find that the southern side of Dickson Terrace remains intact and is not visually dominated, supporting a finding that the southern side of Dickson Terrace is a section of the street within the TBC Overlay Code that has traditional character.

⁶¹ Ex 3, Mr Elliott, para 22.1(h); Mr Kennedy, para 22.2(h).

⁶² Ex 4, p 4, para 3.2.

⁶³ T1-26.

⁶⁴ Ex 3, p 20, para 22.2, p 24, para 22.2(h); T1-60, ll 43 – 44.

- [70] I am not satisfied that, for the purposes of this analysis, the correct approach is to confine the consideration of character to a group of houses taken in isolation. While AO5(d) recognises that a section of the street within the TBC Overlay is to be considered, in my opinion, Mr Kennedy takes a position not warranted by these words. Consideration of the broader area is also supported by the cases.⁶⁵ Taken to the extreme, Mr Kennedy's approach may result in the consideration of a section comprising two houses, or a single house, which is an artificial construct. Mr Kennedy proffered no reason for considering a section of Dickson Terrace other than the visual catchment agreed by the experts in the joint expert report.
- [71] I proceed on the basis that the section of the street for consideration is the Relevant Section of Dickson Terrace.
- [72] For the purpose of consideration of AO5(d), only the area within the TBC Overlay is considered. Thus, the Local Heritage Place and the proposed road are excluded. I have adopted a strict interpretation of the section agreed by the experts. The effect of this is that the streetscape includes the wall of the large property to the point where the road divides, but not the contemporary house beyond that point.
- [73] Mr Kennedy opined that the Relevant Section of Dickson Terrace has mixed character overall. He accepted that the first two houses from the Toorak Road intersection on the northern side of the street were unsympathetic to the traditional character of the whole street, both in terms of their design and size, and were dominant presences in the street.⁶⁶ He agreed that the 10-metre-high wall on the northern side of the road at the other end of the Relevant Section of Dickson Terrace is the antithesis of traditional building character.⁶⁷
- [74] Mr Elliott observed the five post-1946 houses in the Relevant Section of Dickson Terrace in the TBC Overlay are multi-level masonry houses much larger in scale and visually more prominent than any of the other two-storey pre-1947 houses, such that their mass sways the balance away from traditional character streetscape.⁶⁸
- [75] While the four pre-1947 houses on the southern side of Dickson Terrace are clustered together, traditional character is not a defining feature of the street. Any

⁶⁵ *Bilalis v Brisbane City Council* [2017] QPEC 42.

⁶⁶ T1-62, l 19, T1-63, l 7.

⁶⁷ T1-63, l 44.

⁶⁸ T1-26, ll 35 – 36.

contribution the houses make to the character of the street is overwhelmed by the large-scale, contemporary post-1946 houses⁶⁹ in the Relevant Section of Dickson Terrace such that it no longer has traditional character.

[76] I find that due to the dominant nature of the post-1946 houses the Relevant Section of Dickson Terrace no longer has sufficient character to be reasonably described as having traditional character. Thus, I am satisfied that AO5(d) is met.

Does the proposed development comply with PO5 of the TBC Overlay Code?

[77] In considering PO5(c) the experts disagreed about whether the house contributes to the traditional building character of that part of the street within the TBC Overlay. At present, a full appreciation of the traditional building character of the house is restricted in part by vegetation.⁷⁰ As indicated above, I have assumed there is no vegetative screening in front of the house.

[78] The house has features consistent with a later era. Consistent with my finding that the house, at best, exhibits limited traditional building character, I am not satisfied that the house makes a contribution to the traditional building character of the Relevant Section of Dickson Terrace within the TBC Overlay. Accordingly, I am satisfied that the appellant has proven PO5(c).

Should the proposed development be approved in the exercise of the court's discretion?

[79] The respondent urged that in the event non-compliance is found with the Scheme, the discretion should not be exercised to allow the appeal. Further, it said that the application does not comply with the Purpose and relevant Overall Outcomes of the TBC Overlay Code which it said is significant because:

- (a) these provisions inform the planning purpose behind the TBC Overlay Code, which is to protect pre-1946 dwellings and ensure future development maintains traditional building character housing; and

⁶⁹ Ex 3 pp15 – 19.

⁷⁰ Ex 3, p 29, para 23.2.

- (b) they demonstrate the seriousness of the policy position enshrined in the Scheme at the highest order that these character homes ought to be protected, preserved and maintained.

[80] The purpose of the TBC Overlay Code specifically refers to and requires compliance with the policy direction of the Strategic Framework found in Theme 2 and Theme 5.⁷¹

[81] I respectfully observe and adopt the observations of Kefford DCJ in *Delta Contractors (Aust) Pty Ltd v Brisbane City Council*:

[20] ...these provisions form part of a traditional building character policy direction in the Strategic Framework.

[22] Part of the identified purpose of the Traditional Building Character (Demolition) Overlay Code is the implementation of Council's policy direction with respect to traditional building character and traditional character. As such, the nominate provisions of the Strategic Framework provide relevant context when construing Traditional Building Character (Demolition) Overlay Code. However, they are not identified in City Plan as applicable assessment criteria for code assessment. As such, they are not assessment benchmarks and, pursuant to s 45(3)(b) of the Planning Act 2016, no assessment is to be carried out against them.⁷²

[82] Consistently with these observations the respondent did not raise these as matters of non-compliance. Rather it suggested they inform the planning purpose behind the provisions of the TBC Overlay Code, which is to protect pre-1946 dwellings and ensure future development maintains traditional building character housing.

[83] Having found that the house, at best, exhibits weak traditional building character that its loss would not be meaningful, that it does not make a contribution to the Relevant Section of Dickson Terrace and that the Relevant Section of Dickson Terrace is dominated by large scale contemporary houses such that it no longer demonstrates traditional character, I am satisfied that the house does not:

- (a) individually or collectively contribute to giving the area in the TBC Overlay traditional character and traditional building character;

⁷¹ Ex 9, p 5, 15.

⁷² [2018] QPEC 41, [20]-[21].

- (b) form a part of a character streetscape comprising residential buildings constructed in 1946 or earlier nearby in the street within the TBC Overlay; and
- (c) reflect the traditional building character other than ‘timber and tin’.

[84] Thus, the appellant having demonstrated compliance with the provisions of the TBC Overlay Code outlined above, I am satisfied that Purpose 1(a), OO2(a), OO2(d) and OO2(e) are met.

[85] In the event that the house does not technically meet the criterion, the case for retention of the house is so weak that I would be minded to exercise my discretion (still observing the test in the Scheme). If the street has any traditional character it is minor and any contribution by this house is minor at best. To the extent that there is any conflict with the TBC Overlay Code, I am satisfied that it is so minor as to be trivial.

[86] For these reasons, on balance, I am satisfied that the exercise of discretion favours approval of the application.

Conclusion

[87] I am satisfied the appellant has discharged the onus and the respondent’s decision to refuse the application should be set aside. The respondent’s decision will be replaced with an approval subject to conditions. The appeal is adjourned for the parties to agree upon appropriate conditions.