

# Insufficient grounds to approve partial demolition of a pre-1911 building despite conflicts with the planning scheme

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by Ian Wright, Ronald Yuen, Nina Crew

## In brief - Planning and Environment Court dismisses appeal

The case of *Synergy Property Partners No 2 Pty Ltd v Brisbane City Council* [2016] QPEC 21 concerned an appeal in the Planning and Environment Court by applicant, Synergy, against the decision of the Council to refuse a development application for a preliminary approval to carry out building work, being the partial demolition of a pre-1911 building and for a development permit for a material change of use of premises for a shop, office and food and drink outlet, being a coffee kiosk, at Doggett Street, Teneriffe.

The issues in dispute in the appeal primarily related to conflicts with the *Brisbane City Plan 2014* as a consequence of both the proposed land uses and the form of the proposed development, focusing on issues of need and character.

The Court dismissed the appeal on the basis that the proposed development was in conflict with the *Brisbane City Plan 2014* and there was an absence of sufficient grounds to justify an approval despite the conflict.

## **Court found the proposed development was in a major conflict with the Low-medium density residential zone code as the proposed non-residential uses fell outside the scope of the development contemplated in that zone**

The site is located in the Low-medium density residential zone and contains a pre-1911 building, which is one of six contiguous traditional character buildings. The purpose of the zone code relevantly stated that it was to “provide for a mix of dwelling types supported by compatible small-scale non-residential uses that are positioned along identified active frontages or individually located.”

The proposed development fell outside the definition of "small-scale non-residential use", which relevantly included a shop and an office, but did not include a food and drink outlet.

In relation to the proposed shop and office uses, the overall outcomes for the zone code relevantly provided that development for small-scale non-residential uses, where not within an active frontage area, was to have a gross floor area of less than 250m<sup>2</sup>, serve local residents' day-to-day needs and not undermine the viability of a nearby centre.

Both parties called experts in retail economics who agreed that the proposed development would not undermine the viability of nearby centres due to its small scale. However, the Court found that there was no evidence that the shop and office would cater for local residents or serve their day-to-day needs.

The proposed coffee kiosk was not contemplated in the Low-medium density residential zone. The Council's economics expert gave evidence, which was accepted by the Court, that there were already 13 coffee shops within 500m of the site and that any demand for the proposed use as a result of population growth could be accommodated on appropriately zoned land in Mixed use zones.

The Court, having regard to the nature of the proposed uses, found that there was a major conflict with the Low-medium density residential zone code as the proposed uses fell outside the scope of non-residential uses contemplated for the zone.

**Court found the proposed development was in significant conflict with the Low-medium density residential zone code, the small-scale non-residential uses code and the centre or mixed use code planning scheme due to the commercial nature of the proposed development and its impact on traditional character of the building**

The Council submitted that the commercial character of the proposed development and the failure to provide an appropriate transition to the adjoining character house resulted in conflict with various provisions of the *Brisbane City Plan 2014*, including the low-medium density residential zone code, the small-scale non-residential uses code and the centre or mixed-use code.

The applicable codes relevantly required development to be "of a form and scale that reinforces a distinctive subtropical character of low to low-medium rise buildings"; to respond "to the surrounding character and architecture"; and to complement "the prevailing scale, built form, setting and streetscape character of a surrounding zone in the residential zones category".

In relation to the issues of character and transition, both parties called architectural experts with considerable experience in heritage buildings. The Council's architectural expert gave evidence that the proposed development presented as essentially commercial in character, which was confirmed by Synergy's architectural expert under cross-examination. The Council's architectural expert also gave evidence that the proposed development was not sympathetic to the traditional character of the building which was accepted by the Court.

In relation to the issue of transition to the adjoining character house, the Council's architectural expert and town planning expert conceded that the height and screening of the proposed development would assist with providing a sensitive transition. However, the Court accepted the Council's architectural expert's evidence that the presence of a coffee kiosk at the boundary adjoining the neighbouring character house did not provide a sensitive transition.

The proposed development was found to be in significant conflict with the character provisions of the low-medium density residential zone code, the small-scale non-residential uses code and the centre or mixed-use code, particularly where the house was one of six contiguous traditional character buildings. The Court also found that the proposed development was not appropriate for its location.

## **Court found the proposed development was in conflict with the Fortitude Valley neighbourhood plan code as the proposed development detracted from the cohesive traditional timber and tin character streetscape**

The applicant submitted that the proposed development was not in conflict with the Fortitude Valley neighbourhood plan code, and that any inconsistencies with other codes were of no consequence because the neighbourhood plan code would prevail over other codes.

The dispute focused on whether the proposed development was in conflict with performance outcome PO1 of the neighbourhood plan code, which required that development “contributes to a cohesive streetscape and built form character”. The applicant's architectural expert took a broad view of the streetscape and gave evidence (at [31]) that the proposed development “will integrate residential and commercial characteristics which will visually relate to both the character of the adjoining detached houses and the predominantly commercial built form character of the street”.

The Council's architectural expert took a narrow view of the streetscape and gave evidence that the house “currently forms part of a very cohesive streetscape of five ‘timber and tin’ character houses” and that the proposed development detracted from the “cohesive traditional timber and tin character streetscape” due to both its commercial character and the coffee kiosk. (At [31].)

The Court preferred the Council's architectural expert's evidence and found that the proposed development was in conflict with PO1 of the neighbourhood plan code. The Court further found that there was no inconsistency between the neighbourhood plan code and the other relevant codes with which the proposed development was in conflict and that these codes could all be read harmoniously. In any event, the Court found that the strategic framework prevailed over all of the codes considered, to the extent of any inconsistency, and it clearly contemplated development for retail and commercial uses in accordance with the zoning pattern.

## **Court found the maintenance and improvement of a pre-1911 building to be insufficient grounds to justify approval of the proposed development despite the conflicts**

The only ground raised by the applicant as being sufficient to justify approval of the proposed development despite the conflicts was that it was a matter of public interest that pre-1911 buildings were maintained and improved. The Court did not find this to be

a sufficient ground to justify approval of the proposed development despite the conflicts noting that the reuse of the house could have been achieved without a commercial use.

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## KEY CONTACTS



**Nina Crew**  
Solicitor



**Ian Wright**  
Partner



**Ronald Yuen**  
Senior Associate