

Does a street have traditional character, it's more than just a numbers game

28 June 2016

by Ronald Yuen, William Lacy

In brief

The case of *Guiney v Brisbane City Council* [2016] QPEC 26 concerned an appeal by Margaret Guiney commenced in the Planning and Environment Court against the decision of the Brisbane City Council to refuse a development application for a preliminary approval to carry out building work being work for the demolition of a pre-1947 dwelling located within the Traditional Building Character Overlay of the *Brisbane City Plan 2014*.

The determinative issue for the appeal was whether the proposed demolition conflicted with the Traditional Building Character (demolition) Overlay code. The Court found that the proposed demolition conflicted with the code as the house the subject of the proposed demolition was located in a street with traditional character and the house contributed positively to that character.

The Court considered whether the proposed demolition conflicted with certain outcomes of the Traditional Building Character (demolition) Overlay code

In considering whether the proposed demolition conflicted with the Brisbane City Plan 2014, the Court focused on the following outcomes of the Traditional Building Character (demolition) Overlay code:

PO5(c) which provides "Development involves a building which... does not contribute positively to the visual character of the street"

- > AO5(d) which provides "Development involves a building which ... is in a street that has no traditional character"

The appeal appeared to proceed on the basis that if either of these outcomes could be satisfied the proposed demolition would not be in conflict with the *Brisbane City Plan 2014*.

Ms Guiney contended that the house did not contribute positively to the visual character of Williams Avenue or that the street had no traditional character

The house the subject of the proposed demolition was located in Williams Avenue, Hendra, and was a tin and timber house which the Court observed was "... a fine example of traditional building character" (at [8]).

Williams Avenue was primarily comprised of dwellings with a mix of pre-1947 and post-1946 buildings. The street contained more post-1946 than pre-1947 buildings and this formed the basis for Ms Guiney's contention that the street was one with a modern character and therefore, despite the traditional character of the house, it did not contribute positively to the visual character of Williams Avenue.

To support this contention it was argued by Ms Guiney that a street could have only one character, the character of a street would be determined by reference to what predominated in the street and, because of the predominance of post-1946 houses, Williams Avenue was a street of modern character only.

The Court considered how the character of Williams Avenue was to be determined

In asserting that a street may have only one character, Ms Guiney sought to rely on *Leach and Ors v Brisbane City Council* [2011] QPEC 55. However, the Court was not persuaded that this decision was an authority for the proposition that a street may only have one character. Instead, the Court preferred the reasoning in *Lucas v Brisbane City Council* [2015] QPEC 25 where the Court in that instance relevantly stated (at [37]):

It is only if one can characterise the visual character as a significantly predominant one and, thereby, exclude the fact that there is any realistic co-existing character at all which has anything of significance to do with a pre-1946 character that one could conclude that it [the house] did not contribute positively to that.

The Court also relevantly observed as follows in respect of applying AO5(d) and PO5(c) in the context of the proposed demolition:

- > The fact that the subject house formed part of a group of traditional character houses did not necessarily dictate that demolition must be assessed to be in conflict with the assessment criteria, rather the demolition of the house must be considered in the context of the relevant street (at [29]).
- > A numerical predominance of post-1946 buildings, while being a relevant factor, would not inevitably justify a finding that a street had no traditional character or that a building of traditional character did not contribute positively to the visual character of the street (at [32]-[33]).
- > Another factor, other than numerical predominance, which may be relevant to the assessment of the character of the street, was the visual prominence of the pre-1947 buildings (at [32]).
- > No weight was to be given to the fact that some of the other pre-1947 buildings in the street were "not in good condition and their 'potential longevity' is questionable" as there was not sufficient evidence to establish whether these buildings were susceptible to demolition (at [36]).
- > What would be required was an assessment of the present visual character of the street and not the street's potential character in the future (at [38]).

The Court found that Williams Avenue had retained a traditional character and that the house contributed positively to the visual character of the street

Having considered the evidence of the expert witnesses the Court relevantly found as follows:

The numerical predominance of post-1946 buildings in the street is relevant, gives the street an element of non-traditional character and provides an arguable case to permit demolition. On balance however, on the evidence, I am satisfied that this is not a case of a street properly characterised as simply being of a modern character with a few remnant pre-1947 character buildings which have no meaningful influence on the character of the street as a whole. Rather, it is a case of a relatively short street of mixed character in which notwithstanding the numerical predominance of more modern buildings (of different styles), the street, assessed as a whole, nevertheless retains (and retains as a distinguishing feature) traditional character to a significant degree by reason, in particular, of the influence of the traditional character buildings within it, including by reference to their attributes, location, consistency of character, relationship with each other and visual exposure to the street. In that context, not only is traditional character of significance in the street but the subject dwelling, being a fine and readily visible example of traditional building character, contributes positively to

the visual character of the street (at [43]).

On this basis the Court found that the proposed demolition did not meet AO5(d) and PO5(c) and therefore the proposed demolition conflicted with the *Brisbane City Plan 2014*.

As Ms Guiney had not advanced grounds to justify the approval of the proposed demolition despite the conflict, the Court dismissed the appeal.

KEY CONTACTS



William Lacy
Solicitor



Ronald Yuen
Senior
Associate