

by Chris Robertson

Heritage, character & Brisbane City Plan 2000 – Identification, regulation & listing

One can picture the scenario. A practitioner alone in his office late on a Friday, a knock at the door and in walks an important client brandishing a letter with Brisbane City Council letterhead.

The practitioner, who successfully handled the conveyancing on the client's property two years before, politely seats his guest and begins to read the letter. It states the property has been identified as a heritage place of cultural significance and that the owner has until Monday next to lodge a submission regarding the listing.

What then does the practitioner do? After reassuring the client that there was no such issue at the time he purchased the property, the practitioner then packs his briefcase for a weekend in the trenches, preparing for battle on Monday with the council.

But understanding how the heritage listing process occurs within the ambit of the Brisbane City Plan 2000 (City Plan), and what it actually means, is half of the battle and may well be the saviour of their weekend.¹

This paper provides background information which will aid in understanding the heritage listing and character housing designation process, and the subsequent regulation of such designated properties within the ambit of the City Plan.

1 Heritage listings

Administration of heritage listings occurs with BCC's Heritage Unit, which is currently part of City Planning, within the newly named City Policy and Strategy Division. In mid-1989 the council established the unit to implement the heritage policies of council.² A priority is to conserve places of the cultural significance to Brisbane.

The foremost point to note with heritage listings is that state listings occur under the *Queensland Heritage Act 1992* and local government listings occur under the respective city or town plans. Nearly all (apart from those most recent additions to the Queensland Heritage Register) state heritage listed places within Brisbane appear within the City Plan³ Heritage Register.

Apart from regulatory aspects, the systems run relatively independent of each other.⁴ Initially we need to recognise that there are different types of protection within the City Plan. These include straight heritage listings, 'commercial character buildings' and 'character houses in demolition control precincts'.

This first section discusses the process of identification and entry onto the 'Schedule 1 Heritage Places of Cultural Heritage Significance' (Heritage Register), located in Volume two Appendix 2 of the City Plan.

The City Plan Heritage Register contains about 2400 to 2500 individual listings ranging from remnants such as sewer vent pipes to City Hall. The Heritage Register is a Planning Scheme Policy as per Division 5 Chapter 2 of *Integrated Planning Act 1997* (IPA). It is as equally important to envisage the Heritage Register as a dynamic document constantly being updated with places being removed, entered and amended as required.

Those who turn to the register will see that it is organised alphabetically by suburb and then by street. Properties that are also entered onto the Queensland Heritage Register are highlighted by shading.

1 The predecessor of City Plan, the Brisbane Town Plan 1987, did have heritage listings, mainly by area, and these were transferred across in the City Plan Heritage Register.

2 The BCC Heritage Unit is located on

Level 11 of the Brisbane Administrative Building. Contact phone: 07 3403 5048.

3 It is important to note here that all IPA-compliant town plans should recognise places that appear on the Queensland Heritage Register as per

s2.1.3A, 'Core matters for planning schemes'.

4 The recent discussion (2005) on the review *Queensland Heritage Act 1992* released by the state has mooted the combining of a number of aspects,

including listing and administration, of state and local government heritage matters, and in particular the creation of a single register.

The register is preceded by the Heritage Register Planning Scheme policy that outlines the criteria for entry and processes.

It is important to take time to read this page as it holds important key basics. Section 2, 'Criteria for entry in the Heritage Register' states that a place may be entered in Schedule 1 if it meets one of the listed cultural heritage values. (It should be noted that in appraisal and regulation of places, generally the guidelines in the Burra Charter⁵ are adhered to).

Continuing under point 2 in the statement, "(W)hen a citation is prepared documenting these characteristics (criteria), it should include:", and secondly under point 3, "Process for entry in the Heritage Register", it states: "(C)itations need not be prepared prior to inclusion of sites in the Heritage Register."⁶ Thus a place can be nominated for listing without a citation being completed, so long as prima facie it satisfies at least one of the criteria for entry.⁷

In practice, if you are required to lodge a submission against a heritage listing (the process is discussed below) you must address the grounds (criteria) upon which a potential heritage place has been nominated. The criteria are generally applied in the property's citation.

The first step then is to contact the BCC Heritage Unit and ask for the citation on the property, or in the every least the criteria that have been applied to identify the place as a place of cultural heritage significance. Until you are supplied with such information, together with adequate time to respond, the entire process should be put in abeyance.

It is important to note that there are two levels of listing, unlike the state, where a property must be of cultural heritage significance to the state. The City Plan criteria recognise two levels of importance – local and city-wide. Thus you may see that under Criterion 1, "it is important in demonstrating the evolution or pattern of the City's or local area's history", a place may be of cultural significance to Brisbane City and/or the local area.

The Heritage Register as a planning scheme policy requires that any amendment to it must follow the correct procedure as outlined in IPA Schedule 3.⁸ However, while the requirements in IPA only state that to amend a planning scheme policy a public advertisement containing stipulated information in a "newspaper circulating generally" is all that is necessary, the BCC has elected to, as a matter of policy, notify owners direct by letter.⁹ But it is important to remember this is not a requirement of IPA.

Further, as a planning scheme policy the final decision whether to enter a place on the Heritage Register or not is the sole prerogative of the elected representatives, councillors. Nominations for heritage listing may be derived through BCC surveys, by

owners or through individuals or groups who feel a place may be of cultural significance. The listing generally encompasses the property's Real Property Description or where appropriate, part thereof.

The actual listing procedure within BCC is quite complex and time-consuming. Once a place has been identified and nominated, preliminary research is undertaken to assess whether it should proceed further.¹⁰ If it is assessed that the listing should not proceed, then the process goes no further.

If it is determined that listing should proceed to the next stage, the place is then assessed by the BCC's independent Heritage Advisory Committee (HAC).¹¹ It is evaluated against the criteria for listing. If it is decided not to proceed then again the process regarding the particular property goes no further. If the HAC decides the place is worthy of listing, the next step is to present the recommendations to Council's Civic Cabinet, also referred to as the Establishment and Co-ordination Committee.¹² This comprises the Lord Mayor and the six chairs of the committees of the council. Once the place has passed this assessment, it is then given to full council as a resolution proposing to amend a planning scheme policy.¹³

From this point the amendment becomes the consultation stage.¹⁴ This involves advertising and the sending out of letters as per the scenario in the introduction. Submitters have 20 business days to lodge a submission after the notice is first published.¹⁵ For this reason (and the possible need for expert advice) it is important owners do not 'sit on' letters of notification.

A submission must address the listing criteria (thus the need for BCC to supply it) and include all pertinent information that supports the submission. This may include additional information, both historical and architectural, that will assist in further evaluating the cultural significance of the place. In addition it is quite within the bounds of reason to argue structural unsoundness and/or that the structure is irreversibly altered in that its heritage integrity has been compromised.

Generally it is advisable for the practitioner to seek independent heritage advice regarding a property. While the heritage profession within Brisbane is a relatively small group, there is a number of highly experienced conservation architects available to provide advice and evaluation. Above all, it is important to remember that each property is unique to its own particular circumstances, thus the need for specialist advice.

Such arguments in a submission as financial hardship on the owner/s are not administrative issues. Council officers can only assess a property against the applicable criteria. While financial hardship may

5 The Burra Charter 1999: The Australia Charter for Places of Cultural Significance. (Burwood: Australia ICOMOS Inc.2000). But also note the recent Peter Marquis-Kyle & Meredith Walker, *The Illustrated Burra Charter: Good Practice for Heritage Places* (Burwood: Australia ICOMOS. 2004).

6 This was not always the case. When City Plan came into force on October 30,

2000, a citation was required prior to a property being listed. This amendment became effective on July 1, 2003.

7 A citation should document the characteristics disclosed in the applicable criteria on the respective property. City Plan Vol.2. Appendix 2, p93.

8 'Schedule 3: Process for making or amending planning scheme policies', IPA

pp369-72. Note there are three stages – Proposal, Consultation and Adoption.

9 Ibid., Part 2, p369.

10 An often-asked question is why not get the property owners involved at this stage before progressing to the formal stage. Frequently they are, but there is a need for consistency of approach as well as input from elected representatives and for initial research to be completed in

order to adequately assess and discuss the matter with owners.

11 HAC is comprised of elected representatives (councillors), professionals within the architecture/heritage fields, and representatives form various interested community groups and organisations.

12 It is important to contrast the HAC with the State Heritage Council. HAC, unlike

be argued, any decision not to heritage list on such grounds is a policy decision and thus is the prerogative of the elected council. The council officers administering the submission do, however, have a duty to list financial hardship as one of the grounds of objection for the policymakers to consider.

One of the interesting idiosyncrasies of IPA is that a submission can also be made by individuals and organisations, not only the owners or controllers of a property. Thus an owner may lodge a submission against a listing and there may be others that favour the listing. Once a submission is made, the staff of the BCC Heritage Unit process the submissions and respond to the points raised. For example, a point may be raised that the structure has had such extensive later alterations that its heritage integrity has been compromised. In such instances an inspection by an architect and historian will normally follow to assess the extent of the alterations.

The procedure then follows the initial assessment process, with all additional information being included to allow HAC, the establishment and co-ordination committee and council to reassess the potential listings in light of the submissions made. Once council adopts the amendments, there is usually a period of time before they come into effect.¹⁶

There are three final points that practitioners needs to keep in the back of their minds. Once the initial list of places, at the commencement of the process, has been adopted by the council, only council may remove it from the process. Thus, if a submission correctly details that a nominated structure is structurally unsound and it is assessed as such by council officers, then a recommendation is made to council that the listing should not proceed. The usual course of action is that recommendations are made when the final list is presented to council to adopt as an amendment to the planning scheme policy. But again council is not bound to follow the recommendations.

Secondly, unlike the state heritage listing process, there are no grounds for appeal once the planning scheme policy has been adopted.¹⁷ Neither is compensation automatic.¹⁸

However, practitioners are not faced totally with brick walls. They need to consider three process options once a place appears on the register and the amendment has come into effect. Firstly, council may choose to make a policy decision for a particular reason and remove the place from the Heritage Register (this is extremely rare). Secondly, the owner of the listed place may still lodge a development application. This may be done under a superseded planning scheme or under the current amended planning scheme policy. The former may lead down the road of injurious affection¹⁹ and the latter possibly to

a suitable negotiated outcome. If the development application is refused, then the matter may be appealed to the Environment and Planning Court and thus, if applicable, incorporating a challenge to the validity of the property as a heritage place. But emphasis needs to be directed to the individual nature of a particular property, including the property's designation and potential.

The third option, often seldom considered, is that the property owner can elect, after weighing up just what effect the listing will actually have, to do nothing. Unless there are major building works planned on the property, there are no onerous maintenance requirements.

Finally, even though council has provided notice of the proposal to amend the planning scheme policy, a development application may still be lodged with council.²⁰ There is nothing to prohibit the lodging of a development application under the current planning scheme and planning scheme policy right up until the final adoption of the list as a planning scheme amendment. Council may elect to, and this is the usual practice due to the delay in printing of the amendments, bring the amendment into effect at a later date.

It is important to note the difference between adoption and effect.²¹ In this instance, any application lodged between the adoption and the effect date, dependent of course on what regulations are already in force upon the property, may well receive the Coty principle treatment.²²

The strategic decision as to whether and when to lodge an application will again depend upon the collective assessment of all the factors, including intention of the owners, concerning a particular place. One often over-looked consideration is that such a listing may well be of advantage to an owner.

2 Regulation of a heritage-listed place

Under the City Plan, the Heritage Place Code, a planning scheme, has at least on face value quite wide application. According to City Plan, the code will "apply in assessing building work (including demolition), reconfiguring a lot or operational work on a premises that includes a heritage place or a premises adjoining a heritage place".²³

While this may seem rather all-encompassing, the reality is that it is not. A brief run through this code will clarify this point.

Clearly a property must be entered in 'Schedule 1 Heritage Places of Cultural Heritage Significance' City Plan identified by place, address and lot and plan number (this, of course, excludes the adjoining premises mentioned).

The second paragraph offers the next exclusion "where a citation prepared by Council in response to

the Heritage Council, has no legislative power. It is solely an advisory committee.

13 'Part 1. Proposal Stage', 'Schedule 3' IPA. p369.

14 'Part 2. Consultation Stage', 'Schedule 3' IPA. p369-70

15 Ibid., Part 2 (2) (2).

16 Note the requirements of Schedule 3, 'Process for making or amending

planning scheme policies.' IPA.

17 A lodged objection may be appealed to the Planning and Environment Court; refer s30(5) *Queensland Heritage Act* 1992. p26.

18 Refer Chapt 5 Part 4 or see Chris Robertson, 'Compensation lost Compensation Found: Injurious affection and the *Integrated Planning Act* labyrinth'. Proctor, April 2002, pp20-21

19 Ibid.

20 It is important to note that, unlike s24 of the *Queensland Heritage Act* 1992, there is no provisional listing process. A place is not bound from the day of notification. pp21-22.

21 Refer to 'Dictionary', 'Schedule 10' under definition of 'Development application (superseded planning scheme)' IPA pp421-22.

22 *Coty (England) Pty Ltd v Sydney City Council* (1957) 2 LGRA 117 accepted in *Lewiac Pty Ltd v Gold Coast City Council* 1996 2 QdR 266.

23 'Heritage Code', '1 Application.' Brisbane City Plan 2000, Vol.1 Chapter 5. p89.

a development application does not support retaining the site on the Heritage Register". The most obvious of these would be where a particular structure was entered on the Heritage Register but has subsequently been burnt down. The citation aspect basically refers to a reappraisal and obtaining written clearance from the council.

Secondly, and this is quite obvious, that where a property appears on the BCC Heritage Register but is also included on the Queensland Heritage Register, the Heritage Place Code will not apply where the work constitutes "excluded Work".²⁴

A distinction is made in the code between "building work" and "minor building work". As with all good government planning schemes, the answer will not be found in one location. Under Definitions in Chapter 3 of the City Plan, "Building Work" is "as defined in the *Integrated Planning Act* 1997, but excludes minor building work". A lengthy definition of "minor building work" and "minor demolition work" is provided in the above section.²⁵

Basically the scenario is this, if it is "minor building work", then the level of assessment is 'code', whereas if it is "building work", as outlined in the Heritage Code, the level of assessment is 'impact'. The difference can be exemplified simply – under "Minor Building Work" (with reference to Schedule 5 of the Standard Building Regulation 1993) "in a Residential area (where not on a small lot)" includes "internal building Works".²⁶

If this were impact assessment, that would mean that as per IPA requirements, an owner would have to advertise, with submitters being given the right to object, to internal works they would be undertaking on their residence.²⁷ By making it code assessable, the only assessing that would be done is through the council, ensuring the work maintains the heritage integrity of the place and that it was indeed minor building works.²⁸

As stated in the introductory quote, the Heritage Code is also applicable on premises adjoining a "heritage place". Despite this, the code goes on to limit the ambit of the extent of this statement, in that:

1.5 Unless impact assessment is required elsewhere in the level of assessment tables, relevant assessable development on land adjoining a Heritage Place is subject to code assessment where it involves:

- building work except for a house . . .

The reality is that where the new development (adjoining to a heritage place) is related to a house, it is not subject to the code, unless of course some other

factor triggers the code or another code within City Plan.

However, all is not as simple as it sounds. In the Introduction Section of City Plan it states that the codes may be "varied by the Local Plans in Chapter 4"²⁹ – for example, the City Centre Local Plan. In particular, refer to Appendix A, which lists sites allocated Transferable Development Rights (TDR).³⁰ Essentially where council was assured of the conservation of a heritage place, a calculable and transferable site area was defined and this TDR is able to be transferred (sold) to another site to enable greater development on a non-heritage site.

Importantly, it should be recognised that there is not total prohibition of development on or adjacent to a heritage site. Reference to the Performance Criteria and Acceptable Solutions section of the Heritage Place Code should be made.³¹ Under 3.2 Performance Criteria and Acceptable Solutions, for each proposal put forward the acceptable solution is a report accompanying the application that "... verifies the proposal has been prepared in accordance with the Australia ICOMOS Charter for the Conservation of 'Burra Charter' Places of Cultural Significance 1998"³²

Essentially, if an application has such documentation accompanying it, is prepared by an experienced conservation architect and addresses the conservation issues concerning a heritage place, then it is highly likely the application would proceed. However, as stated in Part I, the application is subject to impact assessment and therefore subject to submissions. A properly made submission/s may have a bearing on a decision as to whether to approve the application or not.³³

If an application is refused, what then should you do? Realistically there are four options:

- Do nothing; or,
- Address any issues the council may have (a pre-lodgement meeting may well point an applicant in the right direction prior to lodgement of the application);³⁴ or,
- Determine whether or not injurious affection is applicable;³⁵ or,
- Challenge the decision to refuse the application.

If the fourth option is selected, this will of course be dependent on what type of development is sought, and it is always pertinent to remember that each heritage-listed place is unique in its circumstances.

A challenge to an application refusal can be under a number of grounds, including that the place was incorrectly entered onto the Heritage Register; it is

24 The reality is that the Queensland Heritage Regulation 1992 was repealed by s11 SL268 2003. Reference should now be made to the issue of exemption certificates as per Part 5 Division 2 *Queensland Heritage Act* 1992. However, it should be noted this does not totally exempt local government jurisdiction within an application where the application involves other planning matters.
25 Chapter 3 pp66-71. City Plan.
26 *Ibid.*, p70.
27 Chapter 3, Part 4 IPA.

28 Refer to the tables in Chapter 3 and the 'Heritage Place Code' in City Plan.
29 '1.1 How to Use the Codes', 'Introduction', City Plan. Vol.1 Chapter 5. p3.
30 Chap.4 p417. TDRs were introduced in c1989 shortly after the Town Plan for the City of Brisbane 1987 was introduced. While the practical effectiveness of TDRs has always been questioned, about eight have been taken to date. Currently BCC is undertaking a CBD Masterplan and these may be under review.
31 While special sections within the code

have been set aside for places on or adjoining a place of special cultural significance to indigenous people or a place of natural heritage significance, generally most applications concern development on or adjoining a heritage place.
32 This should read 1999. The Burra Charter 1999: The Australia Charter for Places of Cultural Significance. (Burwood: Australia ICOMOS Inc.2000).
33 s3.4.9 'Making A Submission (p124) and Schedule 10', 'Dictionary', 'Properly Made Submission', IPA, pp434-435.

34 The BCC offers limited assistance in the form of architectural advice and is going to commence grants (subject to conditions) to owners of places which appear on the BCC Heritage Register.
35 See Chris Robertson, 'Compensation lost Compensation Found: Injurious Affection and the *Integrated Planning Act* Labyrinth'. Proctor. April 2002 pp.20-21.
36 Structural soundness is not specifically referred to in the Heritage Place Code. However, valid argument could be made that one may read into P4 of the Performance Criteria under 3.2.1 of the

structurally unsound and is not reasonably capable of being made structurally sound.³⁶

In dealing with the incorrect entry issue, the practitioner should consider two main points. Ensure that a copy of the citation, identifying which criteria the heritage place satisfies, is obtained from the BCC. An experienced conservation architect will be able to advise whether listing on the grounds determined in the criteria may be sustained.³⁷

This should have been completed in the report that accompanied the development application.³⁸ Secondly, they need ensure the property was correctly entered (as per Schedule 3 IPA) onto the Heritage Register.³⁹

Further grounds for challenge may be the current condition of the property. This has been examined in two relatively recent cases, *Gould v BCC*⁴⁰ and *Armstrong v BCC*.⁴¹ While not directly dealing with the Heritage Place Code, both cases dealt with the issue, among other things, of structural soundness and whether a structure is reasonably capable of being made structurally sound.⁴² Both judgments understandably dealt with the particular elements and conditions of each structure.

In *Gould*, an application was made under the old Town Plan for the City of Brisbane (1987) s7.3.6.2. (c) for a waiver based upon the fact that a Heritage and Character Building “is structurally unsound and not capable of being made structurally sound”. The BCC argued that while aspects of the annexe (to the subject building) were considered “to be not structurally sound in the short term”, the “(H)ouse is of heritage significance and is structurally sound”.⁴³

The overall condition of the building was assessed and evidence produced by both parties. His Honour Quirk J accepted the evidence of the appellants that the building was not structurally sound but stated that the question to be decided was “whether the dwelling is reasonably ‘capable of being made structurally sound’”.⁴⁴ Emphasis was made on the word reasonable.

His Honour also distinguished between the need to make the building structurally sound and a “complete and faithful restoration of a building to its original condition”.⁴⁵

While acknowledging the importance of preservation of heritage and character buildings, his Honour applied the test of that of a “reasonable and prudent owner” in consideration of advice as to whether to choose between demolition and “reinstatement of structural soundness”.⁴⁶ In this instance his Honour

held that a reasonable and prudent owner would reject the latter and chose the former option.

Armstrong, while being an appeal of a refusal of an application to demolish a pre-1946 dwelling under the “Demolition Code” of City Plan, re-examined the issue of structural soundness and whether a structure is reasonably capable of being made structurally sound.⁴⁷

In *Armstrong*, evidence was again given as to the condition of the structure. In this instance, his Honour Newton J preferred the evidence of the respondent (BCC) to that of the appellant as to the cost of repairs and in doing so applied the test of Quirk J:

“I am satisfied that a reasonable and prudent owner of the house at 40 Boyd Street would consider that the expenditure of moneys approximating the estimate given by Mr Pope (builder) to reinstate the house to structural soundness would be moneys wisely spent.”⁴⁸

Gould was distinguished by his Honour in *Armstrong* on the basis that the “house in question had long since passed beyond the point where it could, on any reasonable and competent assessment of its condition, be considered to be structurally sound”.⁴⁹

One other comment (which distinguished *Gould* from *Armstrong*) is worth mentioning here. His Honour Newton J commented that the condition of Armstrong’s house “had come about as a direct result of a decision taken by the appellants in 1994 to restrict maintenance to that of an essential nature only”.⁵⁰

Yet in *Gould* his Honour Quirk J, accepted the owner’s assertion that deteriorated condition of the structure had come about “because it lacked the attention needed over some 20 years prior to my ownership”.⁵¹ This is despite the fact that the owner in *Gould* had purchased the property some 10 years before.

Clearly the contribution and approach of an owner to the condition of the structure cannot be disregarded if a practitioner is contemplating such an action.⁵² It is perhaps with a touch of irony that Armstrong’s property burnt down while under going renovation!

While any discussion on each of the following categories could easily fill a book, and strictly speaking have a peripheral relationship to heritage, it is important to understand not only these individual categories, but how they also fit into the broader picture with regard to City Plan. It is proposed to deal with the ‘commercial character’ and ‘residential design’ briefly.



code in that structural soundness and whether the structure is reasonably capable of being made structurally sound is directly pertinent to the conservation of a heritage place. Such comments would be addressed in the report accompanying the application.

37 This is particularly so where a citation not recommending the property remains on the Heritage Register is sought – as per the Heritage Place Code.

38 For example, if the selection criterion identifies the place as a rare type of duplex in a certain area, have this

verified and ensure the place has indeed retained its heritage integrity.

39 This is particularly relevant as the state’s EPA has elected to remove from the Queensland Heritage Register all properties owned by the Commonwealth at the time of listing and where they have since passed into private ownership, moved to re-enter them (refer s52.1 Australian Constitution) Also refer to *Old Heritage Council v The Corp of the Trustees of the Roman Catholic Archdiocese of Brisbane* (2000) QCA 378.

40 *Gould v BCC* [2000] QPE 048.

41 *Armstrong v BCC* [2003] QPEC. 007.

42 It is actually dealt with in the Demolition Code under ‘5. Performance Criteria and Acceptable Solutions’. pp70-71, City Plan. This code, however, only has applicability to those buildings identified in the Demolition Code. It excludes those places that fall within the ambit of the Heritage Place Code.

43 *Gould v BCC* [2000] QPE 048 at 4-5.

44 *Ibid.*, p8.

45 *Ibid.*, p9.

46 *Ibid.*

47 The ‘Demolition Code’ of City Plan is discussed below.

48 *Armstrong v BCC* [2003] QPEC at 16-17.

49 *Ibid.*, p12.

50 *Ibid.*, p10.

51 *Gould v BCC* [2000] QPE 048 at 3.

52 It should be noted here that there are, apart from the requirements in the *Building Act 1975* – specifically Part 4, s22, no wilful neglect provisions in City Plan nor the *Queensland Heritage Act 1992*.

3 Commercial character

‘Commercial character’ properties have their own register (a Planning Scheme Policy) within City Plan located in Volume 2 Appendix 2⁵³ in addition to the Commercial Character Building Code.⁵⁴ The criteria for entry on the ‘Register of Commercial Character Building’ is that the property is pre-1946 (this term is explained below under Character Housing), has a non-residential gross floor area of less than 250m² and is essentially your neighbourhood corner shop.⁵⁵

Two other points regarding commercial character are worth noting. The first is that buildings that essentially qualify as commercial character but lie within a multi-purpose centre are excluded from the Commercial Character Register.⁵⁶

The second point is that any proposed change of use within a commercial character building on the register becomes self-assessable (excluding restaurants) provided the “Performance Criteria and Acceptable Solutions” within the Commercial Character Code are met.⁵⁷ This is offered as an incentive to owners for entry onto the register.

4 Residential design

Brief mention of the residential design codes need only occur at this stage as much of the character housing issues are discussed below. Of note are the following:

- The Residential Design – Character Code applies to “Residential Areas in the Demolition Control Precinct” (DCP). In a nutshell, this code applies to both pre-1946 and post-1946 residences. The idea is to conserve the pre-1946 housing character of DCPs while ensuring new infill does not detract from the existent character housing.⁵⁸
- Residential Design – Low Density, Character and Low-medium Density Code. The purpose here is to retain pre-1946 dwellings and buildings built prior to 1900.⁵⁹
- Residential Design – Medium Density Code & Residential Design High Density Code. Specifically refer to the performance criteria to retain buildings built prior to 1900.

5 Character housing

While ‘character housing’ has a somewhat lower profile than heritage-listed places, character houses are far more common.⁶⁰ It is important to understand the evolution of character housing within Brisbane, as this provides an indication of how the current controls have been derived.

The first introduction to character housing occurred in October 1995 when three defined areas were mapped. These were essentially the older suburbs it was envisaged that had developed in pre-1940 Brisbane.⁶¹

Interestingly enough, these controls were all encompassing. That is, all development applications were technically within the ambit of this section. Once an application was made, those residences that were regarded as pre-1940 were assessed as such. Policy at this stage was that character houses must be within a minimum group of five.

The next jump came with the introduction of Brisbane City Plan 2000. Under City Plan, character housing has taken both an expanded yet narrowly applicable role. The trigger planning mechanism and thus key for the retention for character housing is the Demolition Code.

To understand the ambit of this code and character housing, five points need to be considered. The first is that a character house must be within a Demolition Control Precinct. Its definition, often resulting in confusion, is explained in the Strategic Plan section of City Plan:

Demolition Control Precincts are those locations in older suburbs that contain pre-1946 housing with distinctive ‘timber and tin’ architecture.

A precinct contains either:

- a minimum group of three houses, and at least two-thirds of the precinct contains pre-1946 houses⁶²

OR

- A building built prior to 1900.

DCPs also contain non-residential buildings . . .⁶³

Secondly, the operation of character housing was extended to what has been softly termed pre-1946.⁶⁴ This date is somewhat of an anomaly. The actual reference is that the residence must not be substantially constructed prior to 31 December 1946. If it is constructed after this date then it is not classified as a character house.⁶⁵

Thirdly, the Demolition Code under “1. Application” provides the extent to which the code applies. Generally the code does not come into operation where minor demolition work (as defined in Chapter 3) extends to commercial character buildings, registered boarding houses in defined circumstances and again where demolition is assessable against the code under a local plan.

It is also important to note “2. Using the Code” reference is made to which level of assessment is applicable.⁶⁶ In general, it has a City Plan unique level of

53 At last count there were fewer than 1000 properties listed on the Register of Commercial Character Buildings.

54 It should be noted that the code clearly states the code does not apply where the building is “substantially demolished or destroyed” unless the new building is rebuilt with the same architectural detail, character, floor area and setbacks. City Plan Vol. 1. Chapter 5 p59.

55 The qualification for entry is provided in the Commercial Character Planning Scheme Policy in City Plan, Vol. 2, Appendix 2.p29.

56 This would appear to be a policy decision implemented by council and it is presumably based around the rationale that commercial character buildings essentially receive the same development advantages (for example, self-assessment) as buildings located within the multi-purpose centres.

57 As stated in the Commercial Character Building Code, reference must be to the level of assessment table in Chapter 3 and Local Plans in Chapter 4.

58 Reference should be made to the Residential Design Code – Character

Code and in particular the ‘Performance and Acceptable Solutions’ part of the code, as there is building work excluded from the code.

59 For further discussion on the buildings erected prior to 1900, refer to the discussion on the Demolition Code within this paper.

60 It is estimated that within Brisbane there are 50,000-55,000 character houses.

61 These included Wynnum, Sandgate and an area that roughly encircled the wider central Brisbane area.

62 Note the important reduction from a

minimum of five character houses within a group down to three.

63 Brisbane City Plan 2000. 4.2.2.4 ‘Maintaining Character’ Vol.1. Chapter 2, p17-18.

64 There were a number of practical reasons for changing for this date. As styles did not substantially change during the war period, it was felt many of these dwellings contributed to the streetscape. In addition, as the first complete existent set of aerial photos of Brisbane, the 1946 aerial photos provided a definitive and reliable source

assessment termed Notifiable Code. This provides for public notification (outlined under “6. Public Notification” of the code) which facilitates public comment on the development but allows no submitter appeal rights, as would be the case for impact assessment.

The fourth point is that the “Performance Criteria and Acceptable Solutions” provide what a residential building “must not have”, in order for it to exclude itself from the character protection controls. Briefly, these are that it has been substantially altered and does not have the appearance of being constructed in or prior to 1946, that an engineering report states that the building is structurally unsound and is not reasonably capable of being made structurally sound, and that the building does not contribute to the streetscape.

The foremost point with regard to character housing is that it has at its centre contribution to the streetscape. The Demolition Code and the outline within the Strategic Plan in Chapter 2 of City Plan both refer to what makes the unique character of the older suburbs of Brisbane as deriving “mainly from the topography, urban layout and ‘timber and tin’.”⁶⁷ The above point has often been the matter of controversy where arguments have been made that the character is limited to the traditional Queensland “timber and tin” home, implying exclusion of other styles such as brick and stucco.

However, two recent cases provide further illumination with regard to this argument. The first of these is *Berlese v Brisbane City Council*.⁶⁸ This case concerned an appeal against a refusal for demolition of a pre-1946 dwelling house at Annerley. Council argued that the subject house positively contributed to the traditional built character of the street. The appellants argued the house was not a “remarkable building worthy of retention”.⁶⁹

While the appeal was dismissed, his Honour, Quirk DCJ, remarked that the word “remarkable” did not actually appear within the Demolition Code and importantly held that:

“Nor is it, in my view, essential that a particular building should exhibit each and every one of the features identified in the Code’s explanation of ‘traditional building character’.”⁷⁰

In the recent case of (2004) *Razia Developments Pty Ltd*, which was another appeal against a refusal by the council to approve a development for building work, being the demolition of a pre-1946 house; an explanation of the term of “Traditional Building Character”, which appears in the code, was under-

taken and further expanded.⁷¹ In this instance the appellants argued that the house, while having “important features which distinguish it from the ‘austere’ post-1946 houses” and which did “possess many of the features of the inter-war house” did not have the appearance of a dwelling constructed prior to 1946.⁷²

The respondents (Council) argued that the house represented “a transitional style of Queensland house with its roots in the style of the inter-war period but features which anticipate post-war housing”.⁷³ Importantly, it was not disputed that the “street possessed traditional building character”.⁷⁴

In this instance, it was held by his Honour, Skoien J, that the definition of traditional building character within section 4 of the Demolition Code “... may be seen as a useful guide, it is only an explanation. It is not, and does not purport to be, a definition.”⁷⁵ His Honour further elaborated:

“I do not read the Code as suggesting that ‘traditional building character’ denotes some type of prototype from which only minor deviations of style are permitted. To accept that would be to accept that architects and builders of the period were devoid of flair, artistry, experimentation and individuality.”⁷⁶

Essentially these cases widen the ambit of the Demolition Code in that a character house need not satisfy all the features of traditional building character to qualify as a character house and that the type of house may not be limited to the accepted style of “timber and tin”. One further minor yet important point is that within both these cases the court refers to the dwellings more correctly as pre-1947.

The fifth, final and perhaps currently one of the most important and extensive recent changes to the ambit of the Demolition Code is the extension of the Code to cover pre-1900 buildings.⁷⁷ Essentially the only way a pre-1900 building will be able to be demolished, aside from it not being in a Demolition Control Precinct, is if an engineering report is “submitted demonstrating that the building is structurally unsound and not reasonably capable of being made structurally sound”.⁷⁸ Any argument with regard to streetscape or that the building is substantially altered where a pre-1900 building is concerned (it is presumed that its qualification is a building substantially constructed prior to 31 December 1899) is superfluous.⁷⁹

To the practitioner facing refusal on these grounds, the only options are structural unsoundness or demonstrating the building was not erected

as to whether a house was constructed prior to this date in conjunction with the BCC record keeping moving from the old Building Register entries system to building cards attached to individual properties.

65 Under the old pre-1940 scheme, the cut-off date was that a property must not be substantially constructed prior to January 1, 1940.

66 City Plan. Chapter 3 & Chapter 5 under the Demolition Code. p69. It should be noted no reference to ‘Notifiable Code’ is made within IPA. However, as the City

Plan underwent a state interest check and approval prior to its introduction, **74** *Ibid.*, p3.

creation of such a category is presumed permissible. Likely the additional opportunity for community input was an important consideration.

67 City Plan Vol.1. Chapter 2, p17.

68 *Berlese v Brisbane City Council* [2002] QPEC 073.

69 *Berlese v BCC* at 5.

70 *Ibid.*

71 *Razia Developments Pty Ltd* [2004] QPEC 059.

72 *Ibid.*, p8.

73 *Ibid.*

74 *Ibid.*, p7.

75 *Ibid.*, p7-8.

76 Under P7 of the ‘Performance Criteria and Acceptable Solutions’ Demolition Code. City Plan Vol.1. Chapter 5, p71.

77 Affective from July 1, 2005.

78 *Ibid.* But for a discussion on cases relevant to structural soundness and reasonably capable of being made structurally sound, refer to *Gould v BCC* [2000] QPE 048 and *Armstrong v BCC* [2003] QPEC 007.

79 This is in contrast with the pre-1946 character houses performance criteria and acceptable solutions, which as explained above, uses the end of the demarcation year. that is, December 31, 1946.

before 1900.⁸⁰ In each instance specialist advice is required.⁸¹ If it is the latter, then the applicant may well be faced with streetscape issues. It is likely that post-1900 elements of a building, where they can be identified, may still not be able to be demolished or altered if the additions are post-1900 but completed prior to 1947, as they may contribute to the streetscape and therefore are required to be retained.

With the December 31, 1946, cut-off date established for pre-1947 character buildings within a DCP, in most instances it is relatively easy, primarily due to existent and accurate BCC records at this time, to establish the application date and thus the likely construction date of a building.

In practice, could an argument be successfully mounted by parties that, as the intention of the code was to protect pre-1900 buildings, a structure possibly constructed after 1900 that has the appearance of a pre-1900 building, in the absence of a definitive date, should fall within the ambit of the code and thus receive the same protection? That, however, may be a decision for the courts to consider.

Prior to the introduction of the above pre-1900 performance criteria in the Demolition Code, the only power to retain pre-1900 buildings was that within the residential codes mentioned above. But this required that an application to demolish and to build was made within the same application. The alternative option was to lodge a demolition application only, thus circumventing triggering the residential design codes and the dreaded pre-1900 retention clause.⁸²

What then is the best approach regarding heritage, character listings and regulation? Firstly, a phone call to BCC Heritage Unit to discuss intended plans. Then consider all your options.*

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80 Unlike the pre-1946 character housing date, the sources existent to prove that a building was erected after 1900, depending of course upon the building, are not so readily available. In addition, there is no clear definitive style finish and start based upon this date. Many of the styles considerably overlap. In short, be prepared for in-depth research on your subject property.

81 This of course does not mean injurious affection is not an option. Refer Chapter 5 IPA or see Robertson 'Compensation lost Compensation Found: Injurious

Affection and the *Integrated Planning Act* Labyrinth'. Proctor. April 2002 pp20-21.

82 Reference should also be made to local plans in Chapter 4 of City Plan. Some of these local plans have the requirement to have a "committed program" for building work on the site. For an example refer to City Plan, Vol.1. Chapter 4 .p409 'Generally inappropriate'.