SUPREME COURT OF QUEENSLAND

CITATION:	*Brisbane City Council v Klinkert* [2019] QCA 40
PARTIES:	**BRISBANE CITY COUNCIL** (applicant) **v** **STEPHEN KLINKERT** (respondent)
FILE NO/S:	Appeal No 7886 of 2018 DC No 3458 of 2017
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave *Planning and Environment Court Act*
ORIGINATING COURT:	Planning and Environment Court – [2018] QPEC 30
DELIVERED ON:	12 March 2019
DELIVERED AT:	Brisbane
HEARING DATE:	22 November 2018
JUDGES:	Gotterson and Philippides JJA and Boddice J
ORDERS:	**1. Leave to appeal be granted.** **2. The appeal be dismissed.** **3. That the applicant pay the respondent's costs of the application for leave and the appeal, to be assessed on the standard basis.**
CATCHWORDS:	ENVIRONMENT AND PLANNING – BUILDING CONTROL – COUNCIL CONSENT AND APPROVAL – MATTERS FOR CONSIDERATION – ON APPLICATIONS FOR DEMOLITIONS – where the Council refused building work, namely the demolition of a house – where the house was an inter-war house – where the house was said to be a strong contributor to the character of the street – where the house was subject to the City Plan 2014 – where the issues turned on statutory interpretation – whether the development complied with the Demolition Code, effective on 19 May 2017 – whether, if the development complied with the May 2017 Code, s 60(2)(a) of the *Planning Act* mandated approval of that application – whether and what weight was to be given to the amended Demolition Code *Planning Act* 2016 (Qld), s 43, s 45, s 59, s 60 *Planning and Environment Court Act* 2016 (Qld), s 63
COUNSEL:	B D Job QC for the applicant D R Gore QC, with J Lyons, for the respondent

SOLICITORS: Brisbane City Council for the applicant
Broadley Rees Hogan for the respondent

[1] **GOTTERSON JA:** I agree with the orders proposed by Boddice J and his Honour's reasons for them. I would add the following brief observations.

[2] The meaning intended for s 45(7) of the *Planning Act* 2016 (Qld) is unclear. It follows a provision, s 45(6), which mandates that an assessment of an application that is carried out against a statutory instrument or other document which is applied, adopted or incorporated, must be carried out against such instrument or document as is in effect when the application was properly made.

[3] Section 45(7) operates if the statutory instrument or other document is amended or replaced before the application is decided. The section implies that when there is such an amendment or replacement, the assessment which is to precede determination of the application may be carried out having regard to the terms of the amendment or the replacing document.

[4] However, as I have noted, the immediately preceding provision, s 45(6), expressly stipulates that the assessment must be carried out against the statutory instrument or other document as in effect when the application was properly made; that is to say, the statutory instrument or other document as it is in effect prior to the amendment or replacement.

[5] Within the framework for which s 45(6) provides, it is quite unclear how the assessment manager might "give weight" to the amendment or replacement. Section 45(7) gives no guidance as to what is meant by that expression. Moreover, the provision confers a discretion to give weight but throws no light on when, or for what purpose, the discretion is intended by the legislature to be exercised.

[6] Despite this lack of clarity, it is, I think, tolerably clear from the emphatic terms in which s 45(6) is enacted, that s 45(7) is not a vehicle for displacement or modification by the assessment manager of the statutory instrument or other document as in effect when the application was properly made.

[7] **PHILIPPIDES JA:** I agree with the reasons of Boddice J and the further reasons of Gotterson JA and the orders proposed.

[8] **BODDICE J:** On 15 June 2018, the Planning and Environment Court upheld the respondent's appeal against the Brisbane City Council's refusal of a development application for approval for building work, being the demolition of a house at Archer Street, Toowong.

[9] The Council seeks leave, pursuant to s 63 of the *Planning and Environment Court Act* 2016 (Qld) to appeal that decision. At issue, is whether leave should be granted. That question turns on the proper construction of certain provisions of the *Planning Act* 2016 (Qld) (***Planning Act***), which replaced the earlier *Sustainable Planning Act* 2009 (Qld).

Background

[10] The Toowong house was constructed in 1938 in the English Revival style. In material relied upon before the primary judge, the house was described as an attractive high quality

piece of architecture, forming part of a cohesive group of five contiguous, inter-war houses. The house was said to be a strong contributor to the character of the street.

[11] The house was located on land included in the Council's Traditional Building Character Overlay, in its planning scheme, City Plan 2014. Relevantly, that plan, which came into effect on 30 June 2014, required code assessment of the development application in respect of the Toowong house. A central aspect of that code assessment process was compliance with the Traditional Building Character (Demolition) Overlay Code (***the Demolition Code***) in force as part of that plan.

[12] In September 2015, the Council resolved to amend their planning scheme, including the Demolition Code and its supporting Planning Scheme Policy (***PSP***). The council publicly notified the amendments to both the Demolition Code and the PSP between 17 October 2016 and 25 November 2016. The amendments did not however come into effect until 1 December 2017.

[13] Prior to those amendments taking effect, the respondent lodged the development application, the subject of the appeal below. That development application, lodged on 30 June 2017, was refused by the Council on 15 August 2017. On 12 September 2017, the respondent instituted an appeal against that decision.

Primary Judge's decision

[14] The respondent's appeal was conducted in accordance with an agreed list of issues. That list raised three matters. First, whether the development complied with the Demolition Code, effective on 19 May 2017. Second, in the event the development did comply with the May 2017 Code, whether section 60(2)(a) of the *Planning Act* mandated approval of that application. Third, if not, what weight (if any), was to be given to the amended Demolition Code, which took effect on 1 December 2017 and, whether the discretion conferred by s 60(2)(b) of that Act, ought to be exercised in the respondent's favour.

[15] In respect of the first issue, the primary judge noted that the case had been conducted by both parties "on the footing that compliance with any limb of PO5 (Performance Outcome 5) or AO5 (Acceptable Outcome 5) demonstrates compliance with the demolition code". The primary judge also noted that the Demolition Code directed the reader to the PSP for guidance.

[16] After considering each of those matters, in the context of other provisions, the primary judge held that whilst Performance Outcome (***PO***) 5(a) of the Demolition Code is directed to traditional building character, the protection was qualified in its application to land in the character residential zone under City Plan 2014. The Toowong house and land were not included in the character residential zone. Accordingly the house was not treated as traditional building character by that aspect of the PSP. Further, ss 2.2(3) and 2.3(4) of the PSP stated in unequivocal terms that building fabric will not comprise traditional building character where the site is not included in the character residential zone, but included in the low medium density zone, as in the case of the Toowong house. Those sections were compelling provisions in favour of a conclusion that PO5(a) and Assessment Officer (***AO***) 5(c) of the Demolition Code were satisfied.

[17] The primary judge found that a consideration of the terms of the overall outcome contained in s 8.2.21.1(2)(e) of the Demolition Code, supported a conclusion that the

policy involved a deliberate decision to exclude a specific class of building form, from the protection afforded by the application of the traditional building character overlay and the Demolition Code. As the application to demolish the house complied with PO5(a) and AO5(c) of the Demolition Code in force at the date the application was properly made, that application complied with the Code as a whole. The respondent had established the development complied with the assessment benchmarks in force at the date the application was properly made.

[18] As to the second issue, the primary judge found that as the development complied with the assessment benchmarks in force at the time the application was properly made, s 60(2)(a) of the *Planning Act* was engaged, with the consequence that the application must be approved. In so holding, the primary judge rejected a submission by the Council that the decision making process involved the assessment manager carrying out an assessment of the development application against the amended City Plan 2014 and the amended Demolition Code. Section 60(2)(a) did not require an assessment to be carried out for compliance of the development application in respect of amended or replaced assessment benchmarks.

[19] In respect of the third issue, the primary judge noted that the respondent's alternate case involved a submission that in the event s 60(2)(a) of the *Planning Act* was not engaged, the court would exercise its discretion under s 60(2)(b) to approve the application. Whilst it was strictly unnecessary to decide this point, the primary judge found that if s 60(2)(a) of the *Planning Act* was not engaged, the discretion conferred by s 60(2)(b) should not be exercised in the respondent's favour for the following reasons.

[20] Whilst the fact the respondent had demonstrated compliance with the assessment benchmarks in force at the date the development application was properly made was a powerful discretionary consideration in his favour, that was only one of a number of competing considerations in determining the weight to be given to the amendments to City Plan 2014 and the PSP. Those amendments represented deliberate contemporary planning consistent with a long held planning strategy of the Council involving the retention of traditional building character and traditional character in Brisbane. Those amendments should be given determinative weight.

[21] Having regard to a number of factors, including that the demolition of the dwelling house would represent a substantial loss of traditional building character and the amendments had been publicly advertised and were the product of a deliberate planning decision, approval of the application would be contrary to a deliberate planning policy. Further, refusal of the application would not represent the end. The respondent had a right to make a request for a superseded planning scheme to apply to the proposed development. Finally, the nature of the development, was not such that conditions of approval could be imposed to achieve compliance with City Plan 2014 in its amended form.

Applicant's submissions

[22] The applicant submits leave to appeal ought to be granted as the primary judge erred in law and the appeal involves important questions relating to the proper construction of the *Planning Act* regarding code assessable development applications. That issue is of importance, not only to the parties. It has important implications for development proponents and assessment managers more generally.

[23] The applicant submits a proper interpretation of s 60(2)(a) of that Act supports a conclusion that the assessment benchmarks include both the assessment benchmarks

in the original code and, if the decision maker decides it is appropriate to attribute weight to the amended code, the assessment benchmarks in the amended code. The primary judge erred in finding there was no requirement for the decision maker to have made any findings about weight, if any, that may be given to the amended code, and that the weight to be given to the amended code was irrelevant to the decision maker's enquiry when determining whether s 60(2)(a) of the Act was engaged. That conclusion was contrary to the effect of ss 45 and 59 and removed the discretion afforded by s 45(7) of the Act.

[24] Further, the interpretation applied by the primary judge was contrary to the contemporary approach to the interpretation of legislation, and a consideration of all of the provisions of the Act. The primary judge's approach means that for code assessment, a decision maker could not exercise the discretion to give weight to amendments to a planning scheme or any other statutory instrument unless there was some noncompliance with the relevant instruments in force at the time the application was properly made. There is no clear indication of such an intent in the legislation and planning schemes are intended to regulate development in the public interest.

Respondent's submissions

[25] The respondent submits that the primary judge's interpretation of s 60(2)(a) was correct and consistent with contemporary principles of statutory interpretation. Section 60(2)(a) is expressed in mandatory terms and determinative weight must be given to its language. The Council's position incorrectly assumes that s 60(2)(a) of the Act is not engaged until an assessment manager has first carried out an assessment against the assessment benchmarks for the development in force at the time the application was properly made, and determined the weight that is to be given to any amendments made to the assessment benchmarks prior to deciding the application.

[26] That construction deprives s 60(2)(a) of its prima facie ordinary meaning. It also leads to wide and distorted approaches to the language in other sections of the Act. The consequence of such an interpretation is that an assessment manager would be required to form an opinion about an issue of weight, depriving the true effect of a mandated approval by force of s 60(2)(a) of the Act. Such a conclusion would lead to inconvenience, injustice and absurdity.

[27] Finally, the respondent submits that the construction placed on the section by the primary judge was supported by public interest considerations. There was no error on the part of the primary judge. Leave to appeal should be refused.

Legislative Scheme

[28] It is not in dispute between the parties that the respondent's application involved development that required Code assessment. There were a number of provisions of the Act relevant to such as assessment, namely ss 43, 45, 59 and 60. It is useful to set out those sections.

> "**43 Categorising instruments**
>
> (1) A ***categorising instrument*** is a regulation or local categorising instrument that does any or all of the following—
>
> (a) categorises development as prohibited, assessable or accepted development;

(b) specifies the categories of assessment required for different types of assessable development;

(c) sets out the matters (the ***assessment benchmarks***) that an assessment manager must assess assessable development against.

(2) An assessment benchmark does not include—

(a) a matter of a person's opinion; or

(b) a person's circumstances, financial or otherwise; or

(c) for code assessment—a strategic outcome under section 16(1)(a); or

(d) a matter prescribed by regulation.

Examples of assessment benchmarks—

a code, a standard, or an expression of the intent for a zone or precinct

(3) A ***local categorising instrument*** is—

(a) a planning scheme; or

(b) a TLPI; or

(c) a variation approval, to the extent the variation approval does any of the things mentioned in subsection (1) .

(4) A regulation made under subsection (1) applies instead of a local categorising instrument, to the extent of any inconsistency.

(5) A local categorising instrument —

(a) may state that development is prohibited development only if a regulation allows the local categorising instrument to do so; and

(b) may not state that development is assessable development if a regulation prohibits the local categorising instrument from doing so; and

(c) may not, in its effect, be inconsistent with the effect of a specified assessment benchmark, or a specified part of an assessment benchmark, identified in a regulation made for this paragraph.

Note—

Assessment benchmarks are given effect through the rules for assessing and deciding development applications under section 45, 59 or 60.

(6) To the extent a local categorising instrument does not comply with subsection (5), the instrument has no effect.

(7) A variation approval may do something mentioned in subsection (1) only in relation to—

(a) development that is the subject of the variation approval; or

(b) development that is the natural and ordinary consequence of the development that is the subject of the variation approval.

(8) Subsections (4) and (6) apply no matter when the regulation and local categorising instrument commenced in relation to each other.

45 Categories of assessment

(1) There are 2 categories of assessment for assessable development, namely code and impact assessment.

(2) A categorising instrument states the category of assessment that must be carried out for the development.

(3) A ***code assessment*** is an assessment that must be carried out only—

(a) against the assessment benchmarks in a categorising instrument for the development; and

(b) having regard to any matters prescribed by regulation for this paragraph.

(4) When carrying out code assessment, section 5(1) does not apply to the assessment manager.

(5) An ***impact assessment*** is an assessment that—

(a) must be carried out—

(i) against the assessment benchmarks in a categorising instrument for the development; and

(ii) having regard to any matters prescribed by regulation for this subparagraph; and

(b) may be carried out against, or having regard to, any other relevant matter, other than a person's personal circumstances, financial or otherwise.

Examples of another relevant matter—

- a planning need
- the current relevance of the assessment benchmarks in the light of changed circumstances
- whether assessment benchmarks or other prescribed matters were based on material errors

Note:

See section 277 for the matters the chief executive must have regard to when the chief executive,

acting as an assessment manager, carries out a code assessment or impact assessment in relation to a State heritage place.

(6) An assessment carried out against a statutory instrument, or another document applied, adopted or incorporated (with or without changes) in a statutory instrument, must be carried out against the statutory instrument or document as in effect when the application was properly made.

(7) However, if the statutory instrument or other document is amended or replaced before the assessment manager decides the application, the assessment manager may give the weight that the assessment manager considers is appropriate, in the circumstances, to the amendment or replacement.

59 What this division is about

(1) This division is about deciding properly made development applications, including variation requests.

(2) An assessment manager must follow the development assessment process for the application even if a referral agency's response directs the assessment manager to refuse the application.

(3) Subject to section 62, the assessment manager's decision must be based on the assessment of the development carried out by the assessment manager.

60 Deciding development applications

(1) This section applies to a properly made development application, other than a part of a development application that is a variation request.

(2) To the extent the application involves development that requires code assessment, and subject to section 62, the assessment manager, after carrying out the assessment—

(a) must decide to approve the application to the extent the development complies with all of the assessment benchmarks for the development; and

(b) may decide to approve the application even if the development does not comply with some of the assessment benchmarks; and

Examples—

1 An assessment manager may approve an application for development that does not comply with some of the benchmarks if the decision resolves a conflict between the benchmarks.

2 An assessment manager may approve an application for development that does not comply with some of the benchmarks if the decision

resolves a conflict between the benchmarks and a referral agency's response.

(c) may impose development conditions on an approval; and

(d) may, to the extent the development does not comply with some or all the assessment benchmarks, decide to refuse the application only if compliance can not be achieved by imposing development conditions.

Example of a development condition for paragraph (d)—

a development condition that affects the way the development is carried out, or the management of uses or works that are the natural and ordinary consequence of the development, but does not have the effect of changing the type of development applied for

(3) To the extent the application involves development that requires impact assessment, and subject to section 62, the assessment manager, after carrying out the assessment, must decide—

(a) to approve all or part of the application; or

(b) to approve all or part of the application, but impose development conditions on the approval; or

(c) to refuse the application.

(4) The assessment manager must approve any part of the application for which, were that part of the application the subject of a separate development application, there would be a different assessment manager—

(a) other than to the extent a referral agency for the development application directs the refusal of the part under section 56(1)(c); and

(b) subject to any requirements of the referral agency under 56(1)(b).

(5) The assessment manager may give a preliminary approval for all or part of the development application, even though the development application sought a development permit.

(6) If an assessment manager approves only part of a development application, the rest is taken to be refused."

[29] Further, the appeal below was conducted by the parties on the footing that compliance with any limb of PO 5 or AO 5, would demonstrate compliance with the Demolition Code. Relevantly, s 8.2.21.2(2) of the City Plan 2014 provided that the purpose of the Code would be achieved through the following overall outcome:

"(a) Development protects residential buildings constructed in 1946 or earlier that give the areas in the Traditional building character overlay, their traditional character and traditional building character…

(d) Development protects a building constructed in 1946 or earlier where it forms an important part of a streetscape established in 1946 or earlier…

(h) Development ensures that, in conjunction with the Traditional building character (design) overlay code, precincts of residential buildings constructed in 1946 or earlier are retained and redevelopment in those precincts complements the traditional building character of buildings constructed in 1946 or earlier."

[30] Guidance in respect of the Demolition Code was also given by the PSP[1] where a performance outcome or acceptable outcome related to one of two matters, namely traditional character or traditional building character. They are different concepts. That distinction is maintained throughout the Demolition Code.

Discussion

[31] Section 60 of the *Planning Act* imposes obligations on an assessment manager in respect of properly made development applications. By those obligations, the assessment manager "must decide" to approve the application, to the extent the development complies with all of the assessment benchmarks for the development, and "may decide" to approve the application even if the development does not comply with some of the assessment benchmarks.

[32] The clear intent of s 60 is that there be no discretion in the assessment manager's decision in respect of developments that comply with all of the assessment benchmarks. However, that obligation only arises on the assessment manager, "after carrying out the assessment". Section 45 of the Act specifies two categories of assessment for assessable development, code and impact assessment. Relevantly, a code assessment must be carried out only against the assessment benchmarks in a categorising instrument for the development and having regard to any matter prescribed by regulation for this paragraph.

[33] The process of the assessment is the subject of specific provisions in Chapter 3, Part 1 of the Act. Pursuant to those provisions, a categorising instrument is a regulation or local categorising instrument that sets out the assessment benchmarks that an assessment manager must assess assessable development against.[2] A local categorising instrument, is, amongst other things, a planning scheme. Significantly, a local characterising instrument may not, in its effect, be inconsistent with the effect of a specified assessment benchmark.[3]

[34] There are further relevant provisions when an assessment is carried out against a statutory instrument, or an applied, adopted or incorporated document in a statutory instrument. That assessment must, pursuant to s 45, be carried out against a statutory instrument or document as in effect when the application was properly made,[4] subject to the qualification in subsection 7, that if the statutory instrument or other document is amended or replaced before the assessment manager decides the application, "the assessment manager may give the weight that the assessment manager considers is appropriate in the circumstances to the amendment or replacement."

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1 Traditional Building Character (Demolition) Overlay Code s 8.2.21.1(3).
2 *Planning Act* 2016 (Qld) s 43(1)(c).
3 *Planning Act* 2016 (Qld) s 43(5)(c).
4 *Planning Act* 2016 (Qld) s 45(6).

[35] A proper interpretation of s 60(2)(a) of the *Planning Act*, having regard to the contents of the Act as a whole, is that s 60(2)(a) requires the assessment manager to approve a development application that complies with the assessment benchmarks in the Code in force at the time the application was properly made. The primary judge was correct in rejecting the applicant's submission below that, for s 60(2)(a) to operate, there was required to be an assessment of the properly made application carried out for compliance with both the original assessment benchmarks and the amended assessment benchmarks.

[36] The assessment manager determines whether the assessment benchmarks in the original Code have been met, after giving weight to the contents of the amended Code, if the assessment manager determines to give weight to that amended Code. The giving of weight, if appropriate, does not mean s 60(2)(a) requires that an assessment manager must decide to approve the development application only if it complies with the assessment benchmarks in both the original Code and the amended Code. In carrying out a code assessment of a properly made application, the assessment manager may not replace the assessment benchmarks in the original Code with those in the amended Code.

[37] This conclusion is consistent with the contents of s 45(3) of the Act. That section confirms that a code assessment is to be undertaken only against assessment benchmarks. The reference in s 43(2) of the Act to a matter of personal opinion not being an assessment benchmark is also consistent with this conclusion. The code assessment is being undertaken having regard to whether the relevant assessment benchmarks are met by the proposed development. The paramountcy of those assessment benchmarks is confirmed by s 43(5). It provides that a local categorising instrument may not in its effect be inconsistent with the effect of a specified assessment benchmark.

[38] The respondent's submission that s 45(7) is only intended to play a role with impact assessment, is not supported by a consideration of s 45 as a whole. There is no basis to conclude that ss 45(6) and (7) are intended only to apply to an impact assessment, but not to a code assessment. Neither s 45(3), nor s 45(5) refer to assessments carried out against a statutory instrument or other document. An interpretation of s 45 as a whole supports the conclusion that subsections 45(6) and (7) relate to assessments of assessable developments, be they code or impact assessment.

[39] Contrary to the respondent's submissions, there is no inconvenience, injustice or absurdity in an interpretation of s 60(2)(a) which gives appropriate force to the contents of s 45(7) of the Act. Whilst the assessment manager is entitled to give weight to an amendment or replacement, if considered appropriate, any weight given is in the context of a statutory requirement for the assessment manager to carry out the assessment only against the assessment benchmarks that are in effect when the application was properly made. Further, to the extent that an amendment is given weight, that weight must be afforded, having regard to the prohibition on a local characterising instrument, in its effect being, inconsistent with the effect of a specified assessment benchmark.[5]

[40] This construction also gives due weight to public interest considerations. It is in the public interest that an assessment manager have the ability to give weight to such amendments, if considered appropriate, whilst ensuring that properly made applications are ultimately assessed in accordance with the assessment benchmarks in operation at the time of the properly made application.

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5 *Planning Act* 2016 (Qld) s 43(5)(c).

Conclusions

[41] The primary judge correctly concluded that s 60(2)(a) of the *Planning Act* required the respondent's application to be approved by the assessment manager once it was determined there was compliance with the relevant assessment benchmarks in operation at the time of the application.

[42] Having regard to this conclusion, it is unnecessary to consider the remaining grounds of appeal.

[43] I would order:

1. Leave to appeal be granted.
2. The appeal be dismissed.
3. That the applicant pay the respondent's costs of the application for leave and the appeal, to be assessed on the standard basis.