

Between:	<b>JOHN EDWARD MYTTON BARNES and GEOFFREY FREDERICK COOK</b>	Appellants
And	<b>SOUTHERN DOWNS REGIONAL COUNCIL</b>	Respondent
And	<b>THE CHIEF EXECUTIVE, DEPARTMENT OF ENVIRONMENT AND RESOURCE MANAGEMENT</b>	First Co-respondent
And	<b>McCONAGHY GROUP PTY LTD ACN 108 353 199</b>	Second Co-respondent

## SECOND CO-RESPONDENT'S WRITTEN SUBMISSIONS

### BACKGROUND

1. On or about 14 September 2007, the Second Co-respondent, McConaghy Group Pty Ltd (**McConaghy**) lodged a development application with the Second Co-respondent, Southern Downs Regional Council (**the Council**) in which it sought a preliminary approval for the demolition of 82 Fitzroy Street, Warwick and the partial demolition of 84 Fitzroy Street, Warwick (**the Development Application**)<sup>1</sup>. On 26 November 2009, the Council issued a Decision Notice that approved the development, albeit with a number of conditions<sup>2</sup>. Some conditions contained in the Decision Notice were required by the First Co-respondent, the Department of Environment and Resource Management (**DERM**) and some were imposed at Council's instigation. The conditions imposed by DERM meant that McConaghy was prohibited from demolishing either 82 Fitzroy Street or part of 84 Fitzroy Street before carrying out "*conservation works*" to the majority of 84 Fitzroy Street<sup>3</sup>. The extent of such works was to ultimately be determined by DERM in consultation with a qualified heritage architect, engaged by McConaghy.
2. Both 82 Fitzroy Street and 84 Fitzroy Street are listed on the Queensland heritage register, which is administered by DERM in accordance with the *Queensland Heritage Act 1992* (**the Queensland Heritage Act**). However, only 84 Fitzroy Street is listed on the local heritage register. It is common ground that the effect of that is:

<sup>1</sup> Ex-1; Appeal Book, Volume 1; page 31

<sup>2</sup> Ex-1; Appeal Book, Volume 1; page 256-266

- a. that Council is the Assessment Manager with respect to the Development Application<sup>4</sup>;
  - b. DERM is a Concurrence Agency with respect to the Development Application<sup>5</sup>;  
and
  - c. the proposed development as far as it relates to 82 Fitzroy Street is code assessable.<sup>6</sup>
3. As far as the development relates to 82 Fitzroy Street, it has been determined by his Honour Judge Rackemann that the submitter appeal is limited to the development as far it relates to 84 Fitzroy Street<sup>7</sup>. His Honour found that there was no “*inextricable link*” between the properties and accordingly the Council’s decision to approve the demolition of 82 Fitzroy Street is not part of this merits appeal. In that decision his Honour Judge Rackemann also dealt with the issue of whether a proposed extension of the adjoining shopping centre was a relevant consideration in determining whether the Development Application should be approved. It is accepted that some of the material that was provided as part of the Development Application did refer to the prospect of the shopping centre being expanded. Relevantly, when his Honour determined the point, there was no application on foot with respect to the shopping centre, nor is there one now. His Honour found that any proposed extension of the shopping centre was of no relevance to this matter<sup>8</sup>. During the course of the trial, your Honour suggested that any attempt to give any weight to the shopping centre extension would be prevented in light of the Court of Appeal decision of *BCC v Cunningham & Anor; Eastern Suburbs Leagues Club Ltd v Cunningham & Anor*<sup>9</sup>. It is respectfully submitted that your Honour is correct and that any future development of the shopping centre is of no consequence to this appeal.

#### **IMPACT OR CODE ASSESSABLE**

4. Whilst preparing for trial the parties proceeded on the basis that the development so far as it related to 84 Fitzroy Street was impact assessable. The expert evidence has revealed that that approach may be incorrect. Of course, whether 84 Fitzroy Street is impact assessable or code assessable is a matter for the Court.

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<sup>3</sup> Ex-1; Appeal Book, Volume 1; page 261

<sup>4</sup> IPA; s 3.1.7(1) and Sch 8A, Table 1, Item 1

<sup>5</sup> *Integrated Planning Regulation 1998* (IPR); Sch 2, Table 1, Item 11

<sup>6</sup> IPR; Sch 1; part 3; Table 5; Item 3.

<sup>7</sup> See Exhibit 1; Appeal Book – Volume 2; page 10 (*Barnes & Anor v Southern Downs Regional Council & Ors* [2010] QPEC 111)

<sup>8</sup> Ex-1; Appeal Book, Volume 2; page 16; para [27] (*Barnes & Anor v Southern Downs Regional Council & Ors* [2010] QPEC 111)

5. Assessable development can be either code assessable or impact assessable. A regulation, a planning scheme or a temporary local planning instrument may require impact or code assessment, or both impact and code assessment, for assessable development.<sup>10</sup> In this case the relevant instruments are the “*Warwick Shire Planning Scheme*”<sup>11</sup> (**the Planning Scheme**) and the “*Planning Scheme Policy No.1 Cultural Heritage*” (**the Cultural Heritage Policy**). The Cultural Heritage Policy provides at s 1.3(i):

*Places in the Shire of identified cultural heritage significance are listed in the Register of Cultural Heritage Places appended to this policy. Development which would involve the demolition or removal or external building work to listed buildings will require impact assessment and applicants will be requested to prepare a conservation report. Council will also have regard to the impact of development proposed for nearby sites on the heritage and landscape values of these places.*

6. Prima facie, s 1.3(i) of the Cultural Heritage Policy suggests that any development involving “*demolition or removal or external building work*” at 84 Fitzroy Street would require impact assessment. Notably, “*external building work*” is defined in s 1.51 of the Planning Scheme as:

*Means any building work related to the exterior portion of a building, other than development that is made exempt or self assessable under the Standard Building Regulations. The term does not include repair or maintenance work.”*

It is common ground between the parties that the removal of the rear-service wing would constitute “*building work*”<sup>12</sup>. It is submitted that in this case the development so far as it relates to the rear-service wing is “*external building work*”. Support for that submission is found in s 5.3.3.1(a) and (b) as well as the similar provisions, s 4.2.4.1 (c) and (d). When one reviews those sections it becomes apparent that the provisions that deal with “*demolition or removal of buildings*” (ie. ss 5.3.3.1(a) and 4.2.4.1(c)), envisage the circumstance where there is a total demolition or removal of a building, not just part of a building. Notably, two of the town planning experts, Mr Gill and Ms Doherty agreed that the proposed development, so far as it related to the removal of the rear-service wing constituted “*external building work*”<sup>13</sup>. The Appellants’ town planning expert, Associate Professor Searle was of the view that the removal of the rear-service wing did not

<sup>9</sup> [2001] QCA 294

<sup>10</sup> IPA; s3.1.3(1)

<sup>11</sup> Adopted by Warwick Shire Council on 9 December 1999

<sup>12</sup> s 1.5.1 of the Planning Scheme; Definition of “*Building Work*”

<sup>13</sup> Ex-5 (Report of Doherty); para 5.4.2 and Transcript; 29/07/11; page 3-10

constitute “*external building work*” because it involved both external and internal works<sup>14</sup>. If Associate Professor Searle is correct, then to the extent that internal works are proposed to the rear-service wing, that part of the development would appear to fall under the criteria for “*self assessable development*” contained in the “*Table of Development – Building Work*” at paragraph 5.3.2.

7. Section 5 of the Planning Scheme contains provisions that deal with development other than a material change of use. Section 5.3 of the Planning Scheme<sup>15</sup> sets out matters that specifically relate to “*Carrying out Building Work*”. Section 5.3.2 contains a “*Table of Development – Building Work*”, which provides that the following type of development requires code assessment:

“● *External building work on buildings listed in Planning Scheme Policy No. 1 which:*

- *does not extend the height of the building; and*
- *does not extend the useable floor area of the building; and*
- *does not have a deleterious effect on the design integrity of the building; and*
- *does not introduce design elements unsympathetic to the architectural style of the building”*

8. In contrast, any development that falls under the following description requires impact assessment:

“● *Removal, demolition or external building work, other than in circumstances identified in the Code Assessable category, on buildings listed in Planning Scheme Policy No. 1”*

9. If the Court finds that removal of the rear-service wing is “*external building work*” then it will need to determine whether the development is code assessable or impact assessable by reference to the “*Table of Development – Building Work*”. Assuming it is external building work under the Planning Scheme, then it can only be described as impact assessable if it fails to comply with any of the four limbs contained in the part of the Table of Development that addresses code assessable development (referred to in paragraph 7 herein). It is obvious that the proposed development will not extend the height of the building, nor will it extend the useable floor area of the building. Mr Gill gave evidence that in his opinion the removal of the rear-service wing would not have a deleterious effect

<sup>14</sup> Transcript; 29/07/2011; page 3-86; line 1-2  
<sup>15</sup> Ex-1; Appeal Book, Volume 2; page 163

on the design integrity of the building<sup>16</sup>. Mr Gill also was of the view that the removal would not introduce design elements that were unsympathetic to the architectural style of the building.<sup>17</sup> Indeed, Mr Scott in giving oral evidence accepted that if the removal of the rear-service wing was external building work, then its removal would not trigger at least 3 of the 4 limbs referred to in paragraph 7 herein. However, he was of the view that there would be deleterious effect on the design integrity of the building. With respect, it is difficult to accept that view given the current state of the rear-service wing. The first thing to note is that the “*design*” integrity of the building should be assessed as it is now. That is to say, a potential design integrity is of no consequence. Then one should consider what is meant by the term “*design integrity*”. It is not a term that is defined in the Planning Scheme and therefore should be given its ordinary meaning. “*Integrity*” is defined as meaning “*the condition of having no part or element taken away or lacking; undivided state; completeness*”.<sup>18</sup> It is the word “*design*” which qualifies the integrity. “*Design*” is relevantly defined as “*the action of or art of planning and creating in accordance with appropriate functional or aesthetic criteria*”. It is common ground that the rear-service wing lacks in aesthetic characteristics. Accordingly, it is submitted, that in the context of this case the current function of the rear-service wing is what the Court should focus on. Simply put, the test can be described as being “*will the removal of the rear-service wing cause harm or damage to the function of 84 Fitzroy Street as a whole?*”. When cross-examined by Dr McGrath, Mr Gill gave oral evidence in which he said that if the rear-service wing was to be used in the future, then it would need to undergo substantial work both from a planning and building standards perspective. In terms of town planning expertise, that evidence remains unchallenged given the unreliable nature of Associate Professor Searle’s evidence. McConaghy contends that the rear-service wing, in its current form does not contribute in any measurable way to the design integrity of the building as a whole. Whilst Mr Gill’s view cannot bind this Court, it is submitted that his view should be given some consideration in assessing whether the development is code assessable or not. Associate Professor Searle was not in a position to comment on this given that he could not recall whether he had been provided with a copy of the Development Application<sup>19</sup>, nor had he visited the site.

10. If the Court finds that the proposed removal of the rear-service wing is “*external building work*” of the type referred to in the “*development requiring code assessment*” criteria,

<sup>16</sup> Transcript; 29/07/2011; page 3-11.  
<sup>17</sup> Transcript; 29/07/2011; page 3-15  
<sup>18</sup> Shorter Oxford English Dictionary  
<sup>19</sup> Transcript (29/07/2011); page 3-75

then the effect is that the Appellants have no right of appeal<sup>20</sup> and the appeal must be dismissed.

### THE APPEAL

11. If the removal of the rear service wing is development that is impact assessable, then the appeal must be determined on the merits. In which case, the onus is on McConaghy to establish that the Appellants' appeal should be dismissed<sup>21</sup>.
12. The Appellants contend that the development should not have been approved on the grounds that the Development Application in proposing to demolish the rear of 84 Fitzroy Street<sup>22</sup>:
  - (b) conflicts with the laws and policies administered by DERM as a concurrence agency; and
  - (c) conflicts with the planning scheme and there are not sufficient grounds to justify the decision despite the conflict.
13. The Appellant's two grounds of appeal are addressed in more detail below. However, it is worth noting that the Appellants' case is essentially based on the following allegations which are framed as particulars in the "*Ground of Appeal and Further and Better Particulars*":
  - a. The rear of section of 84 Fitzroy Street is noted in the heritage listing and forms part of the overall listing for the property;
  - b. The rear section of 84 Fitzroy Street is an early addition to the building dating from prior to 1899 and possibly prior to 1882;
  - c. The rear section of 84 Fitzroy Street provided service areas that were necessary to the service and function of the whole building and, therefore, contributes to the historic values of the whole building;
  - d. The rear section of 84 Fitzroy Street is visible from Fitzroy Street and Haig Avenue and contributes to the streetscape character and associated heritage values of the whole of the building;
  - e. The rear section of 84 Fitzroy Street is structurally sound and in reasonably good condition;

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<sup>20</sup> Section 4.1.28 of IPA restricts submitter appeals to development which is impact assessable

<sup>21</sup> IPA; s 4.1.50

<sup>22</sup> Ex-1; Appeal Book, Volume 2; page 1 ("*Amended Grounds of Appeal and Further and Better Particulars*" dated 11 April 2011; paragraph 3 and 4)

- f. An underground water tank, which is likely to be representative of very early 19<sup>th</sup> century brick making and brickwork construction in Warwick, is located near the rear section of 84 Fitzroy Street and may be damaged if the rear section is demolished;
- g. The underground water tank near the rear section of 84 Fitzroy Street is noted in the heritage listing and forms part of the overall listing for the property;
- h. The prudent and feasible alternative to demolishing the rear section of 84 Fitzroy Street is not to demolish it.

### **FIRST GROUND OF APPEAL**

14. DERM's referral jurisdiction as a concurrence agency for the purposes of the Development Application is "*the purposes of the Queensland Heritage Act 1992*". Section 2(1) of the Queensland Heritage Act states the object of the Act as being to "*to provide for the conservation of Queensland's cultural heritage for the benefit of the community and future generations*". Section 68 of the Queensland Heritage Act provides further guidance as to how the object or purpose is to be achieved and states:

#### ***68 Assessing development applications under the Planning Act—State heritage places***

*(1) If, under the Planning Act, the chief executive is the assessment manager or a referral agency for a development application for development on a State heritage place, the chief executive must assess the application against the object of this Act.*

*(2) If the chief executive is satisfied the effect of approving the development would be to destroy or substantially reduce the cultural heritage significance of a State heritage place, the chief executive must, unless satisfied there is no prudent and feasible alternative to carrying out the development—*

*(a) if the chief executive is the assessment manager for the application—refuse the application; or*

*(b) if the chief executive is a concurrence agency for the application—tell the assessment manager to refuse the application.*

*(3) In considering whether there is no prudent and feasible alternative to carrying out the development, the chief executive must have regard to—*

*(a) safety, health and economic considerations; and*

*(b) any other matters the chief executive considers relevant.*

15. The effect of s 68 of the *Queensland Heritage Act* is that DERM must tell the Council to refuse the Development Application, if it is satisfied of the following:

- a. the “*the effect of approving the development would be to destroy or substantially reduce the cultural heritage significance*” of 84 Fitzroy Street;
- b. there is “*no prudent and feasible alternative*” to carrying out the development.

16. Cultural Heritage Significance is defined as “*of a place or feature of a place, means its aesthetic, architectural, historical, scientific, social, or other significance, to the present generation or past or future generations.*”<sup>23</sup>
17. In considering the test under s 68 of the Queensland Heritage Act, all of the Heritage Experts agreed that the cultural heritage significance of 84 Fitzroy Street would not be destroyed if the development were to proceed<sup>24</sup>. However, there was some disagreement as to whether the development would substantially reduce the cultural heritage significance of 84 Fitzroy Street. It was common ground between Mr Davies and Mr Ross-Watt that the removal of 84 Fitzroy Street would not substantially reduce the cultural heritage significance of 84 Fitzroy Street<sup>25</sup>. The Appellants’ Heritage Expert, Mr Scott disagreed with that view and also said that there was a prudent and feasible alternative to demolishing the rear service wing, that being, not to demolish the wing.
18. In considering whether the “*cultural heritage significance*” would be substantially reduced, it is appropriate to consider the context of the Queensland Heritage Act and how it operates. Section 35(1)<sup>26</sup> outlines the circumstances in which a place may be entered into the Queensland Heritage Register. In this case, 84 Fitzroy Street satisfied a number of the criteria referred to in that section. Specific details as to why 84 Fitzroy Street was listed in the register are stated in the Queensland Heritage Register citation dated 14 April 2008<sup>27</sup>.
19. It is submitted that when assessing whether a proposed development “*substantially reduce(s)*” the cultural heritage significance of the place, regard should be had to reasons that caused the place to be listed on the State heritage register originally. Support for that submission is found in the words of his Honour Judge Skoien who stated in *Sinnamon v Miriam Vale Shire Council & Anor*<sup>28</sup> at [32] (albeit in the context of trees):
 

*In looking at the heritage issues, it must be borne in mind that nowhere, including in the heritage listing, is it said that each and every tree on the site has heritage significance. Rather, the site is simply part of a larger area with cultural heritage*

<sup>23</sup> Queensland Heritage Act 1992; Sch

<sup>24</sup> Ex-1; Appeal Book Vol 3 (Joint Report of Heritage Experts (Supplementary Report)); page 52

<sup>25</sup> Ex-3 (Report of Davies); para 7 and Ex-6 (Report of Ross-Watt); page

<sup>26</sup> The section was numbered s 34(1) as at the date of the QHR citation

<sup>27</sup> Ex-1; Appeal Book Vol 1 – page 167

<sup>28</sup> [2002] QPEC 051



*significance. Part of the character of that wider area is low-key development which is seen in and around the vegetated environment. Indeed part of the heritage listing acknowledges the importance of the Town of 1770 as demonstrating a holiday or fishing village. It is difficult to see how the development of a relatively small scale motel which will be very substantially screened from view (see paras [39]-[41]) will adversely affect the cultural heritage significance of the Town of 1770.*

20. If the proposed development does not change or alter the matters that are detailed in the Queensland Heritage Register citation, then it follows that the cultural heritage significance will not be touched, let alone substantially reduced.
21. Mr Davies was of the opinion that 84 Fitzroy Street gained entry into the Queensland Heritage Register by virtue of the principal sandstone part of the building. He also addressed each of the criteria referred to in s 35(1) of the Queensland Heritage Act to ascertain whether the rear-service wing would lead to a listing on the state register. Mr Davies was of the firm view that it would not<sup>29</sup>. Mr Ross-Watt also gave evidence that specifically addressed the criteria that triggered 84 Fitzroy Street's state heritage status. Under cross-examination Mr Ross-Watt was taken to each of the relevant criterion and asked whether the matters described under each criterion would change if the development was to proceed. He was of the view that they would not<sup>30</sup>. Mr Ross-Watt was also of the opinion that the cultural heritage significance of 84 Fitzroy Street would not be reduced<sup>31</sup>.
22. Mr Scott's report identified the importance of the criterion that was contained in the Queensland Heritage Register citation, by restating the criterion as far as it relates to 84 Fitzroy Street.<sup>32</sup> In cross examination, he accepted that the criterion makes no specific mention of the rear-service wing. He conceded that the conjectural drawings that formed part of his report were based on many assumptions, on the basis that the evidence was unclear. Relevantly, Mr Scott also conceded that it is entirely possible that walls of the rear-service wing are not those which existed in 1899.
23. All of the heritage experts agreed that there was no evidence to indicate that an underground water tank exists on the site. Mr Scott stated in his report that he has only ever come across 4 such tanks in his career. The likelihood that one exists here seems low. However, even if one does exist, it is of no consequence to whether the demolition of a small rear-service wing should proceed. Mr Davies in his report highlights the fact that if

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<sup>29</sup> Ex-3 (Report of Davies); para 24

<sup>30</sup> See Transcript (28/07/2011); pages 2-78 to 2-79

<sup>31</sup> See Transcript (28/07/2011); pages 2-80; line 47

<sup>32</sup> Ex-8 (Report of Scott); para 2.01

an underground tank was to be discovered in the course of demolishing the rear-service wing, McConaghy will have to abide by certain provisions of the Queensland Heritage Act that relate to archaeological artefacts<sup>33</sup>. To suggest that development should be hindered on the basis of the hypothetical existence of an underground water tank makes no sense, especially when there are ample statutory provisions to address any concern relating to the tank (which may not exist).

24. If the Court finds that the removal of the rear-service wing would substantially reduce the cultural heritage significance of 84 Fitzroy Street, then it must also consider whether there is a prudent and feasible alternative in order to reject the Development Application pursuant to s 68 of the Queensland Heritage Act. Mr Scott suggests that the prudent and feasible alternative is to not demolish the rear-service wing<sup>34</sup>. That seems incongruous with the purposes of the Queensland Heritage Act. Mr Davies was of the view that if the Court was to find that the removal of the rear-service wing did substantially reduce the “*cultural heritage significance*” of 84 Fitzroy Street (something that he says he would not do), the prudent and feasible alternative to its removal would be to refurbish it in a proper and meaningful way so as to fairly represent the cultural heritage significance that it is said to have. However, Mr Davies<sup>35</sup> points out the practical problem that arises by virtue of fact that the rear-service wing simply cannot be refurbished to any known and relevant historical point in time. Further, it was agreed by all heritage experts that it is not an option to remove the concrete render, even though on the Appellants’ view the brick underneath is the only original fabric to speak of. All of that tends to support Mr Davies’ opinion,<sup>36</sup> that to the extent that the rear-service wing can tell part of the story for 84 Fitzroy Street, given the amount of change that has occurred, the “*story*” can just as easily be told through interpretation through the use of photographic, historical sources and perhaps other extrinsic material.
25. It is submitted that the opinion of Mr Davies and Mr Ross-Watt should generally be preferred over that of Mr Scott. They both were of the view that:
- a. the rear service wing in its current state does not resemble the wing as it may have existed in 1889 or 1929<sup>37</sup>;

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<sup>33</sup> Ex-3 (Report of Davies); para 35

<sup>34</sup> Ex-1; Appeal Book Vol 3 (Joint Report of Heritage Experts (Supplementary Report)); page 52

<sup>35</sup> Ex-3 (Report of Davies); para 38.

<sup>36</sup> Ex-3 (Report of Davies); para 40.

<sup>37</sup> Ex-3 (Report of Davies); para 18-19 and Ex-6 (Report of Ross-Watt); page 6

- b. the rear wing contains almost no original fabric, having undergone a number of roof changes, the addition of internal partitions and chamfer boards, crude rendering on the western and southern walls.<sup>38</sup> Notably, Mr Scott also conceded in his report that much change had occurred<sup>39</sup>;
- c. the rear wing does not contribute to the streetscape value of 84 Fitzroy Street. Ross-Watt describes the rendered finish of the service wing as being “a clumsy junction with the main building.”<sup>40</sup> The photos contained in each of the reports show that to be an accurate statement.

26. Whilst giving oral evidence, Mr Scott suggested that if an interested observer was walking down the Fitzroy Street, he or she would take note of the rear-service wing and form a view that it was a service wing of cultural significance. It is submitted that in assessing the streetscape from a heritage perspective, one should apply the test used in *Lonie v Brisbane City Council & Ors*,<sup>41</sup> where his Honour Senior Judge Skoien stated that the Court should approach it from the perspective of “*the average person walking the street and looking about, with a perception which falls somewhere between that of a PhD in architectural history on the one hand and that of a philistine on the other*”.

27. Mr Scott’s opinion that the removal of the service wing will lead to a “*substantial reduction*” in the cultural heritage significance is premised essentially on two bases:

- a. First, Mr Scott contends that the rear service wing in its current state contributes to one’s understanding of the heritage place, namely 84 Fitzroy Street<sup>42</sup>;
- b. Secondly, Mr Scott says that the rear service wing “*forms a minor but not insubstantial component of the appearance of 84 Fitzroy Street*”<sup>43</sup> from a streetscape perspective.

28. Neither Mr Davies nor Mr Ross-Watt offered any support for Mr Scott’s opinion that the rear-service wing contributed to the understanding of the building. In fact, both dismissed that view entirely. Mr Ross-Watt pointed out that “*the service wing currently consists of rendered brick work to the west and south walls, a recent hipped zincalume custom orb roof and skillion veranda*” and that “*other than its use as a toilet block, there is no fabric*

<sup>38</sup> Ex-3 (Report of Davies); para 12 and Ex-6 (Report of Ross-Watt); page 6

<sup>39</sup> Ex-8 (Report of Scott); para 4.03

<sup>40</sup> Ex-6 (Report of Ross-Watt); page 6

<sup>41</sup> [1998] QPELR 206 at [212] (as was also applied in *JL Smallcombe as trustee for The Cotton Tree Trust v Queensland Heritage Council* [2009] QPEC 65).

<sup>42</sup> Ex-8 (Report of Scott); para 4.01

<sup>43</sup> Ex-8 (Report of Scott); paragraph 4.04

to suggest previous functions or suggest how this part of the building may have been used in the past”<sup>44</sup>. Mr Davies also struggled to accept the suggestion that the rear service wing contributed to the understanding of how the building operated. At paragraph 19 of his report, Mr Davies stated clearly “no evidence has been provided as to the use of this rear wing. In my opinion, there has been such a change to the structure that the building may have in fact been rebuilt, in which case there would be an obvious break in the evolution of the wing. The structure may be a reminder of that evolution, but it is nothing more than that.” Relevantly Mr Davies also summarised his view of the changes that have occurred over time to the service wing and at paragraph 12 of his report stated;

*from my own observations I can see that the eastern wall and interior had been demolished over time. The western and southern walls have been crudely rendered both internally and externally as shown in photos 4, 5 and 5 below. In my opinion it provides an aesthetically poor presentation onto Haig Avenue. The walls may have been rendered after the demolition of the Gabel end or to protect the fragile bricks from weathering. The interior has been re-fitted and now includes more recent timber partitions and linings. The interior is heavily degraded and does not provide evidence of earlier use except for the base of the chimney, associated with the 1929 photo (photo 2) which has lost most of its fabric and the fireplace itself. The presentation is therefore very poor and does not represent the earlier appearance of a service wing that has meaning in the context of the principle sandstone building.*

29. It is submitted that Mr Scott’s opinion with respect to the streetscape is a questionable one. Photograph 1 contained in Mr Scott’s report is taken from the front of the building and shows a minor component of the streetscape. Notably, that minor component is only evident when one is almost directly in front of Haig Avenue. The rear-service wing is not visible, for example, when one is in the position from which the photos in Mr Davies Report were taken<sup>45</sup>. Whilst Mr Davies and Mr Ross-Watt disagreed with Mr Scott, it also worth noting that Mr Gill and Ms Doherty rejected any suggestion that the rear-service contributed in any meaningful way to the streetscape character. Mr Gill at paragraph 2.7.8 of his report stated “I consider that the streetscape value of the rear addition to be of limited value, due to its relatively incongruous appearance, the limited streetscape offer of Haig Avenue, and the minimal visibility of the rear building of the site in the broader locality context.” Strangely, Associate Professor Searle was of the view that Haig Avenue was of some importance from a streetscape perspective and that “every streetscape is relevant”<sup>46</sup>. Notably, not even Mr Scott was prepared to support Associate Professor Searle’s view that the streetscape of the Haig Avenue was of importance. Notwithstanding

<sup>44</sup> Ex-6 (Report of Ross-Watt); page 6

<sup>45</sup> Ex-3 (Report of Davies); photograph 7, 11, 12 and 13

<sup>46</sup> Ex-1; Appeal Book, Volume 3; page 20

the difference in opinions, it was accepted by all experts that “*Service Lane*” or “*Laneway*” was an appropriate description for Haig Avenue.

## **SECOND GROUND OF APPEAL**

30. The Appellants contend that the proposed development of 84 Fitzroy Street will breach the second limb of s 3.5.14 of IPA. Specifically, it is argued that the development conflicts with 6 specific provisions of the planning scheme, those being:
- a. Section 4.2.1 (City Centre - Key Policy Statements);
  - b. Section 4.2.2 (City Centre – Policy Intent);
  - c. Section 4.2.4.1 (City Centre – Applicable Assessment Criteria and Codes – Impact Assessment Criteria);
  - d. Section 4.2.5.2 (City Centre Development Code – Purpose);
  - e. Section 4.2.5.4 (City Centre – City Centre Development Code - Development Controls);
  - f. Section 5.3.3.1 (Carrying Out Building Work- Applicable Assessment Criteria and Codes – Impact Assessment Criteria).

### **Section 4.2.1**

31. Section 4.2.1 of the Planning Scheme speaks of the city centre having “*a high standard of amenity, with a cohesive streetscape character in which buildings of heritage significance are protected and new development occurs in a compatible form.*” Ms Doherty and Mr Gill were both of view that the Development Application complied with key policy statements that are stated in s 4.2.1 of the Planning Scheme. Ms Doherty pointed out that the conservation of the sandstone part of 84 Fitzroy Street would mean a higher standard of amenity than what is currently the case (ie. a vacant and dilapidated building)<sup>47</sup>. In terms of the need for a “*cohesive streetscape character*”, the commonly held view of Ms Doherty and Mr Gill was that streetscape that was of relevance and importance was that of Fitzroy Street, rather than Haig Avenue. Of particular importance is the streetscape that is made up of the sandstone part of 84 Fitzroy Street, the Police Station and the Court House. Associate Professor Searle was of the view that the Haig Avenue streetscape was an important one. It is submitted that the opinions of Mr Gill and Ms Doherty should be preferred. Notably, Associate Professor Searle did not visit the site and perhaps did not appreciate the true nature of Haig Avenue, which could best be described as being a “*service lane.*” It was common ground that Haig Avenue really only served as a driveway for shopping centre patrons and delivery vehicles. Certainly, it does not lend itself to

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<sup>47</sup> Ex-5 (Report of Doherty); para 5.2.2

pedestrian traffic. The photographic evidence contained in various reports illustrates the relative insignificance of the Haig Avenue in a streetscape context. Ms Doherty made the good point that Haig Avenue does not even have a cohesive streetscape at present and also said:

*due to the materials, scale and style of this rear-most section of the building being in contrast to the sandstone parts of the building, this part of the building does not add to and may detract from the streetscape. While the demolition of the rear part of the building will change the Haig Avenue streetscape, this change will be of no importance or significance.*<sup>48</sup>

32. The Court of Appeal recently considered what is meant by the term “*streetscape*” in *WAW Developments v BCC*<sup>49</sup>. His Honour Justice Chesterman at [25] confirmed “*streetscape*” to be a common term that could be defined as “*a scene or view of the street; the specific characteristic of or improvements made to a street*”. Justice Chesterman’s comments highlight the fact that “*streetscape*” or “*streetscape*” needs to be referenced to an improvement. To suggest otherwise would mean that almost all “*streetscape*” type criteria contained in planning schemes would be frustrated because the status quo would always remain and development would inevitably be hamstrung. Simply put, to be a relevant consideration the rear-service wing must improve the streetscape, character, or alternatively the streetscape character must suffer some detriment if the wing is removed.

#### Section 4.2.2

33. Section 4.2.2 of the Planning Scheme highlights the policy intent of having commercial activities, government offices and larger community facilities being based in the City Centre. It cannot be argued that the building in its current rundown state fulfils the policy intent. It has been highlighted throughout this proceeding that if the proposed development of 84 Fitzroy Street proceeds then 92% of the building’s gross floor area will be refurbished and utilised<sup>50</sup>. Further, it was Mr Gill’s evidence that “*the demolition of the rear addition would further enhance the site potential, allowing a more coherent approach to redevelopment of the rear, and removal of a potential limitation to any future development’s integration with the existing building.*<sup>51</sup>”. On this point Associate Professor Searle was of little assistance other than to state his belief in the joint report that there was no structural impediment to the future use of the rear service wing. Both Ms Doherty and

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<sup>48</sup> Ex-5 (Report of Doherty); para 5.2.7

<sup>49</sup> [2011] QCA 47.

<sup>50</sup> Ex-15 (Building GFA Estimate0

<sup>51</sup> Ex-2 (Report of Gill); para 2.7.6

Mr Gill were of the view that s 4.2.2 would be satisfied should the development be allowed.

Section 4.2.4.1

34. Section 4.2.4.1(c) and (d) of the Planning Scheme state:

*4.2.4.1 Impact Assessment Criteria*

*In assessing applications for all development requiring impact assessment in the City Centre Land Use Area, Council will consider the following matters in addition to any other relevant provision of this planning scheme:*

*(c) For applications involving the demolition or removal of buildings listed in Planning Scheme Policy No.1, whether a conservation study has demonstrated that:*

- *conservation actions are not feasible or viable; or*
- *the building is of no significance in terms of its historical, architectural, streetscape and other special value.*

*(d) For applications involving external building work to buildings listed in Planning Scheme Policy No. 1, whether a conservation study demonstrates that the new work will not detract from the heritage significance of the building and will be compatible with the streetscape.*

35. In her report, Ms Doherty expressed a view that the demolition of the rear-service wing, being part 84 Fitzroy Street was likely to fall more comfortably within s 4.2.4.1(d), rather than (c). In oral evidence, Mr Gill conceded that he concurred with Ms Doherty's view. Nevertheless, the test under both (c) and (d) was considered by both of them and ultimately they formed the same opinion that the proposed development would comply with both of those provisions.

36. If s 4.2.4.1(c) has application, then in order to determine whether the rear-service wing is of any historical, architectural, streetscape or other special value, it is appropriate to consider what triggered 84 Fitzroy Street being placed on the local heritage register. 84 Fitzroy Street is listed in the Register of Cultural Heritage Places by virtue of<sup>52</sup>:

- a. its association with the local historical theme of the development of Warwick as an administrative centre; and
- b. its architectural value as a sandstone building in a district characterised by the use of local sandstone.

<sup>52</sup> Ex-13 (Extract Cultural Heritage Study Volume 3 – Inventory of Places – Part 1 Survey 55)

37. It was common ground between Ms Doherty<sup>53</sup>, Mr Gill<sup>54</sup> and Mr Davies<sup>55</sup> that the removal of the rear-service wing would not have any bearing on the matters referred to in the preceding paragraph herein. Similarly, the destruction of the rear-service wing will not detract from the matters contained in the QHR citation (referred to in paragraph 17 to 19 herein). It is submitted that rear-service wing, despite the Appellants' contention, simply does not have any "*historical, architectural, streetscape or other value*" to speak of. Accordingly, the development complies with the relevant criteria contained in s 4.2.4.1 of the Planning Scheme.
38. If s 4.2.4.1(d) has application then the test is slightly different than that imposed under subsection (c). Nevertheless, the opinions of Ms Doherty, Mr Gill and Mr Davies do not change. The demolition of the rear-service wing will not detract from the heritage significance because, first, the matters specifically referred to in both the local heritage register citation and the state heritage register citation will be left alone. Secondly, the demolition will be compatible with the streetscape character.

#### Section 4.2.5.2

39. Section 4.2.5.2 confirms the purpose of the code is to "*retain the heritage qualities of the City Centre through the retention of highly significant and significant heritage places in a streetscape context which provides for sympathetic alterations to existing buildings and the incorporation of new development which is compatible with, and respectful to, the existing streetscape character.*"
40. Mr Gill in his evidence was adamant, that the rear-wing was of limited streetscape character and in appearance somewhat detrimental to the original building<sup>56</sup>. Notably, Mr Ross-Watt, Ms Doherty and Mr Davies held a similar view. Ms Doherty highlighted the fact that development will allow for the retention and conservation of the more prominent and significant parts of the building. Both Mr Gill and Ms Davies confirmed that the Planning Scheme envisages alterations to heritage buildings being performed in order to encourage active reuse of such buildings.

#### Section 4.2.5.4

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<sup>53</sup> Ex-5 (Report of Doherty); para 5.4.11  
<sup>54</sup> Transcript (29/07/2011); page 3-7; line 1-10  
<sup>55</sup> Transcript (28/07/2011); page 2-31; line 1-20  
<sup>56</sup> Ex-2 (Report of Gill); para 2.7.10



41. Section 4.2.5.4(a) is aimed at ensuring that “*heritage places are retained in a context which is appropriate to an understanding of their cultural value and respectful of their design qualities.*” Mr Davies was of the view that “*the rear service wing in its current form does not appear in its original form or a form that can be reasonably linked to any particular historical date*”<sup>57</sup>. The Appellants’ heritage expert, Mr Scott disagreed. However, Mr Scott’s view relied heavily on a series of hypotheticals and assumptions illustrated by the conjectural drawings contained in his report.

#### Section 5.3.3.1

42. Section 5.3.3.1(a) and (b) simply mirrors what is found in s4.2.4.1(c) and (d). Accordingly, the expert views referred to in paragraphs 34 to 38 herein deal appropriately with this ground of appeal.

#### GROUNDS TO JUSTIFY APPROVAL

43. McConaghy contends that the Development Application does not conflict with any provision of the Planning Scheme. However, if the Court was to find a conflict, it is submitted that there are sufficient grounds for the Development Application to be approved.
44. Section 3.5.14(2)(b) of IPA provides that a development application must not “*conflict with the planning scheme, unless there are sufficient grounds to justify the decision despite the conflict*”. In the context of that section the term “*grounds*” means matters of public interest, but does not include the personal circumstances of an applicant, owner or interested party<sup>58</sup>. In *Palyarus v Gold Coast City Council*<sup>59</sup>, the Court described the word “*sufficient*” as pointing to a “*positive betterment.*” In *Spondor Pty Ltd v Maroochy Shire Council*<sup>60</sup>, the Court accepted that “*planning grounds were found in the community benefit that would flow from redevelopment.*” Both of those decisions were dealt with in the context of “*sufficient planning grounds*” rather than “*sufficient grounds*”. It matters little though and it is submitted that the “*positive betterment*” analogy has equal application today. The protection and restoration of heritage listed buildings is a matter that falls squarely within matters of public interest and community benefit. That is to say, it is in the public interest that opportunities to restore buildings of cultural heritage significance such as 84 Fitzroy Street are embraced so far as circumstances permit.

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<sup>57</sup> Ex-3 (Report of Davies); para 55

<sup>58</sup> IPA; Sch

<sup>59</sup> [2004] QPELR 162

<sup>60</sup> [2005] QPELR 74

45. Currently, the principal sandstone building that is 84 Fitzroy Street is in an extremely poor and dilapidated condition. The building is a mere shadow of what it should and could represent with reference to its historical past. The historical significance of the building is reported in the Queensland Heritage Register citation and the local heritage register. Importantly, if the development were to proceed none of the matters that are referred to in those citations would be affected. It is common ground that 84 Fitzroy Street has been steadily falling into disrepair. The evidence of the structural engineering experts was identical to the extent of it being agreed that the western sandstone wall of the building is in dire need of structural repair. Albeit giving oral evidence, Mr Scott conceded that conservation of heritage buildings often involves a question of judgment, this case is no different.
46. The proposed development represents an opportunity for the vast majority of 84 Fitzroy Street to be refurbished and brought back to a state that fairly represents its cultural heritage significance. It is an opportunity that has taken some time to arrive and is not one which should be disregarded on the grounds of a minor conflict with the planning scheme (should one exist). In *Australia Capital Holding P/L & Ors v McKay City Council: Australian Capital Holding P/L v McKay City Council & Ors*<sup>61</sup>, his Honour Justice Muir identified the appropriate process for assessing whether a development application should be approved notwithstanding a conflict with the planning scheme. His Honour confirmed that the grounds, which may justify approval, should first be identified and then an assessment should be undertaken as to the role and importance to the planning scheme of the provisions that would be infringed should the proposed development proceed. Further, the adverse consequences, if any, that flow from the infringement should be assessed and then weighed against the grounds that justify approval.
47. During the trial the Appellants tendered a Statement of Evidence which was deposed to by one of the Appellants, Mr Barnes. The statement is of no relevance as to the question of whether the relevant statutory tests are satisfied. 84 Fitzroy Street is currently owned by McConaghy and there is simply no evidence before the Court to suggest that 84 Fitzroy Street will be sold. It is worth noting that the Court's role is not one in which is expected to come up with the best outcome. In *Wingate Properties P/L & Anor v BCC & Ors*<sup>62</sup>, his Honour Judge Brabazon stated at [21]:

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<sup>61</sup> (2008) QCA 157

<sup>62</sup> [2001] QPE 005

*It is not the function of the Court to redesign a proposal. Its function is to pass judgment on that which is proposed. In this case, the issue is whether or not the current proposal has been shown to be acceptable. The fact that some alternative proposal may be thought to be even more acceptable is by the way. If the current proposal is acceptable, then that is enough.*

48. No one can suggest that the building in its current form provides a benefit to anyone. The building, if not repaired and refurbished soon will continue to be a safety impediment to the general community (subject to the narrow powers of DERM under s 87 of Queensland Heritage Act) and will inch closer to the point where it will no longer be capable of being repaired in any proper or meaningful way.
49. Counsel for the Appellants, Dr McGrath sought to make something of the fact that the granting of the approval in its current form will not necessarily ensure that the majority of 84 Fitzroy Street will be refurbished. That is true. But that simply reflects the general principle of planning that no approval guarantees any particular outcome unless an applicant chooses to act on it. Nevertheless, it can certainly be said that an approval of the Development Application will bring the likelihood of 84 Fitzroy Street being refurbished significantly closer to reality than is currently the case. If the approval is acted upon, it is submitted that the cultural heritage significance of 84 Fitzroy Street will not only be retained but also repaired and protected for future generations. Further, the weight of expert opinion confirms that the streetscape character of Fitzroy Street will be not be damaged, but enhanced should the rear-service wing be demolished.

#### **EXPERTS GENERALLY**

50. The Court heard from a total of eight expert witnesses. Two of them, were structural engineers and whilst they differed in their suggested approaches to restoration of the sandstone part of 84 Fitzroy Street, both agreed that works needed to be undertaken in the short term. Of the other six witnesses, Mr Gill and Ms Doherty (town planning experts) were in agreement with respect to all relevant issues. Associate Professor Searle did not really agree with any of the reasoning or opinions that put forward by his colleagues. Interestingly, Associate Professor Searle was the only expert (other than the engineers) that did not produce an individual report. This is particularly strange given that he disagreed with Mr Gill and Ms Doherty on all most every issue. In contrast to Associate Professor Seale's approach, Mr Gill and Ms Doherty produced comprehensive individual reports that detailed their respective opinions and the basis for them. Having given oral evidence, it is submitted that Associate Professor Searle could not be described as being a credible

witness in respect of this proceeding. By his own admission he never visited the site (something which in the context of streetscape arguments would appear to have been a prudent thing to do), nor could he recall having received or reviewed the Development Application. On the other hand, Mr Gill and Ms Doherty were across the issues and aware of the relevant matters that needed to be addressed, both in evidence in chief and cross-examination.

51. Like the evidence that related to town planning issues, the heritage experts failed to reach a mutual agreement. Mr Davies and Mr Ross-Watt were of the view that the proposed development did not conflict with either s 68 of the Queensland Heritage Act or the Planning Scheme (so far as it related to heritage issues). Mr Scott's view was one that relied heavily on assumptions and hypotheticals. He conceded that the conjectural drawings contained in his report were far from conclusive. An optimistic approach to interpreting documents was also taken by Mr Scott. Whilst it is accepted that Mr Scott has expertise in heritage matters, it was also established in the course of cross examination that he currently works professionally with one of the Appellants, Mr Cook. To the extent that there is an inconsistency between the opinions of Mr Scott and the other two heritage experts, that can perhaps be explained by Mr Scott being in the unenviable position of being asked to provide an independent opinion in circumstances where one of the parties seeking the opinion is his employer and no doubt would prefer a favourable opinion. Mr Davies and Mr Ross-Watt on the other hand do not have any issues with respect to their independence. Throughout the trial Counsel for the Appellants, Dr McGrath went to some length to highlight the "*impressive*" nature of Mr Scott's report, which is said to arise out of his ability to collate photos, newspaper articles and illustrates some conjectural drawings. With respect, how the evidence was collated or came to be found is of no consequence. All of the heritage experts had access to the same primary material from which they could form their expert opinion. It may be that Mr Scott was the person who sourced some important material. However the fact remains that all of the heritage experts had the same tools, so to speak, in which to form their respective opinions. Even Mr Scott conceded that both Mr Ross-Watt and Mr Davies were appropriately qualified in heritage expertise. In the circumstances their opinions should be preferred over those of Mr Scott.

## **CONCLUSION**

52. The Appellants' appeal should be dismissed and the Decision Notice of 26 November 2009 should be reaffirmed by the Court.

**D.M Favell**

**Counsel for the Second Co-respondent  
4 August 2011**