



## Land and Environment Court New South Wales

<b>Medium Neutral Citation:</b>	<b>Landow v Wollondilly Shire Council [2022] NSWLEC 1382</b>
<b>Hearing dates:</b>	7-9 June 2022
<b>Date of orders:</b>	25 July 2022
<b>Decision date:</b>	25 July 2022
<b>Jurisdiction:</b>	Class 1
<b>Before:</b>	Walsh C
<b>Decision:</b>	<p>The Court orders that:</p> <p>(1) The appeal is dismissed.</p> <p>(2) Development Application No. DA/2020/909/1 seeking the grant of consent for a child care centre at 125 Hornby Street Wilton is determined by way of refusal.</p> <p>(3) The exhibits are returned except for Exhibits 2, A, B and C, which are retained.</p>
<b>Catchwords:</b>	DEVELOPMENT APPLICATION – centre-based childcare centre – carparking in front setback – defining local character – streetscape character – acoustic fencing
<b>Legislation Cited:</b>	<p>Children (Education and Care Services) Supplementary Provisions Regulations 2012</p> <p>Environmental Planning and Assessment Act 1979, ss 8.7</p>

State Environmental Planning Policy (Educational Establishments and Child Care Facilities) 2017, cl 23, 26  
State Environmental Planning Policy (Transport and Infrastructure) 2021, Sch 9  
Wollondilly Local Environmental Plan 2011

**Texts Cited:**

Association of Australian Acoustic Consultants Guideline for Child Care Centre Acoustic Assessment (October, 2013)  
Child Care Planning Guideline (February, 2017)  
Land and Environment Court of New South Wales, COVID-19 Pandemic Arrangements Policy (February, 2022)  
Wollondilly Development Control Plan 2016

**Category:**

Principal judgment

**Parties:**

Simon Landow (Applicant)  
Wollondilly Shire Council (Respondent)

**Representation:**

Counsel:  
T To and J Cole (Solicitor) (Applicant)  
M Astill (Respondent)

Solicitors:  
HW Ebsworth (Applicant)  
Sparke Helmore (Respondent)

**File Number(s):**

21/244419

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## JUDGMENT

### Introduction

This is a Class 1 appeal under s 8.7 of the *Environmental Planning and Assessment Act 1979* (EPA Act) against the refusal of Development Application No. DA/2020/909/1 (DA) by Wollondilly Local Planning Panel. The DA sought consent for a child care centre at 125 Hornby Street Wilton (site). The site is legally described as Lot 3 in DP759094.

### Site and setting

- 2 The site is regular in shape with a frontage of 20.11m to Hornby Street and a depth of 100.58m. The site area is some 2023.4m<sup>2</sup>. The site is quite level, with a gradual fall to the north-east.
- 3 The site is located on the northern side of Hornby Street approximately 50m east of the intersection of Hornby Street and Broughton Street and approximately 145m west of the intersection of Hornby Street and Almond Street.
- 4 The northern side of Hornby Street in the site environs forms part of an established low density residential neighbourhood. The southern side of Hornby Street in the environs of the site has a more rural residential character. A landscape supplies business is located at 122 Hornby Street, diagonally opposite the site to the south west. West of Broughton Street is a large area of open space called Wilton Recreation Reserve, which includes Hannaford Oval.

### Planning Provisions

#### *Wollondilly Local Environmental Plan 2011 (WLEP)*

- 5 The land use configuration described above generally reflects the zoning, with the lands to the north of Hornby Street zoned R2 Low Density Residential under WLEP, and lands across Hornby Street to the south zoned RU4 Primary Production Small Lots. Wilton Recreation Reserve is zoned RE1 Public Recreation. See zoning map excerpt at Figure 1, with site highlighted in red.

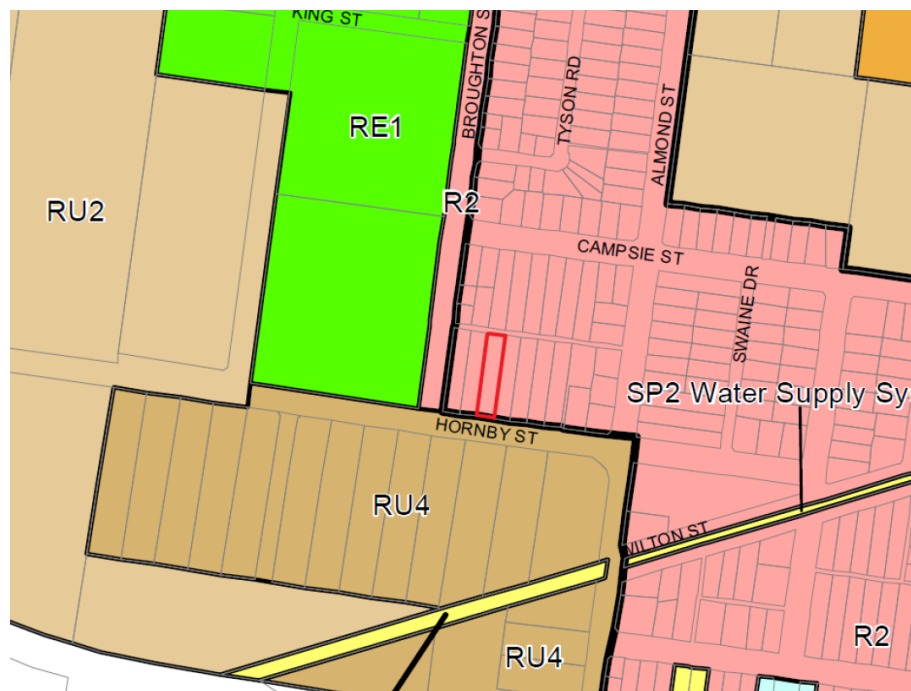


Figure 1 - Zoning map with site highlighted in red (source: Ex 2 p 3)

- 6 The proposal is “permitted with consent” in WLEP’s R2 zone as a “centre-based child care facility”. The zone objectives are as follows:
- To provide for the housing needs of the community within a low density residential environment.
  - To enable other land uses that provide facilities or services to meet the day to day needs of residents.
  - To support the health and well-being of the community by providing well-connected and walkable residential areas close to services and employment.

*State Environmental Planning Policy (Educational Establishments and Child Care Facilities) 2017 (Education SEPP)*

- 7 On 1 March 2022 the Education SEPP was repealed. The replacement policy was included within State Environmental Planning Policy (Transport and Infrastructure) 2021 (Transport & Infrastructure SEPP). However, the savings provisions within Sch 9

of the Transport & Infrastructure SEPP make clear that the Education SEPP continues to apply to development applications, such as this, made but not finally determined before 1 March 2022..

- 8 Clause 23 requires the consent authority to take into consideration the Child Care Planning Guideline (CCP Guideline). The parties agree that the 2017 version of the CCP Guideline applies to this appeal. Council pressed a number of concerns in relation to the CCP Guideline which I will explain later.
- 9 Clause 26 of the Education SEPP is concerned with the inter-relationship between the CCP Guideline and local Council development control plans; indicating that the CCP Guideline prevails, in regard to inconsistencies, in nominated areas:

**26 Centre-based child care facility—development control plans**

(1) A provision of a development control plan that specifies a requirement, standard or control in relation to any of the following matters (including by reference to ages, age ratios, groupings, numbers or the like, of children) does not apply to development for the purpose of a centre-based child care facility:

- (a) operational or management plans or arrangements (including hours of operation),
- (b) demonstrated need or demand for child care services,
- (c) proximity of facility to other early education and care facilities,
- (d) any matter relating to development for the purpose of a centre-based child care facility contained in:
  - (i) the design principles set out in Part 2 of the Child Care Planning Guideline, or
  - (ii) the matters for consideration set out in Part 3 or the regulatory requirements set out in Part 4 of that Guideline (other than those concerning building height, side and rear setbacks or car parking rates).

(2) This clause applies regardless of when the development control plan was made.

*Wollondilly Development Control Plan 2016 (WDCP).*

- 10 Mindful of cl 26 of the Education SEPP, many of the provisions of WDCP do not apply, although they have been referenced on occasion in tendered expert evidence. Notably, WDCP provisions relating to rear setbacks were in contention and do continue to apply. As it arises in evidence, here I note that Vol 4 of WDCP provides controls for

“development for the purposes of residential accommodation and other related land uses and any development ancillary to those uses”, while Vol 5 provides controls for “development for the purposes of commercial, community and other related land uses and any development ancillary to those uses”.

## The proposal

11 The proposal before the Court can be summarised as follows (Ex C Tab 2):

- Demolition of all existing structures and (selected) tree removal.
- Construction of a single storey building about 6.7m in height, with a front building setback of 30.31m. The child care centre would provide for a total of 79 children, with facilities and room sizes in accordance with the Children (Education and Care Services) Supplementary Provisions Regulations 2012 (Regulation). The age grouping of children in the centre is proposed to be as follows: 0-2 years – 16 children, 2-3 years – 20 children, and 3-5 years – 43 children.
- Provision of outdoor play areas totalling of 620 m<sup>2</sup>, readily meeting Regulation requirements.
- Provision of 20 carparking spaces within the front building setback, including 1 accessible space. There would be a 3.1m landscape setback from the street boundary and landscape beds of about 1m wide, every 3 parking spaces.
- Provision of a 2m pathway along the eastern side of the carparking area, with a landscaping area of about 0.7m wide between the pathway and the eastern side boundary.
- Fencing along both side and rear boundaries to meet acoustic requirements. There are significantly different fencing requirements for different “zones” of the site. The particulars will be detailed later, but acoustic fencing on the site would be up to 2.25m within outdoor play areas (1.8m solid fence lapped both sides

with an attached cantilevered and angled plexiglass/polycarbonate fixture above). The acoustic fencing would be down to 1.3m along the eastern boundary, near the car parking area and entrance pathway, tapering down towards the road to allow for sight distance. The applicant proposed to screen the fence, and those walking by along the proposed pathway, with landscaping in the aforementioned eastern boundary landscape strip (Ex K).

- Landscaping otherwise as shown in Ex B Tab 7.
- Staffing would be 17 persons.
- Hours of operation would be 7am to 7pm Mondays to Fridays.

## Proceedings

### *Site inspection and lay submissions*

- 12 The hearing commenced with a site view. While focused on the immediate site environs, the applicant also drew my attention to certain aspects of the wider locality, tendering photographic evidence to assist in this appreciation (Exs D and E).
- 13 Oral submissions from the two next door neighbours were heard, along with another party, each objecting to the proposal. The objectors raised concern including the locational suitability of this site for a child care centre, having regard to accessibility to services and certain suggested hazards in the site environs, matters not pressed by Council. Concerns were also raised about the adequacy of the facilities for children, a matter seen as adequate by Council. But the major concern raised in lay submissions, in my view, related to the perceived impact of the proposal on amenity. There was concern about visual amenity and noise from carparking at the front of the site (extending to the rear building alignment of the existing neighbouring residences). There were also concerns about the location of the childcare building and height of the acoustic fencing in the rear, with both neighbours referencing the locality as distinctive in that the current open (something akin to post and wire style) fencing meant

neighbours could view across and talk to one another while enjoying the large rear gardens. The childcare building setback and both high and solid acoustic fencing was seen to be entirely at odds with the current setting.

- 14 The opportunity was taken to visit the residences of each of the neighbours to gain an improved appreciation of the submissions.

### *Hearing proceedings*

- 15 Mindful of the Court's COVID-19 Policy, following the site inspection, the hearing was conducted on the Microsoft Teams platform.
- 16 The experts providing evidence in regard to the issues are nominated below.

Expert	Expertise	Evidence for
M Brown	Planning	Applicant
M Hawes	Planning	Respondent
G Atkins	Acoustics	Applicant
S Cooper	Acoustics	Respondent

## **Issues**

### *Acoustic-related considerations*

- 17 A considerable period of time within the hearing was dedicated to the resolution of matters related to acoustics. In short here, it was clear to me that the acoustic experts agreed that the proposal, incorporating proposed acoustic fencing, would satisfy the appropriate standard. Here, the experts were relying on the Association of Australasian Acoustical Consultants Guideline for Child Care Centre Acoustic Assessment (Acoustic



Guideline). That is to say: (1) both experts were satisfied that the Acoustic Guideline provided appropriate parameters for the evaluation of the acceptability of child care centres in regard to acoustic privacy, and (2) Mr Cooper was satisfied with Mr Atkin's empirical analysis. This analysis demonstrated that, with the particularised acoustic fencing, the requirements of the Acoustic Guideline would be met. The remaining acoustic-related concerns are the particulars of the proposed fencing and its implications, which I go to now.

- 18 I should make clear that, at the start of the hearing, the picture was relatively clear in regard to all of the proposed acoustic treatments with the exception of the area to the east of the car parking area. By the conclusion of evidence, and with the admission of amending plans, this too was resolved. There are seven different fencing configurations. Here, I need to cover two different areas of acoustic fencing. The first is on the street-side and along the eastern boundary. It concerns the interface with the neighbour to the immediate south, known as 127 Hornby Street (the fencing to the eastern boundary is more contentious than the western boundary due to the site crossfall). The second is the fencing to the north of the rear building alignment of the existing residences at 127 and 131 Hornby Street.

#### **Street-side eastern boundary**

- 19 Acoustic calculations relating to the street-side acoustic fencing (ie forward of the proposed front building line of the childcare centre building, some 30.3m back from the road boundary) need to relate to the finished level of the carpark. For the sake of the explanation, I will assume that the pathway along the eastern edge of the carpark is at the same level as the carpark.
- 20 Notably, and given the site's crossfall, the carpark's finished level would be considerably higher than existing ground level (EGL) in the vicinity of the eastern boundary. Amending plans (Ex J Drawing A110 Rev Z3) showed the carpark finished level some 0.64m above EGL near the proposed front building line of the childcare centre building, which near enough lined up with the rear of the existing building at 127

Hornby Street. In turn, this meant that the eastern side of the childcare centre building would present to the southern part of the rear garden of this property. About mid-way along the carpark, the finished level would be some 0.48m above EGL, presenting to a northern open space area of 127 Hornby Street, which opened out from a living area. At the front building line of 127 Hornby Street, the carpark finished level would be some 0.4m above EGL. The proposed acoustic fencing would then sit on the eastern boundary line at a height of 1.3m above the carpark finished level. I understood the acoustic experts to be satisfied that noise from those walking along the pathway, was also satisfied with this fencing arrangement.

21 In this area, the concern which was not able to be addressed by acoustic experts related to visual privacy. Here I refer to the fact that, given the fencing is only 1.3m high, those walking along the pathway would be visible from the east, and thus from 127 Hornby Street. The applicant sought to resolve this via landscaping. A report prepared by Paul Scrivener, a landscape architect, was tendered which indicated that a Bottlebrush species known as “*Callistemon viminalis* ‘Slim’” was “ideally suited for the 700mm wide planter bed to the side of the proposed carpark”. It could provide a screen up to 3m high, or as low as 1.5m high, and could be trimmed as narrow as 500mm.

22 I can mention here that I was not entirely satisfied with this configuration. I note that the plans indicate the eastern boundary planting bed to be 0.667m in width. The dimension appears to be to the boundary, upon which the fence would sit, narrowing the available width somewhat. It seems to me that on balance, on the evidence, this screen planting could be effective. However, it also seems reasonable to assume that it may take some period (months or perhaps a year or two) to provide an effective screen. For that period, the residents of 127 Hornby Street would experience what I could reasonably see to be the considerable annoyance of those walking along the pathway, each day to and from the child care centre to pick up children, being able to readily see into their rear garden. It seems reasonable to me that this would bring about a disturbance to these residents having regard to what was suggested in the lay submissions to be the quiet tranquillity and “sanctuary” of the rear garden (Ex 5).

- 23 I am aware that there may have been a capacity for this waiting period (for the visual screen to be effected) to be a consideration in any consent (eg early scheduling of the planting may have been able to be factored into a construction program). If this were the determinative factor, I could have sought further evidence on it. But in this instance, I do not rely on this factor for my determination.

**Fencing to the rear of the rear building alignment of the existing residences at 127 and 131 Hornby Street**

- 24 The actual particulars of this rear fencing were less contentious. For context it is useful to note that the building setback to both side boundaries is 2m (albeit including the roof over an increased wall setback along the eastern side), and the rear building setback is some 25.93m (Ex J). The acoustic fencing particulars are as follows:
- For the extent of the proposed childcare building, side boundary fencing would be 1.8m solid fence lapped and capped both sides.
  - From the line of the northern façade of the proposed building along the western boundary (for 25.93m to the back corner) fencing would be 2.25m in total height (1.8m solid fence lapped both sides with an attached cantilevered and angled plexiglass/polycarbonate fixture above).
  - From the line of the northern façade of the proposed building along the eastern boundary, and along the rear boundary, fencing would be 2.20m in total height (1.8m solid fence lapped both sides with an attached cantilevered and angled plexiglass/polycarbonate fixture above).
- 25 Later, I will come back to explain how this rear fencing configuration, along with the rear setback of the proposed child care building is contended to be inappropriately out of character, and the arguments in response.

*Character compatibility considerations*

26

As I understood from the parties in closing submissions, the central issue in dispute (after amending plans) was whether the proposal was satisfactory having regard to certain planning provisions relating to local character compatibility.

## Policy

- 27 In relation to Part 2 of the CCP Guideline, and “design quality principles”, points of note include:

### “Principle 1 - Context

Good design responds and contributes to its context, including the key natural and built features of an area, their relationship and the character they create when combined. It also includes social, economic, health and environmental conditions.

Well-designed child care facilities respond to and enhance the qualities and identity of the area including adjacent sites, streetscapes and neighbourhood.

...

### Principle 2 - Built form

...

Good design achieves an appropriate built form for a site and the building’s purpose in terms of building alignments, proportions, building type, articulation and the manipulation of building elements. Good design also uses a variety of materials, colours and textures.

...

### Principle 5 - Landscape

... A contextual fit of well-designed developments is achieved by contributing to the landscape character of the streetscape and neighbourhood.”

...

- 28 Part 3 of the CCP Guideline then introduces particular “matters for considerations”. The introductory statement includes:

“The matters (*for consideration*) support the design principles and must be considered by the consent authority when assessing a DA for a child care facility. Child care facilities can be developed in a broad range of locations and need to be flexible in how they respond to the requirements and challenges this brings.”

29

In Ex 2, Council itemises a number of the character compatibility related matters raised in CCP Guideline. They involve some duplication. For me the following main matters are particularly relevant.

- 30 An objective (relating to item C5 in the CCP Guideline) to: "...ensure that the child care facility is compatible with the local character and surrounding streetscape"; and related considerations that the proposed development should:
- contribute to the local area by being designed in character with the locality and existing streetscape
  - reflect the predominant form of surrounding land uses, particularly in low density residential areas
  - recognise predominant streetscape qualities, such as building form, scale, materials and colours
  - include design and architectural treatments that respond to and integrate with the existing streetscape •
- use landscaping to positively contribute to the streetscape and neighbouring amenity
- integrate car parking into the building and site landscaping design in residential areas."
- 31 An objective (relating to item C12) to: "...ensure that the scale of the child care facility is compatible with adjoining development and the impact on adjoining buildings is minimised"; and related considerations that the proposed development's: "setbacks to the street should be consistent with the existing character".
- 32 An objective (relating to item C13) to: "...ensure that setbacks from the boundary of a child care facility are consistent with the predominant development within the immediate context"; and related considerations that: "...where there are existing buildings within 50 metres, the setback should be the average of the two closest buildings".
- 33 Under cl 26 of the Education SEPP, the rear setback control under WDCP would continue to apply, albeit subject to the provisions of s 4.15(3A) of the EPA Act. The applicable rear setback control under WDCP is as follows: "consistent with surrounding development" (Ex 1 p 404). I also note here that the applicable side setback control is 0.9m. The proposal has a minimum building side setback of 2m.

## Topics

- 34 While it will be seen that some of the policy provisions apply to both, for my purposes I can note there were two distinct elements to Council's character-related contentions against the proposal. In alignment with the separation above, they can be divided into: (1) "street-side" factors (mostly related to streetscape character and, in particular, the car parking area in front of the proposed childcare building and related landscaping) and (2) what I call "rear yard" considerations, including the proposed acoustic fencing, generally to the rear of the existing rear building lines of nearby dwellings and the related matter of the proposed building setback to the rear.

### Street-side character considerations

- 35 It seems to me that the first nominated objective to Part 3.2 of the CCP Guideline provides a good synthesis of the examination required, when the test is, what I am calling, street-side character compatibility. The objective is as follows:
- "To ensure that the child care facility is compatible with the local character and surrounding streetscape."
- 36 In closing submissions, the applicant correctly argued that this examination starts with the question of what is the "locality", or local character, which the application might be seen as needing to be compatible with.
- 37 The experts had different understandings of this.
- 38 Mr Brown thought it inappropriately narrow to confine consideration to the residential properties on the northern side of this section of Hornby Street when determining such questions as what is the "local character" or what might define "surrounding development". There was a need for a wider consideration of existing nearby development and certainly including both sides of Hornby Street in this area.
- 39 Mr Brown referred to Attachment 5 of the expert report prepared jointly by the town planners (Ex 4). This attachment documented front building setbacks along Hornby Street on an aerial photo base (Ex p 8 par 2-3). Mr Brown's evidence was that:

“...there is a vast difference in setbacks and indeed built form outcomes. On the southern side of Hornby Street, the land is zoned RU4 Primary Production Small Lots. At No 122 is the Wilton Landscape Supplies that contains carparking at the front and two large sheds and landscape supplies behind the sheds. At No 126 Hornby Street, is a dwelling that has a large footprint. Controls for developing residential development on rural lots are contained in Volume 4 (of WDCP).

It is noted that the term surrounding area does not distinguish between zones and as stated above, controls for all residential development in rural and residential zones are provided in Volume 4 (of WDCP), whilst controls for child-care centres are provided in Volume 5. It is clear from (Attachment 5 to Ex 4) that there is no consistent setback that would be found in other areas and no consistent built form or footprint.”

- 40 Further, Mr Brown argued there was considerable variation in setback even within the residential precinct along the northern side of Hornby Street, characterised as it was by particularly large blocks of around 2000m<sup>2</sup>. While the average front setback of the two adjacent properties to the site was 8m (equal to the site itself), Mr Brown pointed to Lot 5 (next door but one to the site to the east) which had a front setback of 29m, and then the setbacks of the three residential properties further east again which had setbacks of 20m, 19m and 17m, respectively. The residence next door but one to the west had a front setback of 13m.
- 41 According to Mr Brown, the proposed 30.31m front setback would not, at all, be at odds with development on the southern side of Hornby Street, where setbacks were almost all considerably deeper than the proposal (up to 88m for Lot 13).
- 42 The argument was also put that the R2 zone under WLEP permitted a relatively wide range of uses, as did the RU4 zone, including uses which would be expected to require significant amounts of car parking. This was demonstrated by the take up of such non-residential land uses in the R2 zone including the Wilton Fire Brigade and the Wilton Anglican Church. I visited both of these sites. The point, as I understood it, was that other than residential uses must be expected under the controls and the evidence is that this has occurred (eg Fire Brigade and Anglican Church). Certain of such uses must be reasonably expected to require front of building parking and/or different front setbacks, such as has occurred locally (eg again Fire Brigade and Anglican Church).

43

Ms Hawes essentially confined her consideration of local character for the test of compatibility with the residential area on the northern side of Hornby Street. In oral evidence she indicated that it was significant to her that the land to the south was in a different zone with different zone objectives. She regarded the open space lands to the west of Broughton Street similarly. Ms Hawes argued that “there is a consistent streetscape along Hornby Street that applies to the development and that is dwellings on large lots that are predominantly located along the southern boundaries of the street with large rear setbacks” (Ex 5 p 9 par 7).

- 44 Ms Hawes highlighted the provisions at control C13 of the CCP Guideline, as follows (Ex p 16 par 29): “where there are existing buildings within 50 metres, the setback should be the average of the two closest buildings”. In oral evidence Ms Hawes indicated her belief that this control should not be discounted and that the CCP Guideline was prepared purposefully to ensure a good fit in existing residential areas. But even if an average of the setbacks along the southern side of Hornby Street in the site environs, the average setback would 14.1m. Ms Hawes thought the proposed parking area would “detract from the aesthetics of the streetscape” (Ex 5 p 11 par 4):

#### Evaluation

- 45 It would not seem to me inappropriate, if the test is local character compatibility, to place too much weight on the permissibility of other non-residential uses within the relevant zone. The fact that a use is permissible, with consent, only means that the first statutory threshold is overcome. There is still the evaluation of merits including, and as put by the applicant in closing submissions, the likely impacts of that development... “in the locality” (EPA Act s 4.15(1)(b)). So for me, this means that while a church or fire station or various other commercial or community uses may be a permissible use, if local character compatibility was required, then the general range of non-residential (and residential) uses would still need to be compatible with the particular local character.

46



I would also say that I did not see the two examples of Wilton Fire Brigade and the Wilton Anglican Church as of great pertinence to this case. The Wilton Fire Brigade and its parking area, off Wonson Street, is situated on a cleared area surrounded by a large and heavily wooded block which has a very distinctive bushland character. While there is a low density residential precinct to the south of Wonson Street, I saw it as distinctively separate from the bushland to the north.

47 I also saw the setting of the Wilton Anglican Church, and I think particularly the new prefab buildings to the north of the old church building (more readily observable from Fitzroy Street), as so different from the site's setting as to be not useful. The difference here is that there appears to be a very large area of vacant land which has been taken up for this what looks like an expanded church-related use. There was a large grassed area between the new prefab buildings and Fitzroy Street. The prefab buildings were also not setback much further than the front setback of the only residence nearby.

48 It would generally be the case that the local visual catchment provides a useful frame for the identification of the bounds of a unified local visual character. However, in circumstances where there is a readily identifiable visual character demarcation this approach is inappropriate. The example I refer to above, in relation to the Wilton Fire Brigade bush block and the residential area across Wonson Street to the south is a case in point. The visual character of that locality is low density residential on one side and bushland on the other side, interrupted only partially by the fire brigade building. The local visual catchment does not have a unified visual character. I believe that similar circumstances apply in regard to the subject site.

49 It is clear that the site and the area on the northern side of Hornby Street, between Broughton Street and Almond Street, has a certain distinctive character. Of particular relevance here is the repeated pattern of open grassed front setback areas with gardens, then residences quite readily apparent behind. The development across Hornby Street to the south is very different. The most obvious factor is the deeper setbacks and, essentially, park-like settings for most of the rural residential dwellings that are located there. Lot 9 which has the setback of 22m (Ex 4 App 5) is the

considerable outlier for these residential properties. The landscape supplies business is obviously distinctive and entirely differentiated from the setting of the north side of Hornby Street.

- 50 The proposal's deep front parking area would be readily apparent as a large, engineered feature in the otherwise lower key existing pattern of development on the southern side of Hornby Street. I agree with Ms Hawes that it cannot be seen as fitting in with the local character. The proposed carpark landscaping helps somewhat but cannot overcome the problem of the scale of the parking area. Rather than harmonious the development would be visually jarring in its setting.

### **Rear yard considerations**

- 51 As I understood things there were two aspects of the proposal that were seen to unreasonably impact on neighbour amenity. First, because of the 30m front building setback (to provide for on-site parking), the "bulk" of the child care building was pushed to the north to be located adjacent to the rear private open space areas of neighbours. I have mentioned above that the applicable rear setback control under WDCP indicates as follows: "consistent with surrounding development" (Ex 1 p 404). Second, was in regard to the proposed acoustic fencing (described at [11]), the segments of which that were higher than 1.8m were argued to be out of character.

- 52 In terms of fencing, I note the following evidence. Mr Brown relied on the cantilevered and angled plexiglass/polycarbonate fixture above the 1.8m timber fence to suggest that (Ex p 14 par 11-12):

"... From the adjoining properties, the fence is viewed as 1800mm high and then cantilevered back inside the property, as per the acoustic requirements. As such the fence is a 1800mm high timber fence with a clear plexiglass section.

In my opinion, the 1800mm fence is consistent with the character of the area which has fence heights of 1800mm high and C5 of the Planning Guidelines."

- 53 Ms Hawes argued that (Ex p 15 par 24):

"The extent of the fence height as proposed is not supported as it is not characteristic of the area, exceeds the typical 1.8m fence height that would comply with exempt development provisions (irrespective of the fact it is cantilevered) and will have an

adverse visual impact on adjoining neighbours irrespective of the fact it is proposed to be cantilevered.”

- 54 In terms of the childcare building’s proposed location, Ms Hawes believed the non-compliance with the rear setback control was a failure to “respect and respond to context” (Ex p 16 par 31). Mr Brown noted that there were already existing buildings in the rear setback areas of local residential properties and potential for more to come (Ex p 6 par 8):

“With the rear setback, it is noted that there are structures with the rear yard areas of Nos 127, 129, 131, 133 and 135. No 135B contains a separate dwelling on a separate lot. In fact Nos 127-133 could be developed with a separate lot and dwelling/s given the minimum lot size of 700m<sup>2</sup> applies under Clause 4.1 of LEP 2011. Indeed, separate structures can be constructed in the rear sections of these properties, as occurred. A shed or other structures could be constructed near the rear of these properties, provided a setback under the DCP is met.”

#### Evaluation

- 55 The character of the rear yard areas of the residential properties, along the southern side of Hornby Street, is quite distinctive; exhibiting a particular sense of place, with the open fencing, so it seems, encouraging good feelings and neighbour relations. I accept the point made by both the planners, that this current open fencing form can change any time, without approval, under exempt development provisions. However, the proposed fencing for the child care centre would, for much of the backyard area, exceed the 1.8m standard. I am not convinced that the proposed cantilevered and angled plexiglass/polycarbonate fixture, above, will do much to result in a less visually intrusive feature (unless one is located very close to the fencing, given sightlines and the 45 degree angle of the cantilever). There are large lengths of acoustic fencing higher than 1.8m proposed, something particularly out of character in this setting. This is a significant negative feature of the proposal.
- 56 The impingement of the child care building into this rear setback area is for me a more complex matter. The relevant objective of the rear setback control (Ex 1 p 403) is general and provides as follows:

“to establish a desired relationship between the street and footpath, public spaces, private spaces and buildings”.

57 In the broad, I would see it as reasonable that there be considerable flexibility in the application of the existing control in these deep blocks, if orderly and economic development is part of the planning ambition. As Mr Brown indicates, there are existing secondary buildings within the rear setback area in some of these locations, and this is certainly not inappropriate. I do not find this particular matter of the child care building's impacts on the enjoyment of the rear gardens as a determinative factor.

## Conclusion

58 I am aware that the proposal is satisfactory, or more than satisfactory, in regard to many provisions, including matters relating to the learning environment for the children, sustainability, safety for children, building height, infrastructure and certain amenity factors (here including acoustic privacy, overshadowing and the like). I am also aware that Council's Social and Health Impact Assessment Working Group were satisfied that the proposal would have an overall positive social and health impact (Ex 1 p 31).

59 However, it seems to me that both the Education SEPP and the associated CCP Guideline are clear and purposive in their ambition to have new childcare centres "minimise impacts on surrounding areas" (the Education SEPP cl 3(c)), and "contribute to the local area by being designed in character with the locality and existing streetscape" (CCP Guideline item C5). In this instance, it is clear to me that the large front parking area would be a visually jarring element, inappropriately at odds with the setting. The proposed acoustic fencing, where it exceeds 1.8m in height, is also unsympathetic to the setting.

## Orders

60 Accordingly, the Court orders that:

- (1) The appeal is dismissed.
- (2) Development Application No. DA/2020/909/1 seeking the grant of consent for a child care centre at 125 Hornby Street Wilton is determined by way of refusal.
- (3) The exhibits are returned except for Exhibits 2, A, B and C, which are retained.

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**P Walsh**

**Commissioner of the Court.**

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Decision last updated: 25 July 2022