

# PLANNING AND ENVIRONMENT COURT OF QUEENSLAND

CITATION: *11 Ludlow Pty Ltd v Brisbane City Council* [2020] QPEC 55

PARTIES: **11 LUDLOW PTY LTD (ACN 619 509 625)**  
(Appellant)  
v  
**BRISBANE CITY COUNCIL**  
(Respondent)

FILE NO: 4573/2019

PROCEEDING: Application

ORIGINATING COURT: The Planning and Environment Court at Brisbane

DELIVERED ON: 28 October 2020

DELIVERED AT: Brisbane

HEARING DATE: 22—23 October 2020

JUDGE: Everson DCJ

ORDER: **The application is dismissed**

CATCHWORDS: PLANNING AND ENVIRONMENT – APPEAL – application for an order that proposed changes to the development application are a minor change

LEGISLATION: *Planning Act 2016* (Qld)  
*Planning and Environment Court Act 2016* (Qld)

CASES: *Cleanaway Solid Waste Pty Ltd v Ipswich City Council & Ors* [2020] QPEC 47  
*Highgate Partners Qld Pty Ltd v Sunshine Coast Regional Council* [2020] QPEC 19  
*Northbrook Corp Pty Ltd v Noosa Shire Council* [2015] QPELR 664

COUNSEL: G Gibson QC and N Loos for the appellant  
J Lyons for the respondent

SOLICITORS: Connor O’Meara for the appellant  
City Legal for the respondent

## Introduction

- [1] This is an application in pending proceeding seeking an order that proposed changes to the development application the subject of the appeal (“the development

application”) are a “minor change” pursuant to s 46(3) of the *Planning and Environment Court Act 2016* (“PECA”).

- [2] The development application seeks development permits for a material change of use and building work for a Food and Drink Outlet, Office and Shop on land situated at 2 Oxford Street, Bulimba (“the site”).<sup>1</sup> The site has frontages to Oxford Street and the Brisbane River and comprises an area of 1,134 m<sup>2</sup>.<sup>2</sup> The development application was subject to code assessment.<sup>3</sup> The site also adjoins the Bulimba Ferry Terminal which is listed on the Queensland Heritage Register as a State Heritage Place.<sup>4</sup> It was constructed in the early 1920s.<sup>5</sup>
- [3] The development application is summarised by the appellant in its written submissions as being for “a four-storey mixed-use commercial building”.<sup>6</sup> The changes, the subject of the application before the court, consist of design changes to the building, improved landscaping and the addition of a basement car park which is to provide 19 parking spaces (“the proposed changes”).<sup>7</sup>
- [4] The respondent does not oppose the application.

### **The jurisdiction of the court**

- [5] Pursuant to s 46(3) of the PECA the court cannot consider a change to the development application “unless the change is only a minor change to the application”. The term “minor change” is relevantly defined in the *Planning Act 2016* in the following terms:

“ ‘**minor change**’ means a change that—

(a) for a development application—

(i) does not result in substantially different development; and

(ii) if the application, including the change, were made when the change is made—would not cause—

(A) the inclusion of prohibited development in the application; or

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<sup>1</sup> Affidavit of Christopher Gerard Buckley filed 20 August 2020, para 2.

<sup>2</sup> Ibid, para 4.

<sup>3</sup> Ibid, para 5.

<sup>4</sup> Affidavit of Andrew Ernest Ladlay filed 12 October 2020, para 7.

<sup>5</sup> Ibid, Exhibit “AEL-4”.

<sup>6</sup> Appellant’s outline of submissions, para 4(a).

<sup>7</sup> Ibid, para 6.

(B) referral to a referral agency if there were no referral agencies for the development application; or

(C) referral to extra referral agencies; or

(D) a referral agency, in assessing the application under *section 55(2)*, to assess the application against, or have regard to, a matter, other than a matter the referral agency must have assessed the application against, or had regard to, when the application was made; or

(E) public notification if public notification was not required for the development application;”

The only question for determination in the proceeding before me is whether the proposed changes will result in a substantially different development.<sup>8</sup>

[6] In *Northbrook Corp Pty Ltd v Noosa Shire Council* the court observed:

“The starting point for the assessment of whether the changes result in a substantially different development is the words of the relevant statutory provision and “substantial” is defined in the *Macquarie Concise Dictionary* as, inter alia, “essential, material or important”. The question for determination is whether the proposed changes fall within this definition in the context of the development application.”<sup>9</sup>

As Williamson QC DCJ subsequently observed in *Cleanaway Solid Waste Pty Ltd v Ipswich City Council & Ors*, “(c)entral to this test is the result of the change to a development application, rather than the significance of the change itself”.<sup>10</sup>

[7] In *Highgate Partners Qld Pty Ltd v Sunshine Coast Regional Council*, Kefford DCJ summarised relevant considerations in the exercise of the court’s jurisdiction in the following terms:

“Whether the proposed change is a ‘*minor change*’ is a matter of fact and degree. It should be considered broadly and fairly, with guidance found in Schedule 1 of the Development Assessment Rules. Both quantitative and qualitative matters may be of relevance.”<sup>11</sup>

[8] Schedule 1 of the Development Assessment of Rules relevantly states:

“4. A Change may be considered to result in a substantially different development if any of the following apply to the proposed change:

<sup>8</sup> Appellant’s outline of submissions, para 3; Affidavit of Mr Buckley filed 22 October 2020, para 4.

<sup>9</sup> [2015] QPELR 664 at 669 [13].

<sup>10</sup> [2020] QPEC 47 at [43].

<sup>11</sup> [2020] QPEC 19 at [14].

...

- (c) dramatically changes the built form in terms of scale, bulk and appearance; or

...

- (f) significantly impacts on traffic flow and the transport network, such as increasing traffic to the site; or
- (g) introduces new impacts or increase (sic) the severity of known impacts; ...”

[9] The facts that the development application was code assessable and that the respondent does not oppose the application before the court do not have any bearing on the limited jurisdiction of the court to entertain a change to a development application. The jurisdiction to entertain a change is the same regardless of whether the development application is code assessable or impact assessable and whether it is opposed or unopposed.

### **The proposed changes**

[10] Many components of the proposed changes are uncontentious. A summary of them in tabular form discloses that they would result in a minor reduction in building height, a minor reduction in gross floor area, slight changes to building setbacks and no change to the area of the proposed park which is to face the river.<sup>12</sup>

[11] The changes which are contentious are the addition of a basement beneath the entirety of the four-storey building with a vehicle cross-over to provide 19 car parking spaces where previously there was no on-site car parking and indeed and no vehicular access was to be provided to the site.<sup>13</sup> Also of significance are the notable changes to the architectural treatment of the proposed development. It has radically changed in appearance. It was described by Mr Buckley, the town planner engaged by the appellant, in his first affidavit as “having a different architectural expression”.<sup>14</sup> Mr Ladlay, the architect who gave evidence on behalf of the appellant, described aspects of the new design as “somewhat visually heavier than the previous proposals”.<sup>15</sup> A comparison of the elevation plans reveals a starkly

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<sup>12</sup> Affidavit of Mr Zietsman filed 13 October 2020, para 18.

<sup>13</sup> Exhibit 2 and Exhibit 3.

<sup>14</sup> Affidavit of Mr Buckley filed 20 August 2020, para 21(c).

<sup>15</sup> Affidavit of Mr Ladlay filed 12 October 2020, para 11(c).

different design from an architectural perspective.<sup>16</sup> Whereas a rather neutral curved façade evocative of the adjoining river was the subject of the plans which form part of the development application, what is now proposed is an angular amalgam of arched terraces and above ground vegetation with a large circular window positioned above the proposed cross-over point. The subtle neutrality of the design the subject of the development application has been replaced with a bold architectural statement.

[12] So far as the proposed change to add the underground car park is concerned, the appellant relies upon the evidence of Mr Quinn, a traffic engineer who asserts that 19 car park spaces will not generate high volumes of traffic.<sup>17</sup>

[13] So far as the architectural changes are concerned, the appellant submits that despite the change to the architectural style of the building “from continuous curves to individual arched elements”,<sup>18</sup> the proposed development remains a four-storey mixed-use commercial building facing the river.<sup>19</sup> There may be circumstances where a design change may not assume much importance, however on the facts before me the interrelationship between the proposed development and the heritage listed Bulimba Ferry Terminal is very much in issue in the appeal.<sup>20</sup> Accordingly, considerations of dramatic changes to built form assume importance in assessing whether or not the changes will bring about a substantially different development.<sup>21</sup> The submission that the proposed development remains a four-storey mixed-use commercial building is simplistic in the circumstances.

### **Conclusion**

[14] Creating a basement car park for 19 vehicles where no on-site parking was previously provided is both a material and important change to the proposed development. It creates a whole new level in the building for the parking of motor vehicles whereas previously there was to be no vehicular access to the site. This

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<sup>16</sup> Affidavit of Mr Buckley filed 20 August 2020, Exhibit “CGB3” and Exhibit “CGB5”; Exhibit 2 and Exhibit 3.

<sup>17</sup> Affidavit of Mr Quinn filed 12 October 2020, para 10(b)(ii).

<sup>18</sup> Appellant’s Outline of Submissions, para 6(c), Affidavit of Mr Buckley filed 28 August 2020, para 17(c).

<sup>19</sup> Appellant’s Outline of Submissions, para 4(a).

<sup>20</sup> Notice of Appeal, paras 9-10.

<sup>21</sup> For an example of such a circumstance see *GBW Investments Pty Ltd v Brisbane City Council* [2018] QPEC 33.

introduces a new impact as a consequence. It results in a substantially different development. The radically different architectural treatment of the proposed building, which dramatically changes its appearance is also a change which is material or important in the context of the adjoining heritage listed Bulimba Ferry Terminal. Accordingly, the changes to the architectural treatment of the proposed development also result in a substantially different development.

[15] Each of these changes is such that the proposed changes are not a minor change pursuant to s 46(3) of the PECA.

[16] I therefore dismiss the application.