SUPREME COURT OF QUEENSLAND

CITATION:	*AAD Design Pty Ltd v Brisbane City Council* [2012] QCA 102
PARTIES:	**AAD DESIGN PTY LTD** ACN 090 793 570 (applicant) **v** **BRISBANE CITY COUNCIL** (respondent)
FILE NO/S:	Appeal No 4375 of 2011 P & E Appeal No 3169 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave *Sustainable Planning Act* – Further Order
ORIGINATING COURT:	Planning and Environment Court at Brisbane
DELIVERED ON:	17 April 2012
DELIVERED AT:	Brisbane
HEARING DATE:	Heard on the papers
JUDGES:	Chesterman JA, Margaret Wilson AJA, and Philippides J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**The appellant pay one third of the respondent's costs of the application for leave and the appeal on the standard basis.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL – PRACTICE AND PROCEDURE – QUEENSLAND – POWERS OF COURT – COSTS – where the respondent succeeded on an appeal against the decision of the Planning and Environment Court – where parties requested to provide written submissions as to costs – whether an award of costs should be made in favour of the respondent *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355; [1998] HCA 28, cited *Queensland Construction Materials Pty Ltd v Redland City Council* (2010) 175 LGERA 153; [2010] QCA 248, cited
COUNSEL:	No appearance by the applicant, the applicant's submissions were heard on the papers No appearance by the respondent, the respondent's submissions were heard on the papers

SOLICITORS: Synkronos Legal for the applicant
Brisbane City Legal Practice for the respondents

[1] **CHESTERMAN JA**: I agree the Court should make the order proposed by Philippides J, for the reasons given by her Honour.

[2] **MARGARET WILSON AJA**: I agree with the order proposed by Philippides J for the reasons given by her Honour.

[3] **PHILIPPIDES J:** The appeal in this matter concerned whether the proposed use of premises the subject of three development applications was for a "multi-unit dwelling" or a "house" as those terms were defined by the *City Plan* 2000. On 9 March 2012, judgment was given in this matter with the orders of the court being that the appeal against the decision of the Planning and Environment Court (the P & E Court) be dismissed and that the parties provide written submissions as to costs.

[4] The P & E Court, upholding the determination of the Building and Development Dispute Resolution Committee, had accepted the submissions of the respondent that, while the proposed use could fall within both the "house" and "multi-unit dwelling" definitions, applying the "best fit" test the proposed use fell within that of a multi-unit dwelling.

[5] The appellant was given leave to appeal and this Court found that the P & E Court had erred in adopting the best fit test. But in arguing the appeal, the respondent took a different approach than that which it had previously adopted and did not base its submissions on the "best fit" test, which it sought to characterise as no more than an application of the approach enunciated in *Project Blue Sky*. Rather, the respondent accepted that if the proposed use fell within the "house" definition, it could not come within the "multi-unit dwelling" definition. However, it contended that there were three essential differences between the definitions which favoured the conclusion that the proposed use was for a multi-unit dwelling. As to two of these grounds of distinction (that going to the description of the residential use and the extent of use) the respondent was unsuccessful. It did however succeed in its argument concerning the description of the user in the definitions. It was on that basis that the appeal was dismissed.

[6] The appellant contended that, in the circumstances, the appropriate costs order is that there be no order as to costs. In advancing that submission, it was said that the respondent's argument on appeal that the P & E Court's conclusion was not affected by a legal error was unsuccessful, as were two of the three contentions advanced to support the outcome as opposed to the decision below. Further, there was a public interest factor in the Court's determination of the scope and operation of the definitions in the planning scheme in question.

[7] The respondent, on the other hand, submitted that the appropriate costs order was that the appellant pay one third of the respondent's costs to be assessed on the standard basis. That, it was contended, reflected the "relative victories" and relative degrees of success of the parties. The respondent acknowledged the case of *Queensland Construction Materials Pty Ltd v Redland City Council* (2010) 175 LGERA 153, as an example where no order as to costs was made, but distinguished it on the basis that in that case the appeal was successful.

[8] In the present case, given that the appellant failed in its appeal, albeit by a narrow margin, it is not appropriate that there be no order as to costs. Nor is such an order indicated because the outcome (as opposed to the decision) was able to be sustained on the appeal – the appellant was aware of the change of approach in the respondent's arguments which were outlined in the written submissions. Nor is the public interest aspect such as to warrant the order sought by the appellant.

[9] However, the costs order made should, as the respondent properly conceded, reflect the relative victories of the parties and the respondent should only be entitled to one third of its costs to be assessed on the standard basis.

[10] The order I would make is that the appellant pay one third of the respondent's costs of the application for leave and the appeal on the standard basis.