PLANNING & ENVIRONMENT COURT OF QUEENSLAND

CITATION:	*Hayday Pty Ltd v Brisbane City Council* [2005] QPEC 102
PARTIES:	**HAYDAY PTY LTD ACN 101 652 703** *Appellant* **BRISBANE CITY COUNCIL** *Respondent*
FILE NO/S:	BD 3187 of 2005
DIVISION:	Appellate
PROCEEDING:	Appeal against deemed refusal of request to change development approval
ORIGINATING COURT:	Planning and Environment Court, Brisbane
DELIVERED ON:	20 October 2005
DELIVERED AT:	Brisbane
HEARING DATE:	6-7 October, 2005
JUDGE:	Robin DCJ
ORDER:	**Appeal dismissed**
CATCHWORDS:	*Integrated Planning Act 1997* s3.5.24, s3.5.33, Schedule 10 definition of "minor change" – Integrated Planning Regulation 1998 Schedule 2 Table 3 Item 6 – appeal against deemed refusal of request to change a development approval (contained in a court order) - request was for addition of a 6th storey and 20% increase in GFA/plot ratio – change of conditions previously refused by court – determining whether request was for a "minor change" – whether request required referral to additional concurrence agency (the EPA under the *Coastal Protection and Management Act 1995*, which was not involved as the law stood at the time of the approval) – whether a remade original development incorporating the change was likely to cause properly made submissions objecting which the actual application did not cause – relevance of "assessment manager's opinion" formed only during course of appeal.
COUNSEL:	Mr W Cochrane for Appellant Mr M Hinson SC for Respondent
SOLICITORS:	Gail Malone & Associates Brisbane City Legal Practice

[1] This an appeal filed as recently as 25 August 2005 against a deemed refusal of the Council which had arisen only two days earlier. The Council had been asked to approve an application for a change to an existing development approval given over land at 33-35 Griffith Street New Farm. The notice of appeal suggests that success would lead to orders: -

> "1. That the Appeal be allowed and that the Application for change to the development Approval be approved.
>
> 2. An order that the development for material change of use for multi-unit dwelling made by the Planning and Environment Court constituted by his Honour Judge McLauchlan QC on 22 August 2003 in Appeal No.1506 of 2003 be changed to the extent that the existing approval identified on drawings numbered TP08E, TP09E AND TP010E dated 12 August 2003 in so far as they relate to Lots 18 & 19 on RP8732, Parish of North Brisbane be amended in accordance with fresh plans TP07F, TP08F, TP09F revised 10 June 2005."

His Honour's order gave effect to a compromise of an appeal brought by the Appellant against the Council's refusal to approve its original development application for a Development Permit for a material change of use and a Preliminary Approval for the carrying out of building work for a five storey multi-unit dwelling. That application had attracted numerous adverse submissions objecting to additional multi-level unit developments in New Farm, particularly on the basis of exacerbating parking problems, acid sulphate soil issues (said to pose a potential health threat to users of the nearby ferry landing) and the like. The site, which is a river frontage, is included in the Medium Density living precinct of the New Farm/Teneriffe Hill Local Plan which forms part of the current planning arrangements of the city of Brisbane. The development proposed originally and approved by the court's order was in the impact assessable (generally appropriate) category, complying with all relevant acceptable solutions; the change puts it in the impact assessable (generally inappropriate) category.

[2] The building is now close to completion. The principals of the Appellant have learned that the Council is apparently willing to approve similar development in the locality which exceeds the standards indicated in the acceptable solutions, specifically in respect of plot ratio and number of storeys. Particular attention was paid to the Council's approval on or about 4 April 2005 of an application for a material change of use development permit and building works approval in respect of 166-170 Oxlade Drive, New Farm which includes a seven storey apartment building to a maximum height not to exceed RL 27.750m; so far as gross floor area is concerned, the recent approval allows a plot ration of 1.2:1. The Appellant is confined to (presumably having invited) five storeys, a height limit of 24.6m and a plot ratio of 1:1. Apprised of the opportunity to develop slightly more intensively, the Appellant had plans prepared for a potential sixth storey which will enlarge the top apartment by 2 bedrooms. Single balconies on levels 4 and 5 are now proposed to be enclosed. Plot ratio will not exceed 1.2:1.

[3] Understandably, the Appellant is anxious to have the proposed changes approved and incorporated in the construction before the roofing is finished, and while necessary large construction equipment is on site. Considerations of fairness and efficiency support what the Appellant wishes to do. It may be said, speaking in general, that evidence obtained from a town planner, Mr Buckley and visual amenity expert, Mr Van Pelt indicates that the impacts of the changes proposed will be difficult to notice. Sightlines involving the river and other landmarks identified in the Local Area Plan are important; it appears they will not be compromised. It may be noted that the sixth storey will effectively exist only at the Griffith Street end of the building, away from the river. The increase in height proposed may be thought unlikely to affect surrounding properties, where development is presently

(and is likely to remain) lower than the five storeys; the neighbour at 29 Griffith Street is a Federation style house on the Council's Heritage Register. Those remarks are made without the court's knowing the attitudes of the owners/occupiers of those properties, which may be much less accepting. The properties across Griffith Street are in the Low Density residential precinct.

[4] The Appellant's initial approach towards implementing its revised proposal was to apply in BD1138/2005 under section 3.5.33 of the *Integrated Planning Act* 1997 (*IPA*) for a change of conditions included in Judge McLauchlan's order. The application failed, because it did not satisfy section 3.5.33 (1) (b) which required that "no assessable development would arise from the change". See *Hayday Pty Ltd v Brisbane City Council* [2005] QPEC 050 (1st July, 2005). Judge Wilson SC at paragraph [11] noted the definition of material change of use as including "a material change in the intensity or the scale of the use" and concluded that "while not visually dramatic, the proposed changes cannot… be described as anything other than significant and, for that reason, material." The Appellant cited the determination, to different effect, in *Martin v Whitsunday Shire Council* [2001] QPELR 348, 350 where Judge Wall QC said:

> "In the present case, the height only of the approved development is increased by the changed condition, everything else remains the same. There is no substantial difference, the concept is the same and the building is of the same character. It is not a substantially different development. I accept that the views of others, in particular, those in the units behind the development, will be further adversely affected with a consequent interference in residential amenity, but in the present circumstances, that is not, in my opinion, sufficient to warrant categorisation of the change as assessable development. Basically, the development is the same, expect that it is slightly higher."

after citing *Rhema Management Services Pty Ltd v Noosa Shire Council* [2000] QPELR 15 and *Rose Bay Developments Pty Ltd v Bowen Shire Council* [2001]

QPELR 340. Those were cases in which approved changes did not increase the bulk of the developer's proposal. No appeal was brought against Judge Wilson's decision, which is binding on the parties.

[5] Instead, ten days later, the Appellant lodged with the Council an application or request to change the existing development approval under section 3.5.24 of the *IPA*. The notice of appeal asserts that no concurrence or building referral agency was involved, so that the Council was required to approve or refuse the change on or before 23 August 2005, that is within 30 business days after lodgement. The section is available to a developer proposing a "minor change".

[6] There was argument as to whether the appeal was under section 4.1.27, as by "an applicant for a development application" in which event section 4.1.50 (1) places the onus of upholding the appeal on the Appellant and the appeal is by way of hearing anew: section 4.1.52(1) – or whether the appeal was under section 4.1.30(4), in which event it is section 4.1.50(4) that places the onus on the Appellant; section 4.1.52 (1) would still apply. Section 4.1.30 is oddly drawn. Mr Cochrane asserted that it does not apply, because, much as his client might have wanted a notice under subsection (1)(b), it never got one. Further, he relied on the approved Form for a section 3.5.24 request, Form 2, which identifies itself as a "development application". Mr Cochrane submitted that this was sufficient to bring in section 4.1.27, alternatively that any appeal authorised by section 4.1.30 (4) would bring in section 4.1.27. It is difficult to identify any necessity for that to occur, having regard to the other provisions mentioned here. It seems to me that section 4.1.30(4): -

> "Also, a person who has made a request mentioned in subsection (1) may appeal to the court against a deemed refusal of the request."

creates an independent appeal category, there being no requirement that the putative appellant has been given any notice. Subsection (5), by way of distinction from the

appeal times in subsection (2) in each of section 4.1.27 and section 4.1.30 itself, provides that: "an appeal under subsection (4) may be started at any time after the last day the decision on the matter should have been made". It is difficult to see that anything much would turn on the outcome of this argument in present circumstances.

[7] Mr Cochrane's written argument referred to s4.1.27(1)(e) and continued:

> "23. It is submitted that since there was a deemed refusal the appeal is against a refusal that is taken to have happened. That is, in this appeal relevant matters are the Town Planning issues which were to be considered in the making of the determination whether to approve or not approve the application. The effect of the Council not deciding either the applied for change was not minor or the application is that any preliminary question to allow the application to be assessed is no longer to be determined. The practical effect is that the applicant is taken to have the application refused and has the onus of showing why the change should be allowed. It is in the same position it would have been in had an application for a material change of use been made considered and refused or not considered and treated as a deemed refusal.
>
> 24. It is submitted that it is now irrelevant given the expiration of the time under the Act for consideration by the Council to now raise a question whether the application is a minor change. If that was to be raised is should have been raised long before the expiration of the time for the consideration of the application for the change to be made to the development approval."

It would be mischievous in the extreme to accept (and nothing in IPA requires) that a developer can succeed on a "minor change" or "not a minor change" issue (whatever is proposed) by default – at least where the planning authority wants to contest it.

[8] The Council resisted the appeal by arguing that the Appellant's proposals are not "minor change", with the consequence that Council had no power to make the relevant changes and that the court would likewise lack power or jurisdiction. Section 3.5.24 is: -

> "3.5.24 Request to change development approval (other than a change of a condition)
> (1) If a person wants a minor change to be made to a development approval, the person must, by written notice—
> (a) advise each entity that was a concurrence agency that the person is asking for the change; and
> (b) advise each entity that was a building referral agency, for the aspect of the application the subject of the request, that the person is asking for the change; and
> (c) ask the assessment manager to make the change.
>
> (4) If the assessment manager has a form for the request, the request must be in the form and be accompanied by—
> (a) the fee for the request—
> (i) if the assessment manager is a local government—set by a resolution of the local government; or
> (ii) if the assessment manager is another public sector entity—the fee prescribed under a regulation under this or another Act; and
> (b) a copy of the advice given to any concurrence or building referral agency for the application.
> (5) This section does not apply if the change is a change of a condition of the development approval."

Although a change of condition was sought, in the sense that the approved plans were identified and given their status by a condition requiring compliance with them in the approval package endorsed by the court on 22 August, 2003, no point was taken by the Council along those lines in this appeal. A communication to the court after the hearing revealed that while it was being pressed to decide the "request", the Council by letter of 26 July, 2005 suggested the situation had to be approached under s3.5.33, so that in light of Judge Wilson's decision a new application for a development permit was required.

[9] The outcome of this appeal depends on the proper interpretation and application of the IPA Schedule 10 definition: -

> "***Minor change***", for a development approval, means a change to the approval that would not, if the application for the approval were remade including the change –
> (a) require referral to additional concurrence agencies; or
> (b) cause development previously requiring only code assessment to require impact assessment; or
> (c) for a development requiring impact assessment – be likely, in the assessment manager's opinion, to cause a person to

make a properly made submission objecting to the proposal, if the circumstances allowed.

Both (a) and (c) were relied on by the Council, in contending the definition was not satisfied. Given the onus provisions of the *IPA* and the general principle that the person making any claim has the onus of proving it, it is for the Appellant to prove the absence of (a), (b) - if it were relevant - and (c).

[10] As for (a), the concurrence agency which the Council suggests must be brought in is the Environmental Protection Authority, for purposes of the *Coastal Management Act* 1995. This has come about by a tortuous process over many years which requires the detailed explanation given by Mr Hinson SC (for the Council). One suspects the Appellant has been ambushed by this point, which one would not expect to encounter at New Farm, even on a riverfront site, but, notwithstanding its contention, the site is within a Coastal Management District and therefore within the current Item 6 in Table 3: Development made assessable under a local planning instrument in Schedule 2 of the Integrated Planning Regulation 1998: -

"Coastal management districts		
6 Material change of use, if carrying out the change of use will involve— (a) operational works carried out completely or partly in a coastal management district; or (b) building work, carried out completely or partly in a coastal management district, that is— (i) the construction of new premises with a GFA of at least 1 000 m^2; or (ii) the enlargement of the GFA of existing premises by more than 1 000 m^2	Chief executive, under the *Coastal Protection and Management Act 1995*—as a concurrence agency	Coastal management under the *Coastal Protection and Management Act 1995*, excluding amenity and aesthetic significance or value"

The foregoing was formerly Item 24 in Schedule 2: -

"Schedule 2 (continued)

Column 1	Column 2	Column 3	Column 4

Application involving	Name of referral agency	Type of referral agency	Referral jurisdiction
24 Material change of use of premises completely or partly within a coastal management district if the change of use is assessable under planning scheme and – (a) the carrying out of the change of use will involve operational work carried out completely or partly within the coastal management district; or (b) the carrying out of the change of use will involve building work, carried out completely or partly within the coastal management district, that is – (i) the construction of new premises with a gross floor area of at least 1000m^2; or (ii) the enlargement of the gross floor area of existing premises by at least 1000m^2	The chief executive administering the *Coastal Protection and Management Act* 1995	Concurrence	Coastal management, other than amenity and aesthetic significance or value.

"

[11] The change happened by SI 200/2004 at the end of September, 2004. Item 25 dealt with "Development that is – (a) reconfiguring a lot that is land situated completely or partly with a Coastal Management District", accompanied by identical provisions in columns 2, 3 and 4. Whether or not there are proposed operational works, it appears to me that the Appellant's proposal relevantly involves "construction" or "enlargement" exceeding the 1000m^2 benchmark. Mr Cochrane's argument is that there are "existing premises" of five storeys, that the GFA is proposed to be enlarged by less than 1000m^2. While literally open, that interpretation, in my opinion, would unjustifiably deprive Item 6 of its intended effect. A developer could proceed in stages, 999m^2 at a time, and never have to confront Item 6. In *Law v Beaudesert Shire Council* Appeal No.4077/1999, 24 May 2000 090 [2000] QPEC 090) the following appears at [17]: -

> "Although the appeal may be regarded as limited to the single issue whether the Court should approve an increased maximum number of cabins above that the Council has deemed acceptable, the Court should not approach the matter as a simple exercise of assessing the impact of additional cabins, which may well be modest in the circumstances. I agree with Mr Hughes' submission, for the Council, that the necessary comparison (with respect to acceptability of impacts) requires examining Mr Law's project in its entirety and comparing, on the one hand, his land as it presently is and, on the other hand, the land as it will be after development, whether that be to the extent Mr Law would wish, or to the more limited extent acceptable to the Council. As it happens, the Council went considerably beyond its own planning advice in going as far as it did; its support for the project was conditional upon the cabins being limited to 18, and other cuts, in particular deletion of the theatre."

In the present context of applying planning controls, even though the approved building is largely "up", it would be artificial to regard the proposal as existing premises of 1123m2 being increased by about 20%.

[12] The recently approved Oxlade Drive development shows this Schedule 2 Item taken seriously. The EPA's views were sought and it stipulated conditions for inclusion. There is a reference to Item 25, which is patently an error, intended as a reference to the former Item 24; the proposal had nothing to do with reconfiguration. Scrutiny of the file, relating to it (see exhibit 10 Concurrence Agency Response – Coastal development, referring to Item 25 (a)) and the unchanging EPA approval number IPCC00052604A11 (which also appears on the Notice of Decision – Concurrence Agency Response) clearly shows the Activity (Referral Trigger) as "Material Change of Use completely or partly within a Coastal Management District".

[13] **How the Beach Protection Act "migrated to the IPA"**

The *Beach Protection Act 1968,* enacted after some years of heavy cyclonic conditions which caused serious erosion in various coastal areas, created the Beach Protection Authority. Section 41A provided in its various subsections that:

(1) "the authority may cause to be prepared in respect of any part of the coast to an erosion prone area plan"

(2) "when an erosion prone area plan is prepared, the authority shall furnish a copy of the plan to the local government the area whereof includes the part of the coast in question."

(3) The local authority shall keep a copy of the plan for public inspection.

(4) The authority may amend the plan (causing an existing plan to be superseded).

"Coast" as used in subsection (1) is defined in section 3 of the Act as all land, including the bed and banks of any river, stream, watercourse, lake etc above the highest astronomical tide mark and within four hundred metres of that mark (measured by the shortest of distance) where situated below the highest astronomical tide mark. The areas about which an erosion prone area plan may be made are obviously extensive.

[14] Exhibit 9 is the Beach Protection Authority erosion prone area plan for Brisbane City. It relates to New Farm (as will be seen), notwithstanding that what it depicts is Moreton Island; it contains important notes: -

> "**Notes**
>
> (1) The seaward boundary of the erosion prone area for all local authority area/s to which this plan relates shall be defined by the seaward limit of Queensland waters.
>
> (2) On land adjacent to coastal waters the landward boundary of the erosion prone area shall be defined as:
>
> (i) a line measured 40 metres landward of the plan position of the mean high water springs (MHWS) tide level except where approved revetments exist, in which case the line is measured 10 metres landward of the upper seaward edge of the revetment, irrespective of the presence of outcropping bedrock; or

(ii) a line located by the linear distance (in meter) specified on this plan measured, unless specified otherwise, inland from:

(b) the seaward toe of the frontal dune. (the seaward toe of the frontal dune is normally approximated on aerial photography by the seaward limit of terrestrial vegetation); or
(b) a straight line drawn across the mouth of a waterway between the alignments of the seaward toe of the frontal dune on either side of the mouth.

(iii) The plan position of Highest Astronomical Tide (HAT);

whichever provides the greater erosion prone area width except:

(a) Where the linear distance specified on this plan is less than 40 metres, in which case note (2)(i) does not apply, however notes (2)(ii) and (2)(iii) do apply;

(b) Where outcropping bedrock is present and no approved revetments exist;

(c) In approved canals in which case the line of HAT applied, irrespective of the presence of approved revetments or outcropping bedrock.

(3) Erosion prone areas defined in accordance with the above are deemed to exist throughout all the local authority area/s to which this plan relates, irrespective of whether the entire local authority area is depicted on erosion prone area plans for the local authority.

(4) Coastal waters, as referred to in note (2), are defined to be Queensland waters to the limit of HAT.

[15] By section 36 of the Acts Interpretation Act, Queensland waters means all waters that are within the limits of the State (or "coastal waters of the State" – which are separately defined). The definition is consistent with that of "coast" in the *Beach Protection Act.* The waters of the Brisbane River at New Farm are brought in.

[16] Note (4) is confirming that waters within the limits of the State to the limit of the highest astronomical tide are coastal waters referred to in note (2). Note (2) provides for exceptions; it tells us that for land adjacent to waters within the limits of the

State, the landward boundary of the erosion prone area is 40 metres landward of the plan position of the mean high water spring tide level except where approved revetments exist – in which case the measurement is 10 metres landward of the upper seaward edge of the revetment irrespective of the outcropping of bedrock.

Paragraph (ii) allows linear deviations on the plan like those mapped for Moreton Island. Paragraph (iii) is an alternative to either (i) or (ii) and is the plan position of highest astronomical tide. Whichever of those options applies to provide the greater erosion prone area width indicates the landward boundary. The (b) after (iii) appears to be irrelevant, as it deals with outcropping bedrock. In the New Farm area, then, four hundred metres is not a relevant dimension, but either 40 metres or 10 metres is – or the plan position of the highest astronomical tide. The greatest of those three will apply.

[17] Note (3) confirms that erosion prone areas are likely to be much more extensive than the ordinary person would imagine. There is no need for them to be mapped in the official "Brisbane City Erosion Prone Areas" plan in exhibit 9. It does not matter that all of Brisbane City is not depicted on the plan.

[18] The Beach Protection Authority has been dissolved. Relevantly, it has been replaced by the Environmental Protection Authority (EPA). The *Coastal Protection and Management Act 1995* provided in section 104 (a) that "each erosion prone area under the *Beach Protection Act* is taken to be a control district under this Act." The Schedule to the *Coastal Protection and Management and other Legislation Amendment Act of 2001* by amendment 28 inserted a note after section 104 which states that the Amendment Act renamed control districts as coastal management districts. The *Coastal Protection and Management Act 1995* Reprint 2 as in force at

January 1 2005 incorporates renumbering whereby section 104 is now section 168. Section 168 reproduces section 104, and includes the note.

[19] Thus, the erosion prone area has become a control district, and then been renamed a coastal management district. Section 169 provides that each area that was a coastal control district under the Act immediately before the commencement of the section is taken to be a coastal management district; there has been an evolution in terminology from erosion prone area to control district to "coastal management district". That is the language used in the Integrated Planning Regulation 1998 Schedule 2 Table 3 Item 6 in describing (for present purposes) what triggers referral to the Chief Executive under the *Coastal Protection and Management Act 1995* – as a concurrence agency.

[20] It was common ground that there is a substantial wall of rock or similar material which provides protection for the site against erosion by the river. The Appellant's case includes assertions, by Mr Buckley in particular, at 4.3 in exhibit 5 that "because there is an existing revetment wall at the river edge, there is doubt that the site is caught". No definition of "approved revetment" has been pointed to. The expression may indicate something for whose construction appropriate permission was given or something which was inspected and approved after construction; both requirements may need to be satisfied. As Mr Hinson said, "we don't know anything about whether it's been approved." By all accounts the wall was constructed long ago, it is suggested in the 1930s. It may well be solid and stable. The Appellant's engineers are presumably confident about that. The wall may merit approval. But speculation or assumption is not permissible. It is the Appellant who makes the assertion, with a view to persuading the court that no "additional concurrence agency" is involved here, that there is an approved revetment, but, as

noted, quite apart from IPA "onus" provisions, the person who makes such an assertion is to establish it. The necessary evidence was lacking.

[21] Exhibit 6 is an untitled map of Brisbane and surrounds which was tendered by Mr Cochrane under the description River Map as Exhibit 6, after being produced by the Council. The transcript at 40ff records some inconclusive discussion about the exhibit. A key shows variously coloured lines indicating Erosion Prone Line Type, including 40 metre offset from HAT and 40 metre offset from MHWST.[1] A brown line indicates "10 metre offset from top of approved revetment". Such a line is prominent in locations like Redcliffe, Fisherman Island and the perimeters of Brisbane Airport: one appears also along Coronation Drive and part of Kingsford Smith Drive; there is no sign of brown in New Farm (which is characterised by a red 40 metre line). There are a couple of blue dots, one of which could be at the site. These and other blue dots, scattered sporadically along the river, are not explained in any way, unless they are fragments of the blue "transition line". Mr Cochrane (41) suggested that "the blue dots indicate the position of revetments", anticipating (in vain) that Mr Hinson would be of "vastly more assistance". As it was, things did not advance beyond speculation. The matter was potentially important. The proposed development would be unaffected by a 10 metre line, but does come within the 40 metre lines.

[22] The regulatory material the court was taken to by Mr Cochrane included the *Coastal Protection and Management Regulation 2003*, which commenced on 20 October 2003. It is concerned with coastal management districts, as one would expect, and with fixing coastal building lines for them. See section 4. Also, it specifies fees in Schedule 2, those in Part 2 (Application other than in connection with an artificial

[1] The abbreviations are explained in [14]

waterway) being pertinent. The Part deals with applications for a material change of use of premises completely or partly within a coastal management district, for carrying out operational work or for reconfiguring lots "completely or partly within a coastal management district."

[23] It appears (for example in the adverse submission of Mrs Gambaro in exhibit 7) that on the site was an "existing dwelling, the proposed development will be 3-4 storeys higher". There were many objections to "multi-unit dwellings", quite a few asking, "how many more character homes will the Council allow developers to knock down before our suburb is totally destroyed?" Mr Cochrane confirmed that the former development was "a house that burnt down… Mr Favell's home… not in any event as a matter of fact a pre-1945 or character house" (transcript page 47). In my opinion, it is that development, or the vacant site that falls to be taken as the starting point for purposes of the EPA's being a concurrence agency, in the present circumstances. The operative application was Form 2 Development Application Request to change an existing approval, notwithstanding that the Appellant also put in Form 1 Development Application Common details and Form 1 Development Application Part A Common details for all applications. The former added nothing to the latter; the only differences are that it describes the existing use as "construction site" rather than as "N/A", the proposed use as "5 unit apartment building" as opposed to "new apartment building". The proposal was for a GFA of 1347.6m^2, compared with the approved proposal for GFA of 1123m^2. It is the same proposal, for present purposes, rather than two separate ones. It assumes its final form at a time when the applicable regime requires referral to the EPA for development exceeding 1000m^2; referral is required, notwithstanding that the additional GFA comes well within 1000m^2. There cannot be a "minor change" to an

approval if there would be a requirement of "referral to additional concurrence agencies" on the footing that "the application for the approval were remade including the change", to quote the Schedule 10 definition. As it was put in *Bartlett v Brisbane City Council* [2003] QPELR 56 at 60: -

> The idea of a remade application for development approval no doubt assumes that it will be remade at a later stage in time than the original application. That will mean, as in this case, that circumstances may have changed between the giving of the approval and the time of the application to amend it."

The Appellant's original development application which resulted in the approval constituted by the court's order was made at a time when the EPA was not a concurrence agency. By the time of the remade application that the court is called on to imagine, the EPA is a concurrence agency, meeting the description of an additional concurrence agency to which referral is required.

[24] That conclusion is sufficient to dispose of the appeal. It may be as well, in case the conclusion be mistaken, to make some comments about element (c) in the definition of "minor change". It is curious, in depending on the assessment manager's opinion - that is the Council's (or its delegate's) opinion. For purposes of the Form 2 application, Mr Jones was designated the Council's delegate. It does not appear that he (or anyone connected it with the Council) formed an opinion about whether the change, if incorporated in the original development application, would "be likely to cause a person to make a properly made submission objecting to the proposal" at any time before the appeal got under way on 25 August 2005. He has had occasion to do so since and produced a reasoned memo dated 21 September 2005 addressed to Mr Chadwick of the Brisbane City Legal Practice, expressly prepared by reference to this appeal. The memorandum, exhibited to Mr Jones' affidavit filed on 3 October 2005, deals with the implications of the *Coastal Protection and*

Management Act 1995 being "rolled" into the *IPA* on 20 October 2003, concluding that element (a) is not satisfied.

[25] The memorandum proceeds to justify an opinion that stands in the way of element (c)'s being satisfied. It is an opinion, following the statutory language, expressed to be "that the proposed change would, if the application for the approval was remade including the change, be likely to cause a person to make a properly made submission objecting to the proposal, if the circumstances allowed." Sensible grounds in support of an opinion to that effect are then set out. Other experienced planners might well form the opposite opinion. Indeed, Mr Buckley, who provided a planning report exhibit 5, did. Mr Buckley says: -

> "**4.2 Likelihood of Submissions**
>
> In my experience the type of change that is likely to cause a person to make a submission is one which by its nature either:
>
> - has some measurable or material impact on character; or
> - brings with it a new package of considerations of a planning nature; or
> - in a functional sense, there are different impacts on the local character, area or amenity.
>
> Whilst the circumstances will vary from site to site, and from locality to locality, it is the contextual considerations of scale, character and land use that are <u>always</u> relevant in considerations of this nature.
>
> Those character land use and amenity considerations for this part of New Farm are all dictated by the mix of housing styles but particularly the concentration of multi level buildings in the locality.
>
> The issue of tall building development is one which generates attention, but expectations for buildings of this type have been of long standing in this part of New Farm. Prior to the coming into force of the City Plan the previous 1987 Town Plan encourages mid rise buildings of a multi unit nature. This was reinforced by the coming into force of the City Plan and described in terms of the local plan for New Farm and Teneriffe. There is an expectation for buildings of this type in the locality. The older approvals combined with new approvals, in particular that at 166-170 Oxlade Drive, indicates that a building of the scale of the subject with the proposed amendment is entirely consistent with local character.

> It is relevant in my opinion that the desired environmental outcomes for the Local Plan are not compromised by the amendment. Also, it is equally relevant that these same outcomes are still being achieved.
>
> For these reasons, it is unlikely in my opinion that a person would be caused to make a properly made submission."

Mr Jones' experience is different. Either opinion is supportable. Mr Buckley's lacks the status that Mr Jones' potentially enjoys as the opinion of the assessment manager.

[26] Mr Cochrane asks the court "to draw the conclusion that no objection that wasn't provoked by the original application would be provoked by the proposal to modify the approval." If the court's opinion comes to matter, I would find it impossible to conclude it was not likely that the change would cause a person to make a properly made adverse submission. It is not a question whether any such submission would be likely to prevail in the end, but whether it would eventuate at all (and comply with formal matters such as being made in time). The significant factor is that the changes proposed, even if they are justifiable in terms of performance criteria, desired outcomes and the like, exceed acceptable solutions, as set out in the planning scheme. A public concern about the proliferation of multi-storey buildings in New Farm obviously exists. Objections complaining about it without more are likely to be pointless where acceptable solutions, as set out in the planning scheme are satisfied – objections are encountered in considerable numbers, nevertheless. It cannot be excluded that where a proposal goes beyond acceptable solutions, however minutely, by creating a built form that is and can be seen or measured to be bulkier, some people will seize on the excess, reasonably asserting that the general public are entitled to expect that the standards incorporated in acceptable solutions will be adhered to. Even if the persons are aware of the Council's ability to allow

relaxations, or to deem other solutions acceptable, persons in this category minded to object would, I think, do so, and urge the Council not to grunt any indulgence.

[27] I am inclined to agree with Mr Cochrane's submission that Mr Jones' opinion comes too late, when the Council is functus officio. There are conceptual problems about the Council, once there is a deemed refusal, revisiting an application with a view to an opinion made relevant by the IPA being formed, even assuming there is no thought of an opinion favourable to the Council's case being wanted. If there had been a timely opinion, the court could have reviewed it, but set it aside only if it were clearly wrong, quite indefensible, on the approach described in *Parramatta City Council v Pestrell* (1972) 128 CLR 305, 325 (Menzies J: was the opinion one that "could not reasonably have been formed"?) and *Foley v Padley* (1983) 154 CLR 349, 353 (Gibbs CJ).

[28] Illustrative of the proposition that exceedance of acceptable solutions may cause adverse submissions to be made is the submission in respect of 166-170 Oxlade Drive made on the following bases: -

> "• The proposed height of 7 storeys is greater than that allowable under the existing planning controls in place for the site. The proposal for 7 storeys is far greater than that typically allowed. The relevant provisions of the Medium Density Living Precinct allow for a 5 storey height limit. Whilst there is a large development adjoining, the reasonable expectations of the community are up to 5 storeys.
>
> • The proposed Gross Floor Area of 2020 square metres is far greater than the typical allowance. The site area is only 1677 square metres. The maximum allowable GFA under the provisions of P2 A2.2 allow a 100% GFA. The increase of 20 approximate percent is a significant benefit, which is not typically granted out by Brisbane City Council.
>
> • Additional visitor car parks should be provided. There are only 2 visitor car spaces proposed. The development should allow for 3 visitor car spaces, on the basis that 25% of 11

> units equal 2.75 car spaces as per P20 of the Medium Density Code.
>
> - It would appear that the side boundary setbacks may not accord with P15 of the LMR Code…
>
> - The BCC should request greater compliance with the current planning provisions in place."

The three dot points omitted relate to a second vehicular access point reducing parking capacity, confirming heights of the 7 storey and 5 storey components above natural ground level and repetition in relation to the five storey component of the point about side boundary setbacks. See exhibit 4. Only the point about visitor car spaces impressed the Council. See exhibit 8, which incorporates the Council's Decision Notice and its officer's Report and Recommendation on Development Application. I think Mr Buckley's views are informed by his professional judgement that similar submissions in Hayday's case would not be acceded to. The question for the court is the likelihood of submissions being made, not their likely fate.

[29] My interpretation of the definition of minor change is that for there to be a possibility of use of the provisions of section 3.5.24, there must be an opinion reached by the assessment manager that submissions would not be likely. I do not think it is the case that unless the assessment manager forms an opinion that submissions would be likely, one of the requirements of minor change is satisfied by default. There is no way in which an opinion to the effect of Mr Buckley's can be deemed to have been formed by the assessment manager. I do not think the situation is affected by the Council's having been urged in material supporting the Form 2 application, specifically in a memorandum of Mr Cochrane incorporating detailed reasoning with citation of authority (part of exhibit 1), to form the opinion

under (c) favourable to the Appellant's cause. Strictly, the lack of such an opinion is fatal to the Appellant's cause (of being able to proceed under section 3.5.24).

[30] If things had somehow gone so badly awry that the court came into the position of being able to form and act on its own opinion, the Appellant fails to establish that Mr Buckley's opinion is right, rather than Mr Jones'. The court's opinion, should it matter, is indicated elsewhere; it does not assist the Appellant. The outcome is the same, whether Mr Cochrane's objection to use of Mr Jones' affidavit is upheld, or not.

[31] Mr Cochrane also placed reliance on a Report and Recommendation on Development Application prepared within the Council in respect of the so-called "Raptis" development at 166-17 Oxlade Drive by Sallie Battist in the following terms: -

> "**DEEM MINOR:**
> The proposed development is to construct a 7 storey multi-unit dwelling. The subject site is located within 100m of the Brisbane River, therefore the proposal triggers referral coordination under section 6.1.35C(1) of the IPA.
>
> The proposal should be considered to be of a minor nature under section 6.1.35C(1)(a) of the IPA, consequently the referral coordination requirements of section 6.1.35C(1) will not apply to the development application.
>
> **RECOMMENDATION**
> It is recommended that the proposal be considered of a minor nature under s6.1.35C(1) of the *Integrated Planning Act 1997*. As such, the referral coordination requirements of s6.1.35C.(1) of the Act will not apply to this development application.

Her superior on 28 September 2004 made a decision according to the recommendation. See exhibit 4. Interest was occasioned by the use of the word "minor". Section 6.1.35C has been radically changed and now deals with a different subject. At the relevant time it defined when "referral coordination" was required for an application (an instance being in relation to development assessment

under a planning scheme "that the assessment manager is satisfied" it is not minor or of an ancillary nature). Referral coordination is no more than a process coordinating various agencies' involvement to streamline or simplify matters. It has nothing whatever to do with whether a particular concurrence agency is involved. That the 166-170 Oxlade Drive proposal may have been deemed "minor" in that context did not, as has been seen, mean that the EPA was not called on to fulfil its role as a concurrence agency.

[32] On "merits" issues, the Appellant presents a strong case. The Council presented no evidence to set against the visual assessment report of Mr Van Pelt (exhibit 3). This established the "invisibility" of the changes proposed, in particular from the point of view of preserving sightlines relevant to important locations around New Farm and the River, including designated "landmarks", quite apart from the architectural merit he sees in the construction elements for the proposed additional storey. Those aspects are expanded in Mr Hayes' architectural report, exhibit 2. I am sure he was not meaning to pronounce on the major question (as opposed to visual aspects) in concluding: "for the above reasons, I recommend the amended design to the Court as a minor modification."

[33] This appeal has been concerned only with whether the Form 2 application comes within section 3.5.24 of the *IPA*, the court's conclusion being that it does not, because the *IPA* definition of "minor change" is not shown to be satisfied. Whether, if only a "minor change" had been involved, the application should be approved on the merits is a completely separate question. On the basis of what the court has seen, one would not anticipate that the Appellant would face difficulties in that regard, but the court is in no position to make a determination to that effect. The situation is doubtless extremely frustrating to the Appellant, for whom it must be galling to see

development at greater scale nearby approved by the Council. Anyone might have sought to get an approval like the Appellant's approval changed in time to take advantage of having equipment and personnel on the site to realise the amended plans as quickly economically as possible.