



## Building and Development Dispute Resolution Committees—Decision

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### *Sustainable Planning Act 2009*

<b>Appeal Number:</b>	<b>39-11</b>
<b>Applicant:</b>	Patricia C.N. Watson and Marion C. Feros
<b>Assessment Manager:</b>	Brisbane City Council (Council)
<b>Concurrence Agency:</b> (if applicable)	N/A
<b>Site Address:</b>	111-113 Ryan Street West End and described as Lots 99 and 100 on RP11261, (subject site)

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### **Appeal**

Appeal about a refusal by the Assessment Manager, Brisbane City Council on 6 April 2011 for a request to extend the period of approval under Section 383 of the *Sustainable Planning Act 2009* (SPA) for a Development Approval for Material Change of Use (MCU) - 2 houses on small lots.

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<b>Date of hearing:</b>	Tuesday 23 August 2011	
<b>Place of hearing:</b>	Offices of Department of Local Government and Planning, Level 5, 63 George Street Brisbane	
<b>Tribunal:</b>	Ernest Harvey	– Chair
	Natalie Rayment	– General Referee
	John Brannock	– General Referee
<b>Present:</b>	Victor Feros	– Town Planner for Applicants
	Graham Bligh	– Architect for Applicants
	Helena Lulham	– Town planner for Brisbane City Council
	Steve Adams	– Town planner for Brisbane City Council
	Eve Vickerson	– Town planner for Brisbane City Council

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### **Decision:**

The Building and Development Dispute Resolution Committee (Committee), in accordance with section 564 of the SPA, **sets aside** the decision of the Council to refuse a request to extend the approval period under section 383 of the SPA for a Development Approval for an MCU for 2 houses on small lots, and under section 564(2)(c) of the SPA **directs** the Council to **approve** the extension by a period of **2 years**.

## Background

The land subject to this appeal is located at 111 & 113 Ryan Street, West End, described as lots 99 & 100 on registered plan 11261 and contains a combined area of 1290m<sup>2</sup>. The lots are currently vacant. The Brisbane City Plan 2000 (City Plan) defines the lots as being small lots due to the width of the lots being less than 15m. The subject site is situated in the low-medium density zone.

The appellants first obtained Development Approvals for a MCU for 2 small lot houses and preliminary approvals for building work on 24 December 2003 and by negotiated Decision Notice effective on 1 March 2004.

The approval related to 2 small lot houses attached on their common boundary and with a height of less than 8.5m above natural ground. The proposed houses consist of 3 levels with mirrored designs with the lower level containing the basement car parking, the middle level containing living areas and the upper level containing bedrooms. The length of the buildings is approximately 24.0m, with the addition of an unenclosed patio at the street frontage of about 2.6m wide, and a rear balcony with balustrade of 1m. The building complies with the minimal setbacks for both frontage and side boundary clearances.

Subsequent applications for extensions to the approval periods were granted by Council on 1 November 2007, 5 December 2008 and 14 January 2010.

On 3 November 2010, Victor G Feros Town Planning Consultants lodged a further request to extend the period of approvals under section 383(1) of the SPA.

On 6 April 2011, Council refused the application based on 2 criteria of section 388 of the SPA:

- a) *the consistency of the approval, including its conditions, with the current laws and policies applying to the development, including for example, the amount and type of infrastructure contributions, or infrastructure charges payable under infrastructure charges schedule*
- b) *the community's current awareness of the development approval.*

The Applicants appealed the decision of Council to the Committee on 10 May 2011.

## Material Considered

The material considered in arriving at this decision comprises:

1. 'Form 10 – Notice for Appeal/Declaration'
2. The SPA.
3. The *Integrated Planning Act 1997* (IPA).
4. Brisbane City Plan 2000.
5. Brisbane City Council submission dated 25 July 2011.
6. Victor G Feros Town Planning Consultants submission dated 13 July 2011.
7. Brisbane City Council Development Permit dated 24 December 2003 and modified on 1 March 2004.
8. Brisbane City Council Development Permit extensions dated 1 November 2007.
9. Brisbane City Council Development Permit extensions dated 5 December 2008.

10. Brisbane City Council Development Permit extensions dated 14 January 2010.
11. Brisbane City Council Temporary Local Planning Instrument – 01/11.
12. Scaled drawings (approved plans) prepared by Mr. Graham Bligh architect being drawing references SD-200 to SD-204 & SD-301 to SD-304.

## Findings of Fact

The Committee makes the following findings of fact:

The application for 2 small lot houses was originally approved in December 2003 with the negotiated Decision Notice becoming effective on 1 March 2004. The 1 January 2003 version of the City Plan identified the level of assessment for the original application as being “code notifiable”. Council were correct in their submission that since 2003 the Residential Development – Small Lot Code (Code) has changed including the level of assessment for the current application dated 3 November 2010.

From the Committees research of the current Code, numerous changes were identified to the Code since 2003. These changes being dated 1 January 2004; 1 January 2007; 12 January 2007 and 15 April 2011 were all noted in the footer notes of the Code.

Council subsequent approvals for extensions to the relevant approval periods dated 1 November 2007, 5 December 2008 and 14 January 2010 were all granted following amendments to the Code and in particular one of the changes adopted on 1 January 2004 introduced building envelopes triggering impact assessment for buildings exceeding limits set by the introduction of building envelope criteria.

The change adopted on 1 January 2004 altered the level of assessment significantly for the original application from code notifiable to impact assessment generally inappropriate. This change in the level of assessment was triggered as a result of the height of side walls on the approved plans not complying with the height restriction of 7.5m at 1.5m setback from the side boundary.

Council had 3 prior opportunities to refuse the application for extension to the relevant period based on the changes made to the City Plan on 1 January 2004 but chose to grant all 3 extensions.

On 6 April 2011, Council refused the fourth application to extend the relevant period of the original approval dated 1 March 2004, based on the approval not complying with the provisions of section 388 of the SPA and, in deciding the request stated that:

- c) *the consistency of the approval, including its conditions, with the current laws and policies applying to the development, including for example, the amount and type of infrastructure contributions, or infrastructure charges payable under infrastructure charges schedule*
- d) *the community’s current awareness of the development approval.*

These criteria were appropriate under the IPA and SPA in all previous decisions dated 1 November 2007, 5 December 2008 and 14 January 2010 with the exception to the reference to infrastructure contributions and charges which do not apply to the subject lots.

At the time of making these decisions to extend the relevant period of the original approvals, section 3.5.23(1)(c) of the IPA, and section 388(1)(c) of the SPA were relevant as the old approval was not consistent with the Planning Scheme dated 1 January 2004 in that the

new level of assessment was impact assessment. In addition Council could have relied on sections 3.5.23(1)(b) & 3.5.23(1)(c)(i) & (ii) of the IPA, and sections 388(1)(b) & 388(1)(c)(i)&(ii) of the SPA relating to community awareness and rights to make submissions during public notification.

However since Council's adoption of the Temporary Local Planning Instrument – 01/11 (TLPI) building heights have been relaxed for properties identified by mapping as having been affected by flooding. The subject land has been identified on map LGA1000-0025-1 sheet 8 as being affected by the Brisbane River January 2011 flood.

Therefore Column 2, Table 1, section 6 of the TLPI applies to the subject land and the height of new and existing buildings can be increased to 9.5m. The purpose of this TLPI is to introduce the Interim Residential Flood Level (IRFL) and facilitate the following:

*Change the level of assessment for a house on a small lot to code notifiable where a new house or raising of an existing house, and not meeting the requirement of Table 1 Building Envelope Requirements of the Residential Design – Small Lot Code and affected by the Brisbane River flooding.*

How this height increase is applied to the building envelope is not clearly defined in the TLPI. However the Committee has applied the height increase to the upper limit of the building envelope shown in figure b, page 164, chapter 5 of the City Plan, resulting in the maximum height increasing to 9.5m and side boundaries of the building envelope increasing to 8.5m. This change overrides non compliance with the height criteria of the Code, Table 1 Building Envelope Requirements, Part A 5.

## **Reasons for the Decision**

The Committee based its decision on the version of City Plan applying at the time of the request to extend was made but also gave weight to the TLPI which became effective prior to its hearing of the matter.

Council submitted that the approved plans could not comply with the Code and in particular section 4, acceptable solutions A1.4 and A2 of the Code.

In relation to acceptable solution A2 of the Code, the Committee is of the opinion that the approved plans comply with the purpose of the TLPI, in that the raising of the allowable heights for new and existing houses from 8.5m to 9.5m would result in a fresh approval for the proposed houses being code notifiable.

In relation to acceptable solution A1.4 of the Code, the Committee is of the opinion that the approved plans comply with Table 1 Building Envelope Requirements. The approved plans for the 2 houses scale 24m for the house, 1m for the rear balcony and 2.6m for the front unenclosed patio. Section 1 of the Code states:

*This code does not apply to the following building work outside the building envelope described in Table 1 Building Envelope Requirements:*

- *One unenclosed patio or gazebo (maximum roofed area 16m<sup>2</sup> and maximum height of 3m).*
- *Stairs, ramps, lifts, eaves and window hoods with a 0.9m minimum setback from side boundaries.*

In addition, Table 1 Building Envelope Requirements, Part A, row 4 of the Code specify that the maximum length of the house excludes eaves, sunhoods and other building work

exempt from assessment as listed in section 1 of the Code.

When applying these provisions of the Code to the approved houses, only the houses and the rear decks are to be counted in the overall length of the building envelopes. Therefore the 25m length of the approved houses is compliant with the code. The front patio, eaves and stairs are excluded under the City Plan.

Council further submitted that a fresh application using the approved plans would be impact assessable generally inappropriate development under the current level of assessment tables of the City Plan. However in the Committee's opinion the existence of the TLPI has changed the level of assessment from impact assessment generally inappropriate development to code notifiable.

The Committee further considered Council's grounds for refusal and in particular the reference to community awareness of the approval, now that 7 years have elapsed since the development was publicly notified. This would be relevant had the original application triggered impact assessable development, or, a fresh application triggered impact assessable development. The SPA and IPA require only impact assessable development to be publicly notified. Under these Acts, code applications do not require public notification therefore sections 388(1)(b) & 388(1)(c)(i)&(ii) of the SPA do not apply. Code notifiable applications under the City Plan are required to be advertised however the public have no appeal rights under the SPA.

In relation to community awareness, Mr. Feros indicated at the Committee hearing on 23 August 2011 that the community had recently been made aware of the existence of the approval for 2 small lot houses. The Committee however have not relied on this information in arriving at its decision. Also Mr. Feros did not provide the Committee with proof such as registered mail receipts or community responses.

Having reviewed the Code in the process of assessing the approved plans it was clear that the numerous changes adopted for this Code over the past 7 years have made the Code both difficult to interpret and complicated in its application. However having assessed the approved plans against the assessment criteria, particularly in relation to building length and height, the Committee were satisfied that these changes made to the Code, when read together with the TLPI, have not affected compliance of the plans with the Code.

Based on the assessment of the facts, material presented to the Committee, and having regard to the consistency of the approved plans and conditions with current planning laws and policies, it is the Committee's decision that the appeal is upheld. Council's decision to refuse the extension of the relevant period for the development approval is set aside and the application to extend the approval is granted for 2 years from the date the Committee's decision becomes effective. In granting the extended period for an additional 2 years the Committee considered the timeframe required by the Applicants to organise their consultant team, finances and builder to complete the construction of the 2 houses.

**Ernest Harvey**  
**Building and Development Committee Chair**  
**Date: 29 September 2011**

## **Appeal Rights**

Section 479 of the *Sustainable Planning Act 2009* provides that a party to a proceeding decided by a Committee may appeal to the Planning and Environment Court against the Committee's decision, but only on the ground:

- (a) of error or mistake in law on the part of the Committee or
- (b) that the Committee had no jurisdiction to make the decision or exceeded its jurisdiction in making the decision.

The appeal must be started within 20 business days after the day notice of the Committee's decision is given to the party.

## **Enquiries**

All correspondence should be addressed to:

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