



Building and Development Dispute Resolution Committees—Decision

Sustainable Planning Act 2009

Appeal Number:	07 - 15
Applicant:	Pacific BCQ - Don Grehan
Respondent:	Noosa Council (Council)
Concurrence Agency: (if applicable)	Not Applicable
Site Address:	27 Shorehaven Drive, Noosaville and described as Lot 132 on RP 839222 — the subject site

Appeal

The Appeal was lodged under section 533 of the *Sustainable Planning Act 2009* (SPA) in relation to an Enforcement Notice issued by the Noosa Council on the grounds that assessable development has been carried out without a permit and that a development offence may have been committed.

Date and time of hearing:	10 am, Monday 23 March 2015
Place of hearing:	The subject site
Committee:	Ain Kuru – Chair
Present:	Don Grehan – Appeal Applicant, Owner’s representative William Tonge – Property Owner Denis Wallace – Planning Co-ordinator, Noosa Council Rob Wibrow – Building Certifier, Noosa Council

Decision:

The Building and Development Dispute Resolution Committee (Committee), in accordance with section 564 of the SPA **confirms** the Enforcement Notice issued by Council.

Background

On 28 January 2015 the Noosa Council issued an Enforcement Notice Ref. No. COM15/0024 (Notice) to DE Tonge and WA Tonge (Property Owners).

The Notice states:

- it is issued under Section 578 of the SPA;

- Council reasonably believes that the owner has committed or is committing a development offence pursuant to Section 578 “carrying out assessable development without a permit” of the *Sustainable Planning Act 2009*;
- Code assessable development being building work not complying with the Noosa Plan, Building Works Code, Table 14.47 (Column 2) has commenced without a development permit;
- Acceptable Solution S25.1 of Table 14.47 does not permit building work, filling or excavation work within 4.5 m of the centre line of the top of the concrete revetment wall, and such work has commenced; and
- the owners must cease work and submit a development application by 27 February 2015.

The works comprise of a concrete block wall under construction. The wall is within one to three metres of a concrete revetment wall and canal, and ranges in height from 200 to 800 mm along the full width of the property. The purpose of the wall is to: retain earth; define the edge of the concrete path; and create a seating area adjacent to the canal.

The Property Owners engaged Pacific BCQ (Applicant) and an Application for appeal /declaration – Form 10 was lodged with the Committee’s Registrar on 10 February 2015.

The Applicant’s grounds of appeal are summarised as follows:

- The retaining wall constitutes self-assessable development under section 21 of the *Building Act 1975* (BA) and section 4, Schedule 1 of the Building Regulation 2006 (BR).
- The retaining wall is classified as a Class 10b structure under the Building Code of Australia.
- The retaining wall is exempt development under the Noosa Plan as sub-section 3 (b) of Schedule 1 – Minimum Boundary Setbacks for Buildings and Other Structures states that setbacks do not apply to Class 10b structures 1 metre or less in height.
- Table 14.47 of the Noosa Plan is not identified as an alternative siting provision to the Queensland Development Code (QDC) and therefore has no effect by virtue of section 78A of the SPA.

On 18 March 2015, Council lodged a written response to the appeal, the key points are summarised as follows:

- Table 11.12 Assessment Categories and Relevant Assessment Criteria for the Noosaville Locality - Development other than Material Change of Use (Table 11.12) of the Noosa Plan calls up the Building Works Code. Building work is code assessable if not complying with Column 2 of Tables 14.44 to 14.47 of the Code. Specific Outcome O25 of Table 14.47 deals with flood retention and amenity of areas adjacent to the revetment wall within the Noosa Water Estate, and Acceptable Solution S25.1 states that no building works must occur within 4.5 m of the centre line of the top of the concrete revetment wall.
- Building work is development under SPA, and is defined under Schedule 3 to include development declared under a planning scheme to be assessable development unless prescribed by a regulation.
- Schedule 3, Part 1 of the Sustainable Planning Regulation (SPR) prescribes building work which is assessable for the purposes of the BA. Schedule 5, Part 1 prescribes the relevant provisions, including the extent to which a planning scheme can regulate building work. These are reflected in sections 30 to 33 of the BA.

- Section 31 of the BA provides that a local planning instrument cannot include provisions about building work to the extent the building work is regulated under the building assessment provisions and that to the extent it does; the planning instrument is of no effect. These provisions are reflected by section 78A which states that a planning instrument has no effect if the building work is regulated under the building assessment provisions, unless permitted by the BA.
- The Applicant maintains that the building work is self-assessable under SPA pursuant to sections 20 and 21 of the BA, however this is an attack on the ability of the Noosa Plan to regulate other matters such as flooding, amenity and drainage. Further, the Applicant relies on the Noosa Plan Building Works Code not calling up Table 14.47 as an alternative siting provision to the QDC under section 33 of the BA.

On 20 March 2015 the Committee received a written submission from the Noosa Waters Residents Association Inc. (the Association). The Committee agreed to receive the submission on the basis the Association address why they believe they have standing in the appeal and why they believe the outcome of the decision will affect their interest. In summary, the Association stated:

- That it represents owners and residents of people residing in the Noosa Waters Estate, and addresses their issues and interests. Further the Association has adopted a Partnering Charter with the Noosa Council.
- The outcome of the appeal will have a bearing on flood management measures, local amenity and environment of the area and could result in diminished economic worth and values of the Noosa Waters Estate.
- Members of the Association may be adversely affected by the outcome of the appeal, and do not have the opportunity to make representations.
- The Association is of the view that the proposed works are assessable under the Noosa Plan and that Council has an obligation to manage development in the public interest.

The Committee read the Association's submission but did not take it into consideration as it addressed broader town planning issues and did not respond to the grounds of appeal and the validity of the Enforcement Notice.

A hearing was held on Monday 23 March 2015 at the subject site.

At the hearing the parties expanded on the arguments made in their written submissions and raised the additional matters below:

- Submission by the Property Owner - a letter written by SCG Consulting Engineers advising that the works would not compromise the integrity of the revetment wall.
- General agreement by all parties that the works would have no impact on flooding and the volume of cut and fill were about the same.
- Concern by the Property Owner about how consistently Council was applying and enforcing building standards adjacent to revetment walls throughout the Noosa Waters Estate, for which the Property Owner provided numerous examples.

While these issues are relevant to assessment of an application by Council, the Chair advised that the matter under appeal was the Enforcement Notice, and whether or not the building work was assessable under the Noosa Plan.

On 10 April 2015, following the hearing, the Committee sought the views of Council about whether they believed the work to be assessable under the BA, as the Enforcement Notice only related to the Noosa Plan. Council advised that the work would require building development approval. This response was forwarded to the Applicant who advised that the block wall is not intended to act as a retaining wall, but is a formal edge to the pathway and decorative screen. As such the Applicant believes the work is self-assessable under the BA, and that the block work around the seating area may actually be exempt as it could be defined as garden furniture under the BR.

Material Considered

The material considered in arriving at this decision comprises:

1. 'Form 10 – Appeal Notice', grounds for appeal and correspondence accompanying the appeal lodged with the Committees Registrar on 10 February 2015.
2. Council appeal response dated 17 March 2015.
3. *Sustainable Planning Act 2009*(SPA).
4. *Building Act 1975* (BA).
5. Sustainable Planning Regulation 2009 (SPR).
6. Building Regulation 2006 (BR).
7. Noosa Plan 2013.
8. E-mail response from Council dated 10 April 2015 in response to a question from the Committee about whether the work is self-assessable under the BA.
9. E-mail response from the Applicant dated 10 April 2015 in response to a question from the Committee about whether the work is self-assessable under the BA.

Findings of Fact

The Committee makes the following findings of fact:

1. The wall is not exempt development under the BA

The Applicant suggested in their e-mail response of 10 April 2015 that the works could be described as garden furniture and therefore prescribed as exempt under Schedule 2 of the BR. However the works comprise of a block wall, partly used as a retaining wall, which are specifically listed in section 1(a) as not being exempt.

2. The wall is assessable development under SPA

The Applicant believes that as the building work is self-assessable under the BA and quotes prescribed building work listed in Schedule 1 of the BR and it is also self-assessable under the Noosa Plan. The Applicant quotes section 3 which states:

- (1) *Building work for a retaining wall is prescribed if—*
(a) *there is no surcharge loading over the zone of influence for the wall; and*

- (b) the total height of the wall and of the fill or cut retained by the wall is no more than 1m above the wall's natural ground surface; and*
- (c) the wall is no closer than 1.5m to a building or another retaining wall.*

The Notice does not address whether the wall is assessable under the BA, though the Applicant believes it is relevant as if it is self-assessable under the BA, it is also self-assessable under the Noosa Plan.

The Council submission addresses whether self-assessable building work under the BA also makes it therefore self-assessable under the Noosa Plan. Section 232 of SPA provides for a regulation to prescribe how development is to be assessed and Schedule 3 of SPR outlines what is assessable and self-assessable development. Part 2 of Schedule 3 makes it clear that for building work assessed under that Act is ... *declared under that Act to be self-assessable development*".

There are also related provisions for self-assessable development contained in the section 20 and 21 of the BA. Section 21(2) of the BA states that building work prescribed under a regulation is self-assessable for the Planning Act (i. e SPA) provided it complies with the deemed to satisfy provisions of the Building Code of Australia and the QDC, and pursuant to complying with any siting provisions of the planning scheme (in accordance with section 33 of the BA), in this case the Noosa Plan.

Sub section 21(1) of the BA also limits the scope of section 21 to assessing work under the BA, provided the boundary clearance and site cover provisions of the planning scheme are satisfied. It does not mean that the building work prescribed under Schedule 1 of the BR is also self-assessable under planning instruments, as this would prevent planning schemes from regulating building work for matters which fall outside the scope of the BA, such as impacts on flooding and the protection of historical buildings.

3. The building works are assessable under the Noosa Plan

The Applicant believes the building works are exempt under Schedule 1 of the Noosa Plan.

The site is located in the Noosaville Locality Plan, the provisions of which are contained in Part 11 of the Noosa Plan. Divisions 1 to 13 of the Locality Plan contain assessment tables for a Material Change of Use in each zone, while Division 14 contains an assessment table for other development. These tables determine whether development requires Council approval, and if so, the criteria against which the development should be assessed.

As the residential use has already been established on the site, the works constitute Building Work rather than a Material Change of Use as defined under s10 of the SPA. Therefore the relevant assessment provisions are contained in Table 11.12 Assessment Categories and Relevant Assessment Criteria for the Noosaville Locality - Development other than Material Change of Use (Table 11.12).

Table 11.12 states that building work is:

- Self-assessable provided it complies with the criteria in Column 3, being the requirements set out in Column 2 of Table 14.44 to 14.47 of the Building Works Code; or
- Code assessable if not complying with Column 2 of Tables 14.44 to 14.47 of the Building Works Code.

Table 14.44 of the Code contains siting provisions in S1.1 which reference Schedule 1. Section 3 of Schedule 1 states that the boundary setbacks do not apply to class 10b structures less than 1 metre in height.

Table 14.47 of the Code contains special provisions in regard to the Noosa Waters Estate. O25 and S25.1 to S25.6 deal specifically with measures designed to address flood management in the canal and amenity of areas adjacent to the revetment walls. S25.1 states no buildings works, filling or excavation works are within 4.5 m of the centre line of the top of the concrete revetment wall.

Section 14.93 of the Code identifies alternative siting provisions to the QDC pursuant to section 33 of the BA. These provisions allow the local government to vary the siting standards in the QDC through their planning schemes. The setback provisions in Table 14.44, S1.1 are listed as alternative siting provisions, and provided building work complies with these standards, it does not become assessable under the Noosa Plan.

The setback provisions contained in Table 14.47, S25.1 are not listed as an alternative siting provision, though there is nothing prescribed in SPA or the BA which state that planning schemes must identify alternative solutions, this being done to assist in interpretation of the scheme.

The key argument here is whether non-compliance with the S25.1 triggers a code-assessable planning application under the Noosa Plan, or whether it is an alternative siting provision pursuant to section 33 of the BA.

Section 33 states:

A planning scheme or PDA instrument may include provisions (alternative provisions) that, for relevant work, are alternative or different to the QDC boundary clearance and site cover provisions.

In Schedule 2, Dictionary of the BA, *QDC boundary clearance* is defined as:

the aspects, mentioned in schedule 1, of parts MP 1.1 and MP 1.2 of the document called 'Queensland Development Code', published by the department.

Firstly, setbacks from a revetment wall are not boundary setbacks for the purposes of QDC MP 1.2. This is because the revetment wall is not a boundary. The terms used in QDC MP 1.2 specifically relate to the property boundary and road frontage. If there was any doubt, then it should be quite clear that the Council does not consider it as an alternative siting provision as it has not been listed as such in the Noosa Plan.

Secondly and in any case, the QDC MP 1.2, does not under its "Application", cover structures less than 1 metre above natural ground. Therefore the QDC does not apply.

4. Section 78A of SPA does not apply

The Applicant believes that due to section 78A of SPA, Table 14.47 has no effect. This is because section 78A provides that a local planning scheme has no effect if a planning scheme includes provisions about building work to the extent they are regulated under the building assessment provisions under the BA.

However the scope of the building assessment provisions are limited to those items specified in section 30 of the BA (e.g. boundary setbacks, site cover, fire safety, structural adequacy etc.). In this case, the provisions relating to the flood detention and amenity functions of areas adjacent to revetment walls within the Noosa Waters Estate are not considered to be building assessment provisions under the BA.

Reasons for the Decision

The Committee confirms the Enforcement Notice issued by Council for the reasons below:

- The building work subject of the Notice cannot be described as garden furniture and therefore exempt under the BA;
- Irrespective of whether building work is self-assessable or assessable under the BA, SPA provides that a planning scheme may still make building work assessable;
- Table 14.47 of the Noosa Plan makes building work within 4.5 m of the centre line of the top of the concrete revetment wall code assessable;
- Table 14.47 is not an alternative siting provision pursuant to section 33 of the BA as:
 - a) it does not relate to a boundary setback; and
 - b) the QDC does not apply to walls less than 1 metre high.
- Section 78A of SPA has no effect as the provisions under Table 14.47 are not building assessment provisions.

Ain Kuru
Building and Development Committee Chairperson
Date: 20 April 2015

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:

The Registrar of Building and Development Dispute Resolution Committees
Building Codes Queensland
Department of Housing and Public Works
GPO Box 2457
Brisbane QLD 4001
Telephone (07) 1800 804 833 Facsimile (07) 3237 1248