



Building and Development Dispute Resolution Committees—Decision

Sustainable Planning Act 2009

Appeal Number:	18-12
Applicant:	Strathpine Design & Drafting
Assessment Manager:	Professional Certification Group
Concurrence Agency: (if applicable)	Brisbane City Council (Council)
Site Address:	15 Ivy Street and described as Lot 28 on SP139894 – the subject site

Appeal

Appeal under section 527 of the *Sustainable Planning Act 2009* (SPA) against the refusal of an application for building works pertaining to a retaining wall and fence. The decision followed a Concurrence Agency response from Brisbane City Council, as the proposed works required a siting variation in relation to the side and road boundary setbacks.

Date of hearing:	10am 16 July 2012
Place of hearing:	15 Ivy Street -the subject site
Committee:	Debbie Johnson - Chair
Present:	Adrian Low - Applicants -Strathpine Design & Drafting Peter Auld –Applicant - Strathpine Design & Drafting Andrew Parker - Property Owner John Reeve - Assessment Manager Peter Bird - Brisbane City Council Duncan Kirk – Brisbane City Council

Decision:

The Building and Development Dispute Resolution Committee (Committee) in accordance with section 564 of the SPA **confirms the decision** of the Professional Certification Group dated 10 May 2012 to refuse the application for building works.

Background

The subject site is in an established residential area now comprising a mix of contemporary and traditional detached dwellings. The land is narrow, having a front and rear boundary width of just over 10 metres (M) however the site area is 814 sq/m due to the length of the allotment being 80M. The

rear or southern boundary is riverfront, providing the site enviable views of the river. These views are enhanced by the elevation or slope of the land as it rises in excess of 7M to the street frontage or northern boundary.

To the west the adjoining parcel of land is a similar configuration to that of the subject lot although set higher. This adjoining site is undeveloped save newly constructed retainment walls along the side boundaries and a small cottage that appears to be more of a temporary or demountable structure. Historically, one dwelling was situated centrally over both these allotments. However, this house, which was built prior to 1946, was demolished following approval from the Brisbane City Council in 2007 (ref: A001921138). To the east there is a larger allotment with an original Queenslander style of home also pre 1946, in apparent good condition.

Following the demolition of the original house which was built in part on the subject lot, a new application was made to develop the subject lot for a single dwelling with a pool. As the site is by definition a small lot, both a preliminary approval to carry out building works for a small lot and a Material Change of Use for a small lot was required. The development proposed a contemporary two storey, three level home and was subject to a public notification process. The development was assessed and approved with conditions on 13 May 2010. The Applicant was engaged to prepare architectural working drawings and a Development Application for building works was subsequently issued on 17 January 2011.

Whilst the dwelling was under construction it was discovered that the existing sleeper retainment wall between the subject site and the adjoining property to the east was encroaching on the site. Negotiations with the two owners at that point in time, resulted in the wall being removed to make way for a new concrete block retainment wall. At or around this time the adjoining property (19 Ivy Street) was listed for sale. A contract was made with the now current owners of this property on 18 August 2011. The contract was unconditional by 19 September, however the settlement was extended until the 20 December 2011. There was no communication throughout this period between the new owners of the adjoining lot and the owners of the subject lot and the construction of their home continued until it was completed in early 2012.

The new owners of the adjoining property had conducted their own investigations with respect to the land they were purchasing and to the extent of building that had been approved by their neighbour on the subject lot. However, they were shocked when accessing their new property on 12 December 2012, just days before settlement to see a wall running down their boundary from the front corner of the site for a length of 60M. The wall was predominately 3M high or more and constructed using unpainted concrete blocks. Immediately following this visit to the site, they contacted their solicitors who, on 19 December 2012, wrote to the owners of the subject site requesting a copy of the approval that had permitted them to build the wall.

It became apparent, that the retainment wall and fence structure had not been approved. On the 15 February 2012, the Applicant, lodged an application with the Council pertaining to the design and siting of the structure. The Council issued their response to the Applicant on the 30 March 2012, refusing the design and siting of the retainment wall and fence. Council stated that the proposal did not comply with the Performance Criteria P1, P2, P3 and P6, of the QDC MP1.1.

The Applicant prepared and lodged an appeal against the decision with the Committee which was received 2 May 2012.

Material Considered

The material considered in arriving at this decision comprises:

1. Form 10 - Appeal Notice and written grounds for appeal including photographs of the construction of the combined retaining wall and fence as prepared by the Applicant and received (unsigned) by

- the Committee Registrar 2 May 2012.
2. Drawings as prepared by Strathpine Design and Drafting identified as Job No DO3936/10 Sheet 1-7 of 7 dated 9 of September 2010.
 3. Correspondence to the owners of the subject site from McCullough Robertson, Sheet 1 of 7 Issue C as revised 5 May 2011, Sheet 2 of 7 Issue D as revised 30 May 2011 and Propose Fence and Retainment Wall dated April 2010.
 4. Responding email from the owners of the subject site to McCullough Robertson dated 15 January 2012.
 5. Concurrence Agency Application to the Brisbane City Council for design and siting of a combined retainment wall and fence, submitted by the applicant on 15 February 2012.
 6. Correspondence (Neighbours Statement) dated 22 March 2012, to the Brisbane City Council as written by the adjoining property owners at 19 Ivy Street.
 7. Brisbane City Council response to the Applicant dated 30 March 2012.
 8. Email dated 8 May 2012 to Brisbane City Council from the Professional Certification Group referring to building application for a combined retainment wall and fence lodged by the applicant.
 9. Development Application Decision Notice dated 10 May 2012 as prepared by the Professional Certification Group.
 10. Email dated 12 May from Brisbane City Council to the Professional Certification Group confirming that the Assessment Manager can assess and decide their application subject to the previously issued Brisbane City Council response as sent to the Applicant.
 11. Development Application decision notice dated 10 May 2012, refusing the application for building works.
 12. Form 10 – Appeal Notice signed by the Applicant 14 June 2012.
 13. Brisbane City Council's Approval Package A002682461 dated 15 May 2010 for carrying out building work, preliminary approval under S3.1.5- House on Small Lot and Material Change of Use Development Permit – House on Small Lot.
 14. Architectural drawings by Ferrier Baudet Architects identified as Project No 1129 Sheets A01-A05 inclusive, dated July 2009, stamped approved by Brisbane City Council 13 May 2010.
 15. Submission dated 20 March 2010 prepared by the adjoining property owners of 19 Ivy Street at that time, Mr Stuart Elliott, objecting to the Small Lot development, as proposed to Brisbane City Council.
 16. Development Application Decision Notice dated 17 January 2011, as prepared by Collins Certification Group, approving building works for a new Dwelling and Pool on the subject lot.
 17. Architectural drawings by Strathpine Design and Drafting identified as Job No DO3936/10 Sheet 1-7 of 7 dated 9 of September 2010, stamped approved by the Collins Certification Group.
 18. Elevation showing Wall Heights drawing No S3462RWI RevA dated 31 January 2012, as prepared by John Akers consulting surveyor.
 19. Elevation showing Wall Heights revised drawing No S3462RWI RevA, as prepared by John Akers

- consulting surveyor and received by the Registrar 12 September 2012.
20. Structural engineering Drawings by Crichton Engineering identified as drawing No 751-12271-1-3/3 inclusive, dated 20 July 2010.
 21. Letter to the owner of the subject lot dated 17 February 2010 as prepared by HCE Engineers with respect to building over existing sewer at 15 Ivy Street.
 22. Letter dated 21 August 2012 from Peter Mackay, engineer with Crichton Engineering to the Committee, confirming the structural adequacy of the retainment wall and fence structure as it has been built.
 23. Letter dated 23 August 2012 from Peter Mackay, engineer with Crichton Engineering to the Committee, further clarifying the former correspondence.
 24. Verbal submissions by all parties present at the hearing 16 July 2012.
 25. Verbal submissions by the adjoining property owners 16 July 2012.
 26. Emailed submission to the registrar from the owner of the subject lot dated 20 July 2012.
 27. Emailed submission to the Committee Registrar from the adjoining property owners dated 22 July 2012.
 28. Emailed submission to the Registrar from the adjoining property owners dated 13 August 2012.
 29. Emailed submission to the Registrar from the owner of the subject lot dated 16 August 2012.
 30. Verbal submission from Rick Collins, of Collins Certification Group.
 31. Verbal submission from Peter Mackay Crichton, Engineering consulting engineers.
 32. Verbal submission by John Akers consulting surveyor.
 33. Verbal submission by Peter Bird, Brisbane City Council.
 34. Verbal submission by John Reeve, Professional Certification Group.
 35. Brisbane City Plan 2000.
 36. Brisbane City Council's PD Online.
 37. *Sustainable Planning Act 2009 (SPA)*
 38. *The Building Act 1975 (BA)*
 39. *The Building Regulation 2006 (BA)*
 40. *The Building Code of Australia 2010 Volume 2 (BCA)*
 41. Queensland Development Code (QDC) Parts MP1.1 Design and Siting Standard for Single Detached Housing – On Lots under 450m².
 42. Queensland Development Code (QDC) Parts MP1.2 Design and Siting Standard for Single Detached Housing – On Lots 450m² and Over.
 43. Photographs of 15 and 19 Ivy Street, indicating the changes to 15 Ivy Street over the last 5 years.
 44. Google Street View and Nearmaps aerial views.

Findings of Fact

The drawings that were prepared by Ferrier Baudet Architects submitted and subsequently approved by the Brisbane City Council show a 2.0M high block fence in part along both the side boundary and front alignments. The extent of this block fence along the shared allotment with adjoining property is

dimensioned as being 10.38M in the area of the pool at the rear of the dwelling on the subject site. This wall is denoted as being rendered and painted block work in colour 1. A second length of wall is shown along the shared boundary. This section is approximately 21.0M long and is indicated in colours 1 and 2, to heights of 1.8M and 2.0M respectively. The drawings accurately reflect those levels determined by the consulting surveyor who prepared the initial detail survey work associated with this development.

The QDC defines height as: *Height of a building or structure* at any point for the purpose of determining its *setback* from a boundary means the vertical distance between the *outermost projection* and the natural ground.

The QDC defines natural ground surface as: *Natural ground surface*, for a *lot*, means:

- (a) the ground level of the *lot* on the day the first plan of survey showing the *lot* was registered; or
- (b) if the ground level on the day mentioned in paragraph (a) is not known, the *natural ground surface* as determined by the *building certifier*.

Further, the Brisbane City Plan defines ground level as follows:

Ground level: the level of the land at the time the original estate was subdivided, and the roads through the estate created, as determined by a licensed cadastral surveyor using best evidence. Best evidence should be based on the most appropriate of the following sources:

- 'As constructed' plans lodged with Council at the time of subdivision and held by Council's plan custodian; or
- Surveyed spot levels from Council's sewer maps(BCC Department of Works Detailed Plan); or
- Council's 2002 BIMAP Contours. Where it is evident that the BIMAP contours do not represent the true levels by an amount greater than 0.5m, a site survey by a registered surveyor is acceptable. Evidence must be obtained demonstrating how the contours relate to ground level at the time the original estate was subdivided.

Further it should be noted that the Brisbane City Plan refers to building height as being taken from *ground level*. In this instance the ground level is clearly indicated on all of the approved architectural drawings prepared by Ferrier Baudet Architects and noted as follows:

"BCC ground lines' and/or 'original contour lines'. Reference to other levels are also indicated, these being the 'existing ground line' or 'existing contours lines'. 'New' levels are also clearly noted, those distinct from the existing or original levels".

The block fence heights are shown at either 1.8M or 2.0M, however their height is measured from the existing contour or ground lines rather than the Council ground lines or original contour lines, as is required. In contrast, the overall building heights are measured with reference to the Council ground lines or original contour lines. These elevations and sections clearly show that the block fence sections would be higher than 2.0M when measured from the *natural ground or ground level*.

Council received a submission from the adjoining property owner (at that time) in relation to the development being proposed. One part of this submission stated:

"The proposed eastern adjoining wall of 15 Ivy Street is over 7.5M and will be built on top of the existing drop of approximately 2.0M to our land making a total of approximately 9.0M from our property. This is non compliant and unacceptable to us. The soil level of 15 Ivy Street was artificially raised by the former owner to between 1.0 and 2.0M along the boundary line".

The drawing, *Elevation showing Wall Heights*, as prepared by John Akers consulting surveyor confirms that the subject site has been substantially filled above the natural ground level at the shared boundary line. Natural ground level is closely reflected by the existing levels at the base of the wall on the adjoining property. The predominately level section of block fence is 26.6M long and has a top of wall RL12.98. The natural ground levels at either end of this section of wall are RL 10.407 falling to RL 9.798. The comparative existing ground levels at the base of the wall in the adjoining property are RL

10.28 falling to RL 10.05, which is approximately 200mm difference at each end. The finished ground levels along the base of the wall at the subject site are RL11.43 falling to RL11.13. The depth of fill along this section of the wall is 1.023M increasing to 1.332M. The block fence through this section is 2.573M high and increases over the 26.6M to a height of 3.182M.

In reviewing the approval package that accompanied the approved drawings, there are three conditions that refer to the retainment walls and or fences on the boundaries. Specifically, conditions 4, 5 and 14.

Condition 4 - Carry out the approved development

Carry out the approved development generally in accordance with the approved drawing(s) and/or document(s). Note:- This development approval may include the location of fences, retainment walls and/or external walls on the boundary of a lot. The approval does not constitute permission to enter the neighbouring properties to carry out the construction of fences, retaining walls and/or external walls of buildings on the boundary of a lot. Permission must be obtained from relevant property owners.

Condition 5 - Complete all building work

Complete all building work associated with this development approval, including work required by any of the following conditions. Such building work is to be carried out generally in accordance with the approved plans, drawing(s) and/or documents and where the building work is assessable development, in accordance with a current development permit.

Guideline

This condition is imposed to ensure that all building work associated with the use are in place before the use commences. It is not appropriate that the site be used without such work being completed. Please note that the work referred to in this condition involves operational work and may therefore constitute 'assessable development'. The Council informs you therefore that this condition does not authorise assessable development to occur and a development permit may therefore be necessary. Please refer to Council's information sheets. For any enquiries about this condition, please contact the assessment manager.

Condition 14 - Retainment Walls

Design and construct all retaining walls, and associated fences in compliance with Council's Filling and Excavation Code.

Guideline

This condition is intended to ensure that retainment walls associated with the development, are designed and constructed in accordance with Council's Filling and Excavation Code and the Building Code of Australia and also, to ensure that no adverse impact is created by the structures on the surrounding properties. The retaining wall designer should note that timber retainment walls facing onto Council property (including the road reserve) will not be permitted. Retainment walls facing onto road reserve or parkland are to be contained entirely within the proposed development site, including the retainment wall's footings. If the retaining wall is higher than 1.0 metre and/or where the combined height of the retainment wall and fence exceeds 2.0 metres, a development permit for building work will need to be obtained. For any enquiries about this condition, please contact the Engineering Delegate, Development Assessment.

Proof of fulfilment

For any retainment walls greater than 1.0 metre in height and/or where the combined height of the retainment wall and fence exceeds 2.0 metres, a development permit for building work. Certification from a registered professional engineer Queensland (RPEQ- Civil) that the retaining wall complies with the filling and excavation code. The certification is to include the stormwater drainage (surface and seepage) water associated with the wall ensuring that the water is directed to an acceptable lawful and legal point of discharge and does not cause any ponding, nuisance or disturbance to adjacent property owners.

The Collins Certification Group issued a Development Approval for building works associated with a new dwelling and pool on 17 January 2011. The decision notice did not identify any further approvals as being required. The decision notice did not indicate that the development was required to meet the self assessable requirements of the Filling and Excavation or any other code. The decision provided an advisory note, that retainment walls retaining cut or fill are to be no greater than 1.0M above natural ground level. Retaining walls exceeding 1.0M above natural ground level will require building approval and engineer structural certification. The Certifier elected to disengage himself on the 7 October 2011, before the building works for the house and the pool were completed. The Certifier informed the Committee that this action was a result of choosing not to renew their own license to approve swimming pools.

The approved architectural drawings were prepared by the Applicant and largely reflected those which were approved and prepared by Ferrier Baudet Architects. Drawn on the site plan, the block fence was indicated at 1.8M high for a length of approximately 60M from the front corner peg back to the rear of the pool area. Drawn on the side elevation, the boundary wall/ fence was shown as being 2.0 M high and the extent of the fence/ wall replicated that which was shown on approved Ferrier Baudet Architects. That is the boundary fence/ wall was not continuous for the 60M length. Similarly, the wall was shown as sitting 2.0M above the existing ground level with the natural ground level marked well below the existing ground level. Drawn on the various building sections (re: S-S, T-T, V-V and W-W), the footings that would support the block fence are shown 'floating' above the finished ground line clearly indicating that retainment walls were required to anchor these walls into foundations below ground level.

The approved structural engineering drawings indicate that there are two retainment walls along the boundary with the adjoining property. These are identified separately as RWVI and RWIV and detailed in corresponding section views. These details were found to be incorrect and did not apply to the circumstances that existed in this instance. Following subsequent discussions with the principal of this engineering firm, the Committee was provided with further written advice. A letter dated 21 August 2012 confirming the structural adequacy of the retainment wall and fence structure as it has been built. A second letter was provided to the Committee further clarifying the former correspondence with respect to structural adequacy of the retainment wall given the block fence on top.

When it became apparent that the retainment wall and the associated block fence did not have the appropriate approvals, the Applicant lodged an application directly to the Council on 15 February 2012.

The application was assessed by an officer in the Built Environment team against the provisions of the QDC MP 1.1 Design and Siting Standard for Single Detached Housing – On Lots under 450m². This was in error, due to the site being defined as a small lot under the definitions prescribed in the Brisbane City Plan. Whilst the lot is narrow, the site area is 814sq/m, hence it should have been assessed against QDC Part MP1.2 Design and Siting Standard for Single Detached Housing – On Lots 450m² and Over. None the less the performance criteria P1, P2, P3 and P6 that were considered and referred to in Council's assessment were the same.

The decision stated that the retainment wall and fence would compromise the outlook for the residents of the adjoining property and negatively impact on their amenity. It should be noted that the former adjoining property owner had written a submission to Council to argue against the small lot development with respect to the height and extent of walls that would affect his property. Similarly, the current owner who is faced with looking at the wall, now complete, is vigorously opposing the structure.

Upon receiving Council's advice the Applicant prepared a Form 10 - Appeal Notice and written grounds for appeal including photographs of the construction of the combined retaining wall and fence. This Application was received (unsigned) by the Committees Registrar on 2 May 2012. As the Applicant did not have a right of appeal, given that the letter of refusal was Concurrence Agency advice, the Applicant lodged an application for building works with a private certifier on or near 8 May 2012.

Following written correspondence and discussions between the Certifier and Council it was agreed that the Certifier would issue a decision based on the previously determined Concurrence Agency's advice.

The Certifier subsequently issued a decision notice for building works on 10 May 2012, refusing the construction of the retainment wall and associated fence citing the Concurrence Agency's refusal to vary the design and siting of the structure.

The Applicant lodged a Form 10 – Appeal Notice signed by the Applicant 14 June 2012. The grounds for appeal and other supporting information, still being on file with the Committee Registrar. In accordance with SPA, an appeal under subsection (1)(a), (b), (c) or (d) must be started within 20 business days (the **applicant's appeal period**):

- (a) if a decision notice or negotiated decision notice is given—the day the decision notice or negotiated decision notice is given to the applicant; or
- (b) otherwise—the day a decision notice was required to be given to the applicant.

The appeal was not lodged until 15 June 2012 therefore the appeal period had expired.

Reasons for the Decision

As the hearing was held at the subject site, the Committee was able to view the retainment wall and fence from within that property. The structure, viewed from this perspective looks entirely proportional and appropriate for the site. Similarly from that side of the wall it is very difficult to appreciate how it might impact on the adjoining property owners. Immediately after the hearing the Committee met with the adjoining property owners on the front verandah of their home. Upon entering the adjoining property, the impact that this wall makes is undeniably staggering. The wall is certainly not acceptable in its current form.

Council's condition 14 on Retainment Walls, contained in their approval package, stated that the retainment wall is to be in accordance with the Filling and Excavation Code. The boundary wall structure cannot comply with the acceptable measures of this code, the first part of which states:

- A1.1** A retaining wall is set back at least half the height of the wall from any boundary of the site
- A1.2** Retaining walls over 1.5m are stepped 0.75m for every 1.5m in height, terraced and landscaped
- A1.3** Retaining wall finishes that present to adjoining land are of a high quality appearance and compatible with surrounding development.

The Committee finds it cannot approve the siting and design of this structure as the structure cannot and does not comply with the self assessable criteria of the Filling and Excavation Code - this being required by condition 14 of the Material Change of Use, the higher order approval.

Neither the Council, through their assessment of the development for a small lot house, nor the Certifier for their assessment of building works, correctly identified the extent of filling along the boundary between the two adjoining sites and the subsequent impact. The drawings that were approved in both circumstances clearly demonstrated that the combined retainment wall and fence was in excess of 2.0M as measured from the natural ground line.

The Committee also finds that the Applicant's appeal period had expired through the delayed and protracted process that the Applicant ultimately sought to appeal the decision.

Building and Development Committee Chair
Date: 22 October 2012

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
PO Box 15009
CITY EAST QLD 4002
Telephone (07) 3237 0403 Facsimile (07) 3237 1248