



Building and Development Tribunals

Queensland Government

Department of Local Government and Planning

APPEAL

Integrated Planning Act 1997

File No. 03-07-034

BUILDING AND DEVELOPMENT TRIBUNAL - DECISION

Assessment Manager: Gold Coast City Council

“The subject site”: *withheld*-“the subject site”

Applicant: *withheld*

Nature of Appeal

Appeal under Section 4.2.9 of the *Integrated Planning Act 1997* against the decision of the Gold Coast City Council to refuse a Development Application for Preliminary Approval for Building Works – siting provisions for a retaining wall on “the subject site”.

Date and Place of Hearing: 12:00pm on Thursday 21st June 2007
at “the subject site”

Tribunal: Mr Chris Schomburgk – Chairperson
Ms Liz Woollard – General Referee

Present: Applicants/Owners;
Mr Grant Harris – Gold Coast City Council Representative

Decision:

The decision of the Gold Coast City Council as contained in its Decision Notice dated 3 May 2007, to refuse the development application for Preliminary Approval for Building Work for a retaining wall, is **set aside** and **the application is approved subject to conditions**.

Material Considered

The material considered in arriving at this decision comprises:

- The application and supporting plans and documentation;
- Plans and documents provided by both the applicant and the Council after the hearing;
- The relevant provisions of the Town Planning Scheme for Gold Coast City Council;
- The Council’s Decision Notice dated 3 May 2007;
- The Queensland Development Code Part 12; and
- The *Integrated Planning Act 1997*.

Findings of Fact

I make the following findings of fact:

- “The subject site” has water frontage to a canal, the revetment wall of which is the subject of this appeal.
- The subject application seeks approval for an extension in height to the existing revetment wall. The existing wall is approximately 870mm in height and the applicants have added two layers of blocks atop that wall, giving a new height of approximately 1290mm. The whole face of the wall has been rendered such that it appears as one wall. This wall is set atop an existing base wall that predates the revetment wall. The revetment wall is set back about 150mm from the waterfront extremity of that base wall.
- While it cannot be accurately determined, there was acceptance by both parties that the original revetment wall was constructed about 30 years ago (circa 1979). The current owners, the applicants, purchased the property in August 2002.
- The application arises from a Show Cause Notice and Enforcement Notice issued by the Council with respect to the additions to the revetment wall. A Show Cause Notice was first purported to be issued dated 1 November 2006 but was found to be invalid because of the conflicting dates on that Notice. Council then issued an Enforcement Notice (30 January 2007). A further Show Cause Notice was issued by Council on 17 February 2007.
- Curiously, by letter dated 11 May 2007, the Council advised that it would hold the matter in abeyance pending receipt of an application to increase the height of the wall. By the time of that letter, the Council had already refused that application, which is the subject of this appeal.
- This appeal raises a number of legal and historical issues that are beyond the scope of the Tribunal. Neither party to the appeal could provide evidence to confirm or deny that approvals for the existing retaining wall were ever required. Council sought to deny approval for the existing wall as well as the additions to it, but on the information available there is no evidence that the original wall (the 1979 wall) ever required an approval. It is the conclusion of the Tribunal that it is an existing use and thus the appeal must be limited to the addition to that wall – the additional 400mm in height.
- Photographic evidence provided by the applicant shows that the subject wall is in fact located approximately 100mm behind the line of the revetment walls on land to both the immediate east and west of the subject site. The wall to the east is lower in height than the subject wall, while the wall to the west appears to be, in part at least, slightly higher than the subject wall. Inspection of the locality, and additional photographs provided by the appellants, show that many walls in the immediate area are as high as that of the subject wall and located as close to the water as the subject wall. Council was not able to confirm when those walls were built or whether they were actually approved (or whether approvals would have even been required for their construction, depending on their age).
- The Council’s decision to refuse the application is based on alleged non-compliance with section 3.6.2 of the Land Development Guidelines 2005, which themselves form part of Planning Scheme Policy (PSP) 11 of the Planning Scheme. Section 3.6.2 as referenced calls up Standard Drawing 05-04-004 Issue 2005. That drawing shows that fences (which presumably includes walls) are to be no higher than 1.2m and are to be located a minimum of 1.0m from the Waterfront Regulation Line, a line depicted on Overlay mapping in the Planning Scheme – in this case Overlay Map OM13-52. Council officers have independently advised that, for this part of Palm Beach at least, the Waterfront Regulation Line is taken to be the centre of the revetment wall.

- It is relevant in the context of this appeal that the provisions relied upon by the Council are “Guidelines” contained within a “Planning Scheme Policy”. Guidelines must be assumed to be just that – guidelines, as opposed to prescriptive requirements. A Planning Scheme Policy cannot regulate the use of premises (s2.1.23 of IPA).
- The relevance of the Overlay Maps referred to above lies in the Constraint Code for Canals and Waterways (Chapter 3 of Part 7, Division 3 of the Planning Scheme). The Acceptable Solutions for Performance Criteria PC1 and PC2 call up the Overlay Maps, although no reference is made in the Code to the Land Development Guidelines or PSP 11.

Based on my assessment of these facts, it is the Tribunal's decision that **Council's decision** to impose a condition on the Application for siting variation for the screen requiring it to be removed or reduced in height is **set aside** and **the application is approved, subject to conditions being:**

- i) The retaining wall is to have a maximum height of 1.2m above the existing original base wall. This is expected to require the removal of at least one row of new blocks.
- ii) Certification is required from a Registered Professional Engineer Qld (RPEQ) that the retaining wall and fill behind it do not adversely impact on the revetment wall. If there are any impacts, the applicant is to undertake the necessary remedial works to the satisfaction of the RPEQ to ensure structural stability and no off-site impacts.
- iii) No structures including fences are to be placed or constructed on top of the wall.

Reasons for the Decision

- The basis for Council's refusal is alleged non-compliance with the Land Development Guidelines that are called up by the Planning Scheme Policy 11. That Policy cannot regulate development. The Council has not alleged non-compliance with any Codes or other provisions of the Planning Scheme Policy.
- The wall as now constructed (to a height of approximately 1290mm) is not out of place in the locality, will not detract visually from the locality and, subject to conditions, does not or will not present any structural problems for the owner or the waterway.
- To reduce the wall to a height of 1.2m as per the Guidelines is appropriate to maintain the water storage capacity of the canal.

Chris Schomburgk
Building and Development Tribunal General Referee
Date: 7 August 2007

Appeal Rights

Section 4.1.37. of the *Integrated Planning Act 1997* provides that a party to a proceeding decided by a Tribunal may appeal to the Planning and Environment Court against the Tribunal's decision, but only on the ground:

- (a) of error or mistake in law on the part of the Tribunal or
- (b) that the Tribunal 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 Tribunal's decision is given to the party.

Enquiries

All correspondence should be addressed to:

The Registrar of Building and Development Tribunals
Building Codes Queensland
Department of Local Government and Planning
PO Box 15031
CITY EAST QLD 4002
Telephone (07) 3237 0403 Facsimile (07) 3237 1248

