



Development Tribunal – Decision Notice

Planning Act 2016, section 255

Appeal Number: 21-069

Appellant: Bradley James Rosser (as attorney for Joyce Rosser)

**Respondent
(Enforcement Authority):** Moreton Bay Regional Council (Council)

Site Address: 16 Acacia Street, Everton Hills in the State of Queensland and described as Lot 119 on RP149035 – the subject site

Appeal

An appeal under section 229 and Item 6 of Table 1 of Schedule 1 of the *Planning Act 2016* (PA) against the decision of the Council to give an Enforcement Notice under section 248 of the *Building Act 1975* (BA) dated 2 December 2021, requiring the repair or removal of all or part of a retaining wall that is located along the eastern boundary of the subject site that the Council considered to be dangerous.

Date and time of hearing: 11.30am, 31 March 2022

Place of hearing: Moreton Bay Regional Council Offices, Strathpine

Tribunal: Samantha Hall – Chair
Michael Moran – Member

Present:

Appellant
Bradley Rosser – Appellant
Karen Dyer – Appellant’s sister

Respondent
Chris Trewin – Principal Building Certifier, Council
Nick Gabriel – Development Compliance, Council

Decision:

The Development Tribunal (Tribunal), in accordance with section 254(2)(d) of the *Planning Act 2016* (PA) **sets aside** the decision of the Council to give the Appellant the Enforcement Notice dated 2 December 2021 relating to a retaining wall and **orders** the Council to **remake** the decision whether or not to give the Appellant any Enforcement Notice in relation to the wall and if so on what terms, within two months of receiving this decision notice.

Background

1. This is an appeal about a retaining wall (retaining wall) located along the eastern boundary of the subject site with the neighbouring property at 14 Acacia Street, Everton Hills, more particularly described as Lot 120 on RP149035 (14 Acacia Street).
2. It is undisputed between the parties that the retaining wall is located on both the subject site and 14 Acacia Street, as demonstrated by a survey plan provided by the Appellant with the Form 10 – Notice of Appeal.

The Enforcement Notice

3. The Council issued an Enforcement Notice to Mrs Joyce Rosser dated 2 December 2021 (Enforcement Notice).
4. The Appellant is Bradley Rosser, the son of the owner of the subject site, Mrs Rosser.
5. Mrs Rosser is currently residing in a nursing home and the subject site is being rented. Mr Rosser was appointed as one of two attorneys by Mrs Rosser to handle her financial matters pursuant to an Enduring Power of Attorney dated 29 February 2016. Mrs Dyer is the other attorney.
6. The facts and circumstances of the Enforcement Notice identified that on 29 November 2021, a Council officer carried out an inspection of the retaining wall that was *“located approximately on the property boundary between ‘14 Acacia Street Everton Hills’ and ‘16 Acacia Street Everton Hills’”*.
7. The Enforcement Notice stated that the Council Officer observed the following:
“that the retaining wall was on a significant lean, several of the concrete blocks had been displaced, and the retaining wall had several significant cracks between the concrete blocks.”
8. Photographic evidence of the retaining wall showing the lean, displacement of blocks and cracks was included as Annexure B to the Enforcement Notice.
9. Based upon the Council Officer’s inspection, the Enforcement Notice stated:
 - (a) *“the retaining wall is subsequently deemed to be dangerous”;*
 - (b) *“The section of retaining wall that is deemed to be dangerous, is from the rear of the premises where the retaining wall adjoins the property at 25 Hakea Street Everton Hills and extends to approximately 10m from the front property boundary adjoining Acacia Street”.*
10. The Enforcement Notice went on to state that:
 - (a) *“Council records indicate that a building approval (BL/1994/4147) was issued for building work involving a retaining wall at ‘Acacia Street Everton Hills’ (please refer to **Annexure ‘C’** enclosed);*
 - (b) *Council has received a survey plan indicating that the retaining wall is located partially on 14 Acacia Street, Everton Hills and partially on 16 Acacia Street Everton Hills (please refer to **Annexure ‘D’** enclosed)”.*
11. The Enforcement Notice required Mrs Rosser to undertake the following:
 - (a) *“Within 24hrs of receiving this notice restrict access around the collapsing retaining wall; **AND***

- (b) *Engage a suitably qualified Registered Professional Engineer in Queensland ('RPEQ') to inspect and provide a report on the structural status of the retaining wall and fence and provide confirmation to Council of your engagement of a RPEQ **by no later than 20 January 2022; AND***
- (c) *Carry out works recommended by the RPEQ and provide Council with a confirmation certificate (Form 16) from the RPEQ certifying the structures have been repaired **by no later than 28 February 2021; OR***
- (d) *Dismantle and remove the sections of the fence and retaining wall that are deemed to be dangerous and ensure that any remaining fill or excavation is not in a dangerous condition. Any cut and fill batters must comply with all relevant Requirements for Accepted Development (RADs) contained within Section 9.4.3 (Site Earthworks Code) of the Moreton Bay Regional Council Planning Scheme, including but not limited to RAD21 (please refer to **Annexure 'E'** Figure 1 enclosed). Once this has been completed, please contact Council for a reinspection **by no later than 20 January 2022.**"*

The appeal

- 12. The Appellant filed a Notice of Appeal (Form 10) with the Tribunal's Registrar on 9 December 2021.
- 13. The Appellant's Form 10 identified the Appellant's grounds of appeal which can be summarised as follows:
 - (a) By reference to an earlier enforcement notice issued to Mrs Rosser on 4 February 2019 (earlier enforcement notice) that was subsequently withdrawn by the Respondent, the Enforcement Notice was not lawfully given because Mrs Rosser:
 - (i) was not the owner of the retaining wall as the wall was located almost entirely on 14 Acacia Street and not the subject site; and
 - (ii) could not lawfully comply with the Enforcement Notice;
 - (b) Only approximately 30cm of the 35m long retaining wall was located on the subject site and so Mrs Rosser could not reasonably be considered the "owner" of the retaining wall for the purposes of section 248(1) of the *Building Act 1975* (BA);
 - (c) The Respondent's officers advised the Appellant that the reason the Enforcement Notice was given to Mrs Rosser was the benefit that Mrs Rosser gained from the retaining wall but this is not a reason for which an enforcement notice can be issued pursuant to section 248(1) of the BA;
 - (d) The Enforcement Notice did not identify the part of the retaining wall which was owned by Mrs Rosser but referred to the whole structure which was similar to the enforcement notices in the case of *Gold Coast City Council v Lear & Anor* [2016] QDC 215 (the Lear case);
 - (e) If the Enforcement Notice was lawful, the Respondent had not demonstrated how the approximately 30cm length of the retaining wall on the subject site was dangerous as the photographic evidence in Attachment B of the Enforcement Notice did not include photos of that portion of the wall;
 - (f) It was not lawful for Mrs Rosser to carry out work on that part of the retaining wall located on 14 Acacia Street, as Mrs Rosser did not own that property; referencing the Lear case as precedent that an enforcement notice cannot lawfully require a party to trespass onto neighbouring land and that any such enforcement notice was invalid; and

- (g) Discussions had been held with the owners of 14 Acacia Street however, the Appellant contended those discussions were not successful due to disagreement as to the apportionment of the costs to repair the retaining wall. By requiring Mrs Rosser to repair the wall and in the timeframe identified, the Respondent was requiring Mrs Rosser to accept what was to her, a detrimental financial position with respect to those negotiations.

14. A site inspection was carried out by the Tribunal at 10.30am on 31 March 2022, followed by the hearing of the appeal at the Respondent's chambers from approximately 11.30am.

Jurisdiction

15. Schedule 1 of the PA states the matters that may be appealed to the Tribunal.¹
16. Section 1(1) of Schedule 1 of the PA provides that Table 1 states the matters that may be appealed to a tribunal. However, pursuant to section 1(2) of Schedule 1 of the PA, Table 1 only applies to a tribunal if the matter involves one of a list of matters set out in sub-section (2).
17. Section 1(2)(h) of Schedule 1 of the PA, relevantly refers to a decision to give an enforcement notice in relation to a matter under paragraphs (a) to (g). Paragraph (g) refers to a matter under the PA, to the extent the matter relates to the BA, other than a matter under the BA that may or must be decided by the Queensland Building and Construction Commission.
18. Section 248(5) of the BA, relevantly provides that an enforcement notice given under that section is taken to be an enforcement notice given under section 168 of the PA.
19. Accordingly, an enforcement notice given under section 248 of the BA, would come within section 1(2)(g) of Schedule 1 of the PA and consequently, also section 1(2)(h) of Schedule 1 of the PA.
20. So, Table 1 of Schedule 1 of the PA applies to the hearing of this appeal.
21. Under item 6 of table 1 of Schedule 1 of the PA, an appeal may be made against the decision to give an enforcement notice. The appeal is to be made by the person given the enforcement notice, who in this case was the Appellant and the Respondent to the appeal is the enforcement authority, who in this case is the Council.
22. Accordingly, the Tribunal is satisfied that it has the jurisdiction to hear this appeal.

Decision framework

23. The Enforcement Notice the subject of this appeal was issued by the Council on or about 2 December 2021. At that time, the PA was in force, as was the BA.
24. The Appellant filed a Form 10 – Appeal Notice on 9 December 2021.
25. The appeal is a PA appeal, commenced after 3 July 2017 under section 229 of the PA. As such, the appeal is to be heard and determined under the PA.
26. This is an appeal by the Appellant, the recipient of the Enforcement Notice and accordingly, the Council, being the enforcement authority that gave the Enforcement Notice, must establish that the appeal should be dismissed.²

¹ Section 229(1)(a) of the PA.

² Section 253(3) of the PA.

27. The Tribunal is required to hear and decide the appeal by way of a reconsideration of the evidence that was before the Council which decided to give the Enforcement Notice the subject of this appeal.³
28. The Tribunal may (but need not) consider other evidence presented by a party with leave of the Tribunal⁴.
29. The PA provides the Tribunal with broad powers to inform itself in the way it considers appropriate when conducting a tribunal proceedings and may seek the views of any person⁵.
30. The Tribunal is required to decide the appeal in one of the following ways set out in section 254(2) of the PA:
 - (a) *confirming the decision; or*
 - (b) *changing the decision; or*
 - (c) *replacing the decision with another decision; or*
 - (d) *setting the decision aside and ordering the person who made the decision to remake the decision by a stated time; or*
 - (e) *for a deemed refusal of an application:*
 - (i) *ordering the entity responsible for deciding the application to decide the application by a stated time and, if the entity does not comply with the order, deciding the application; or*
 - (ii) *deciding the application.*

Material Considered

31. The material considered in arriving at this decision comprises:
 - (a) 'Form 10 – Appeal Notice', grounds for appeal and correspondence accompanying the appeal lodged with the Development Tribunals Registrar on 9 December 2021.
 - (b) The following decisions given to the Tribunal by the Appellant at the hearing:
 - (i) *Gold Coast City Council v Lear & Anor* [2016] QDC 215 (the Lear case); and
 - (ii) *Jensen v Brisbane City Council*, Development Tribunal – Decision Notice in appeal number 19-039 dated 11 May 2020 (the Jensen case).
 - (c) *Planning Act 2016* (PA).
 - (d) *Planning Regulation 2017* (PR).
 - (e) *Building Act 1975* (BA).
 - (f) *Property Law Act 1974* (PLA).

³ Section 253(4) of the PA.

⁴ Section 253(5)(a) of the PA.

⁵ Section 249 of the PA.

Findings of Fact

The Tribunal makes the following findings of fact:

The issues in dispute in the appeal

32. The Appellant's grounds of appeal as set out in the Form 10 – Appeal Notice are summarised in paragraph 13 above and the Appellant's verbal submissions at the hearing of this appeal did not add any new issues but instead provided further detail about those issues. From these two sources, the Tribunal has summarised the issues in this appeal to be as follows:

- (a) The Enforcement Notice was not lawfully given to Mrs Rosser because:
 - (i) Mrs Rosser was not the "owner" of the retaining wall for the purposes of section 248(1) of the BA;
 - (ii) only approximately 30cm out of the 35m long retaining wall was located on the subject site;
 - (iii) the majority of the retaining wall was located on the neighbouring property, 14 Acacia Street and Mrs Rosser could not lawfully enter that property to comply with the Enforcement Notice;
 - (iv) the Enforcement Notice applied to the whole of the retaining wall and not just the part of the retaining wall on the subject site (the Lear case); and
- (b) If the Enforcement Notice was lawfully given to Mrs Rosser:
 - (i) the Respondent had not demonstrated how the approximately 30cm length of the retaining wall on the subject site was dangerous as the photographic evidence in Attachment B of the Enforcement Notice did not include photos of that portion of the wall;
 - (ii) the Respondent was requiring Mrs Rosser to accept a detrimental financial position, as negotiations with the owners of 14 Acacia Street had resulted in disagreement as to the apportionment of the costs to jointly repair the retaining wall.

33. The tribunal finds that the key question in this appeal was with respect to the ownership of the retaining wall, specifically, whether Mrs Rosser owned the retaining wall and, depending upon the answer to that question, whether the Enforcement Notice was lawfully given to Mrs Rosser.

Who bears the onus of proof?

34. In respect of the issues in this appeal, it is the Respondent that bears the onus to establish that the appeal should be dismissed.

Who owned the retaining wall?

35. The Enforcement Notice appeared to answer the question of ownership of the retaining wall by reference to who built the retaining wall whereas the Appellant's grounds of appeal as set out in the Form 10 – Appeal Notice contended that the answer lay in the ownership of the land upon which the retaining wall was built.

Who built the retaining wall?

36. The Enforcement Notice identified that “*Council records indicate that a building approval (BL/1994/4147) was issued for building work involving a retaining wall at ‘Acacia Street Everton Hills’ (please refer to Annexure ‘C’ enclosed)*”.
37. Annexure C of the Enforcement Notice showed a plan, stamped as approved pursuant to permit number 944147 and dated 15 November 1994 (retaining wall approval).
38. The “job” description on the retaining wall approval was “retaining wall 16 Acacia St Everton Hills”, designed by “owner” and client “T & J Rosser”.
39. Accordingly, it seemed to be the Respondent’s position that the person who obtained the approval for the retaining wall, owned the retaining wall and should be responsible for carrying out the works required by the Enforcement Notice.
40. The Appellant’s supporting materials to the Form 10 – Appeal Notice stated the following with respect to the history of the retaining wall:

“The retaining wall was built by the original owners of the lower property, 14 Acacia Street, in 1976. Sixteen years later, in 1992, the upper property, 16 Acacia Street, was purchased by Mr and Mrs Rosser and with the permission of the owners [of 14 Acacia Street] the retaining wall was extended to contain some fill for the benefit of the higher property with the building of a house on that property.”
41. At the hearing, Mr Trewin did not dispute this evidence and advised that the Respondent was satisfied the retaining wall was built at around the time that the house at 14 Acacia Street was constructed to stabilise the cut that was required to create the lot.
42. Mr Trewin noted that his understanding of the retaining wall approval was that the Appellant’s father applied to extend the existing retaining wall to make the retaining wall 3 besser blocks (or 60cm) higher and that the work was done mostly on 14 Acacia Street, with the agreement of the then neighbours.
43. Based on this evidence, the Tribunal is satisfied that the retaining wall was:
 - (a) constructed in approximately 1976 by the then owners of 14 Acacia Street, when the house on 14 Acacia Street was built;
 - (b) extended in height in 1992 by Mr and Mrs Rosser, the owners of the subject site.
44. But the Tribunal is not satisfied that ownership of the retaining wall rests with the party that constructed the wall. In this regard, the Tribunal refers to the Lear case and the Jensen case submitted by the Appellant at the hearing of this matter.
45. In both those decisions, the Court and the tribunal were considering the responsibility for repairing retaining walls which were straddling property boundaries and both found that ownership of the retaining wall did not rest with the party that constructed the wall but instead with the party upon whose land the wall was constructed.

Was the retaining wall constructed on the subject site?

46. Annexure D to the Enforcement Notice comprised sheet 2 of 2 (Additional Sheet) of a survey plan (undated) showing the location of the retaining wall (plan number IS302191).
47. Accompanying the Form 10 – Appeal Notice, the Appellant provided an Identification Survey of Part of Lot 119 on RP149035 dated 14 March 2019 that also showed the location of the retaining wall (plan number IS285576).

48. Both survey plans demonstrated that:
- (a) the retaining wall ran the length of the boundary between 14 Acacia Street and the subject site; and
 - (b) the majority of the retaining wall was located clearly within 14 Acacia Street, with only approximately 30cm of the wall located on the subject site at the rear of the property.
49. It was evident to the Tribunal at the hearing, that the following was agreed between the parties:
- (a) the retaining wall was constructed as shown on both survey plans; and
 - (b) only approximately 30cm of the 35m long retaining wall was located on the subject site at the rear of the property.
50. Accordingly, the Tribunal is satisfied that while most of the retaining wall was located on 14 Acacia Street, a small part of the retaining wall was also constructed on the subject site.

Section 248(1) of the BA

51. The Council's power to give the Enforcement Notice to Mrs Rosser was derived from section 248(1) of the BA, which provided as follows:
- (1) "A local government may give a notice (an enforcement notice) to the owner of a building, structure or building work if the local government reasonably believes the building, structure or building work –*
- (a)*
 - (b) Is dangerous; or*
 - (c) is in a dilapidated condition; or*
 - (d) is unfit for use or occupation...".*
- [emphasis added]
52. Schedule 2 (Dictionary) of the BA relevantly defined "owner" of a building or structure to mean:
- (a) "if the building or structure is on land granted in trust or reserved and set apart and placed under the control of trustees under the Land Act 1994—the trustees of the land; or*
 - (b) if paragraphs (a) to (h) do not apply—the person for the time being entitled to receive the rent for the building or structure or would be entitled to receive the rent for the building or structure if the building or structure were let to a tenant at a rent."*
53. The parties agreed and the Tribunal is satisfied that the retaining wall, whilst built predominantly on 14 Acacia Street, extended for approximately 30cm into the subject site.
54. The Appellant provided a copy of the Jensen case to the Tribunal and the Tribunal notes that in the Jensen case, at paragraph 61, the tribunal in that appeal accepted the evidence of the parties that a retaining wall was a structure and was a fixture that formed part of the land on which it was attached (see also *Holland v Hodgson* (1872) LR 7 CP 328).

55. The Jensen Case also relevantly considered general property law principles and the tribunal in that appeal quoted at paragraph 67, the following passage from “The Law of Real Property” by Megarry and Wade, 8th Ed. (London Weet & Maxwell 2012) at page 1, 354 (para 30-043):
- “As a general rule ownership of a party wall follows the ownership of the land upon which it is built. There is therefore a presumption that, where a wall between adjacent properties is constructed so that the median line follows the boundary, ownership of the wall is split longitudinally between the two landowners.” [citations omitted]*
56. Unlike the Jensen case, this appeal considers a retaining wall that doesn’t straddle the property boundary but instead is clearly constructed within one property for most of its length but crosses into the adjoining property for a smaller length. However, the Tribunal is satisfied the principles espoused in the Jensen case can be applied to this appeal.
57. The Appellant’s grounds of appeal that accompanied the Form 10 – Appeal Notice, as well as the Appellant’s oral submissions at the hearing, considered the decision in the Lear case.
58. The Tribunal found the summary of the Lear case set out in the Jensen case (at paragraph 68) to be helpful and while the Tribunal will not reproduce that summary in this decision, it does note that as with the Jensen case, the retaining wall in the Lear case straddled the boundary and was constructed partly on land owned by each owner.
59. While the retaining wall in this appeal does not straddle the boundary, there is one particular similarity this appeal has with the Lear case, being that the Enforcement Notice did not identify which part of the retaining wall was to be rectified by Mrs Rosser.
60. In the Lear case, the retaining wall straddled the boundary and the local government gave an enforcement notice to each of the owners in identical terms requiring both owners to rectify the retaining wall but these enforcement notices did not identify which part of the retaining wall was to be rectified by each owner.
61. Relevantly, at paragraph 13 of the Lear case, the Court found that:
- “The Enforcement Notice directed the respondents to unlawfully carry out work on the land of their neighbour Ms Nicholas and it was therefore, as the magistrate correctly found, defective.”*
62. The subject site is freehold land that the Tribunal understands is registered in the name of Mrs Rosser. Accordingly, Mrs Rosser would be the person entitled to receive the rent for that part of the retaining wall that is constructed on the subject site, should it be let to a tenant at a rent. In fact, the subject site is currently being rented to a tenant and therefore it is clear to the Tribunal that Mrs Rosser would be the “owner” of the subject site for the purposes of section 248(1) of the BA.
63. However, as the retaining wall is constructed on both the subject site and 14 Acacia Street, the Tribunal finds that it is owned not just by Mrs Rosser but also by the owner of 14 Acacia Street. Therefore, the retaining wall on the subject site is a structure and is a fixture that forms part of both the subject site and 14 Acacia Street.
64. Accordingly, when issuing the Enforcement Notice pursuant to section 248(1)(b), (c) and (d) of the BA, where the retaining wall was located partly on the subject site and partly on the neighbouring 14 Acacia Street, the Respondent should have:
- (a) issued the Enforcement Notice to both owners of the retaining wall being the owner of the subject site and the owner of 14 Acacia Street; and
 - (b) identified the specific work that was to be undertaken by:

- (i) the owner of the subject site on that part of the retaining wall located on the subject site; and
 - (ii) the owner of 14 Acacia Street on that part of the retaining wall located on 14 Acacia Street.
65. The Respondent did not and therefore, the Tribunal finds that the Enforcement Notice was unlawful and should be set aside for the reasons that the Enforcement Notice:
- (a) was given to Mrs Rosser only; and
 - (b) did not specify the specific work to be undertaken to rectify that part of the retaining wall located on the subject site.

The Respondent's onus

66. Pursuant to section 253(3) of the PA, the Council bears the onus to establish that the appeal should be dismissed.
67. All of the written evidence considered by the Tribunal was presented by the Appellant, with the Respondent's evidence limited to oral evidence provided at the hearing by Mr Trewin and Mr Gabriel.
68. At the hearing, there was some discussion between the parties about an earlier enforcement notice that was given by the Respondent to Mrs Rosser and later withdrawn by the Respondent. That enforcement notice and the circumstances surrounding its issue and withdrawal, while interesting to note, were not relevant matters to the Tribunal's consideration of the issues in this appeal.
69. That said, Mr Trewin and Mr Gabriel both admitted that the previous enforcement notice was given to Mrs Rosser only and that no similar enforcement notice was given to the owner of 14 Acacia Street.
70. In respect of this appeal, they advised that when Mrs Rosser was given the Enforcement Notice, the owner of 14 Acacia Street was given a similar enforcement notice in the same terms. The Tribunal was not provided a copy of that document, nor was it relevant to this appeal about the Enforcement Notice, except with respect to a recurring admission by Mr Trewin and Mr Gabriel that the Respondent considered the rectification of the retaining wall to be a civil matter best resolved between the two owners rather than at the intervention of the Respondent. For that reason, the Respondent issued the similar enforcement notices to both owners to encourage them to collaborate on a solution.
71. Mr Trewin and Mr Gabriel made no further submissions to support the dismissal of the appeal.
72. On this basis, the Tribunal is satisfied that while the Respondent clearly had good intentions with respect to the issue of the Enforcement Notice, the Respondent has not provided sufficient evidence to establish that the appeal should be dismissed.

Reasons for the Decision

73. The key issue in this appeal was with respect to the ownership of the retaining wall, specifically whether Mrs Rosser owned the retaining wall and, depending upon the answer to that question, whether the Enforcement Notice was lawfully given to Mrs Rosser.
74. As this was an appeal with respect to an enforcement notice, the onus of proof was on the Respondent to establish that the appeal should be dismissed.

75. The Tribunal found that the Respondent did not establish that the appeal should be dismissed.

Who owned the retaining wall?

Who built the retaining wall?

76. The Enforcement Notice suggested that the question of ownership of the retaining wall would be answered by determining who built the retaining wall.

77. Based upon evidence provided by the Appellant and acquiescence by the Respondent at the hearing of the appeal, the Tribunal is satisfied that the retaining wall was:

- (a) constructed in approximately 1976 by the then owners of 14 Acacia Street, when the house on 14 Acacia Street was built; and
- (b) extended in height in 1992 by Mr and Mrs Rosser, the owners of the subject site.

78. But the Tribunal is not satisfied that the ownership of the retaining wall rests with the party that constructed the wall but rather that the ownership of the retaining wall rests instead with the party upon whose land the wall was constructed.

Was the retaining wall constructed on the subject site?

79. The retaining wall was approximately 35m in length and was located within 14 Acacia Street for much of the length of the boundary between 14 Acacia Street and the subject site, except for approximately 30cm of the end of the retaining wall which was located within the subject site at the back of the property.

80. Section 248(1) of the BA, provides the power for the Respondent to give the Enforcement Notice to “the owner” of the retaining wall.

81. The definition of “owner” in the BA, includes the person entitled to receive the rent for the structure if the structure were let to a tenant at a rent.

82. The Tribunal is satisfied that general property law and case law supports a finding that ownership of the retaining wall rests with the person who owns the land upon which the retaining wall is located.

83. The parties agreed and the Tribunal is satisfied that the retaining wall, whilst built predominantly on 14 Acacia Street, extended for approximately 30cm into the subject site.

84. For that reason, ownership of the retaining wall is divided between the owner of 14 Acacia Street and the owner of the subject site, Mrs Rosser, with each owner owning that part of the retaining wall located on their land.

85. When issuing the Enforcement Notice, the Respondent should have:

- (a) issued the Enforcement Notice to both owners of the retaining wall, being the owner of the subject site and the owner of 14 Acacia Street; and
- (b) identified the specific work that was to be undertaken by:
 - (i) the owner of the subject site on that part of the retaining wall located on the subject site; and
 - (ii) the owner of 14 Acacia Street on that part of the retaining wall located on 14 Acacia Street.

86. The Respondent did not and therefore, the Tribunal finds that the Enforcement Notice was unlawful and should be set aside for the reasons that the Enforcement Notice:

- (a) was given to Mrs Rosser only; and
- (b) did not specify the specific work to be undertaken to rectify that part of the retaining wall located on the subject site.

Cost of rectification

87. As discussed at the hearing between the parties, the rectification of the retaining wall and the arrangements between the two property owners with respect to how that is to occur and who should pay for that, is not a matter that should concern the Respondent. Similarly, that is a matter that is beyond the scope of this appeal and something the Tribunal has no jurisdiction over.
88. The Tribunal however understands that there is some dispute between the two owners of the subject site and 14 Acacia Street with respect to which owner pays for what part of the rectification works. The Tribunal notes that because this case is different to many others in that rather than straddling the boundary line, the parts of the retaining wall that lie within each property are clearly identifiable. Accordingly, a solution might be a proportional cost split based upon the percentage of the wall located on each property.
89. This is of course a matter for the owners to agree and beyond the scope of this decision.



Samantha Hall
Development Tribunal Chair

Date: 17th May 2022

Appeal Rights

Schedule 1, Table 2, item 1 of the *Planning Act 2016* provides that an appeal may be made against a decision of a Tribunal to the Planning and Environment Court, other than a decision under section 252, on the ground of -

- (a) an error or mistake in law on the part of the Tribunal; or
- (b) jurisdictional error.

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

The following link outlines the steps required to lodge an appeal with the Court.

<http://www.courts.qld.gov.au/courts/planning-and-environment-court/going-to-planning-and-environment-court/starting-proceedings-in-the-court>

Enquiries

All correspondence should be addressed to:

The Registrar of Development Tribunals
Department of Housing and Public Works
GPO Box 2457
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Telephone (07) 1800 804 833

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