



## Building and Development Tribunals – Decision

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### *Integrated Planning Act 1997*

<b>Appeal Number:</b>	<b>3–08–040</b>
<b>Applicant:</b>	<i>withheld</i>
<b>Assessment Manager:</b>	Gecon Private Certifiers
<b>Concurrence Agency:</b> (if applicable)	Sunshine Coast Regional Council
<b>Site Address:</b>	<i>withheld</i> –‘the subject site’

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### **Appeal**

Appeal under Section 4.2.17 of the *Integrated Planning Act 1997* against the Concurrence Agency Response issued by the Sunshine Coast Regional Council to refuse a Building Development Application relating to a front and side boundary fence for the subject site.

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<b>Date of hearing:</b>	9:00am, Monday 7 July 2008
<b>Place of hearing:</b>	The subject site
<b>Tribunal:</b>	Mr Chris Schomburgk - Chair
<b>Present:</b>	Applicants Mr Don Graham – Sunshine Coast Regional Council Representative <i>withheld</i> – land owner / neighbour

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### **Decision:**

The Tribunal, in accordance with section 4.2.34 (2) (a) **dismisses** the concurrence agency response of the Sunshine Coast Regional Council to direct the refusal of a Building Development Application for a side and front boundary fence in excess of 2 m in height, and the **appeal is upheld**. The certifier is directed to approve the development application **subject to the following conditions:**

- There being no other matter preventing the development application from being approved, the applicant is to –
  - plant and maintain additional street trees in front of the wall to provide additional screening, subject to local government approval. These trees are to be a variety, density of planting and maturity height to achieve visual screening when viewed from the street.
  - maintain the wall in good condition including the rendered and painted exterior of the wall.
  - restore the footpath/verge to Council’s satisfaction on completion of the renovation works.

## Material Considered

The material considered in arriving at this decision comprises:

- The application, including 'Form 10 – Notice of Appeal', supporting plans and documentation;
- Council's Concurrence Agency Response dated 16 May 2008;
- Verbal submissions from all the parties at the hearing;
- The Queensland Development Code ("QDC") – Part MP1.2; and
- The *Integrated Planning Act 1997*.

## Findings of Fact

The Tribunal makes the following findings of fact:

- The subject site is the subject of a major renovation of an older house. The renovations include the construction of a concrete swimming pool in the front yard, the front and side boundary fences for which are the subject of this appeal.
- The subject site is a sloping allotment that falls from the rear (north) towards the street.
- The fence / wall has been constructed in a different location to that which was approved by a private certifier in November 2007. Those approved plans showed the pool being built right up to the front boundary. The pool has, in fact, been set back from the front boundary by about 1.5 m to allow a pool deck between the pool and the fence/wall in order to reduce the height of the wall above the pool (to comply with pool fencing requirements). This setback has meant that the wall has ended up being higher in part than 2 m.
- The subject locality is one where a number of homes are under major renovation. At present there are few 2 m high front walls / fences, but there is no reason why more might not be constructed lawfully in the future as part of other renovations.
- The applicants, through their certifier, applied for a variation to the siting requirement to allow the fence/wall as it has been constructed. Council was a Concurrence Agency for the variation and directed the certifier to refuse the application. Of note, although not relevant in the determination of this appeal, is that the Concurrence Agency response notes that the Council "*decided to approve the application subject to conditions*" when that same response notes later that "*no approval is granted*" and that the "*Council does not support the proposed building work*". It would be a better outcome for applicants in general if these Notices were more accurately prepared by the Council.
- Council's direction to refuse is based on alleged non-compliance with provisions of the QDC, in particular Part MP1.2. While not specifically referenced by the Council's Concurrence Agency response, that Part includes, as an Acceptable Solution only, that fences be not more than 2 m high. The subject fence is more than 2 m high for a small section (see below), due to the slope of the land.
- The only provisions of the Code relied upon by the Council for its response are Element 1 – Design and Siting of Buildings and Structures - **P1(a)** and **P1(c)**, which state:
  - P1 The location of a building or structure facilitates an acceptable streetscape, appropriate for:*
    - a) The bulk of the building or structure;*
    - and*
    - c) The outlook and views of neighbouring residents.*

- As above, the wall has been constructed. With deference to the adjoining neighbour (*withheld* who attended the hearing), the applicants have rendered the wall, painted it in colours sympathetic to *withheld's* house colours, and have provided and planted a row of trees along the inside of *withheld's* property to provide a visual buffer to the wall. *Withheld* has provided a written statement, and offered verbal evidence at the hearing, to the effect that he supports the application and is pleased with the privacy and aesthetics it now offers.
- The extent of non-compliance with the QDC Acceptable Solution regarding structure height was measured on site. At its highest point (a corner of the wall) the wall measures approximately 2.45 m above ground. On the side wall, that “non-compliance” then tapers back toward the north, so that by about 3.5 m back from the road frontage, the wall is back to 2 m high. That is, there is a triangle created that tapers from 0.45 m at its worst back to zero above the 2 m height, and this taper occurs across about 3.5 m in wall length. Along the front wall, the height above ground level similarly tapers from the 2.45 m to about 1.9 m at the eastern end.
- The renovations have included earthworks spilling onto the footpath/verge of the street, and the original ground level appears to have been altered in some parts due to topsoil or filling incurred as part of the wall construction. This work needs to be restored to its original status.
- The nature of the topography in this location is such that *withheld's* property is the one most affected by the wall, and he has offered written and verbal support for the application. Residents across the road have their primary views away from the street, but in any event, their views towards the wall can be softened by additional street trees being proposed by the applicants. Importantly, there are already two mature street trees in front of the highest part of the wall, both of which are well in excess of the wall height, so that views to the wall from the street are already buffered.
- Council has since issued an Enforcement Notice (dated 17 June 2008). That timing is unfortunate given that the appeal against the Council's Concurrence Agency response was lodged on 16 June 2008 – only one day earlier. The Enforcement Notice indicates that one option to remedy the offence is to apply for and gain approval for a siting variation. That is precisely what has occurred. Again, while not relevant in the determination of this appeal, the form and wording of Council's notices might be improved.

### **Reasons for the Decision**

- The fact that the wall exists unlawfully is no justification, of itself, for approval.
- Only a small triangle of the wall is marginally in excess of that height which is an Acceptable Solution under the QDC. The majority of the wall's length (side and front boundaries) complies with the 2 m height. The minor encroachment does not, in the Tribunal's opinion, detract from an “*acceptable streetscape*” as referenced in P1(a).
- The “*outlook and views of neighbouring residents*” (P1(c)) is not detracted from to any appreciable extent, and that extent can be further mitigated by planting as required by the conditions of this decision. The potentially-worst affected neighbour has provided written and verbal support for the proposal.
- The applicant has offered, and will accept, conditions of an approval requiring the planting of appropriate screening vegetation to the side and front boundaries to soften any visual impacts created by the wall.
- The existing street trees directly in front of the offending portion of the wall provide some existing screening / buffering when viewed from the street.

- The extent of non-compliance with the QDC Acceptable Solution (A1(d)(ii)) of 2 m is minimal and does not, in the Tribunal's opinion, detract from the achievement of the relevant Performance Criteria. In addition, the purpose of the QDC to provide good residential design and acceptable amenity to residents is not compromised.

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**Chris Schomburgk**  
**Building and Development Tribunal Chair**  
**Date: 15 July 2008**

## **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 Infrastructure and Planning  
PO Box 15009  
CITY EAST QLD 4002  
**Telephone (07) 3237 0403 Facsimile (07) 3237 1248**