



## Building and Development Tribunals—Decision

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### *Integrated Planning Act 1997*

<b>Appeal Number:</b>	<b>3—08—039</b>
<b>Applicant:</b>	<i>withheld</i>
<b>Assessment Manager:</b>	Mark Harrison for and on behalf of the Brisbane Certification Group
<b>Concurrence Agency:</b> (if applicable)	Brisbane City Council
<b>Site Address:</b>	<i>withheld</i> —the subject site

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### **Appeal**

Appeal under section 4.2.7(2)(b) of the *Integrated Planning Act 1997* (IPA) and section 9(a) of the Integrated Planning Regulation 2006 against the decision of the Assessment Manager issued on 25 June 2008, as directed by Brisbane City Council's concurrence agency response issued on 27 May 2008.

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<b>Date of hearing:</b>	9.30am -Thursday 17 July 2008
<b>Place of hearing:</b>	At the subject site and at a neighbouring site
<b>Tribunal:</b>	John Panaretos - Chair Michael Yau -Member
<b>Present:</b>	Applicant Rob Dix – Brisbane City Council Representative <i>withheld</i> – Neighbour <i>withheld</i> – Neighbour's Consulting Surveyor

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### **Decision:**

The Tribunal, in accordance with section 4.2.34(2)(c) of the IPA, **sets aside** the decision appealed against regarding the refusal of a building development application for a side and front boundary fence in excess of 2 m in height and replaces it with the following decision.

The Assessment Manager is **directed** to reassess and decide the building development application subject to compliance with all other relevant building assessment provisions, including the following conditions:

- The structure is built in accordance with previously submitted plans subject to the modified plan as lodged by the Applicant on 23 July 2008 (copy attached) showing truncated fence at the south-east corner of the subject site;
- The truncated fence is to run between the penultimate piers at the south-east corner.
- The Applicant is to render and maintain the exterior of the wall in good condition.

## Background

The Applicant obtained development approval to reposition and modify the existing house. At that time, approval was issued by the Assessment Manager for retaining walls to a maximum total height, including balustrade, of 4.2 m above existing ground level, at the footpath in the south-east corner of the site. Contrary to legislative requirements, no variation to the Queensland Development Code (QDC) provisions was sought or issued.

The Applicant applied on 22 August 2007 to change the approval by increasing the height of retaining walls to allow for a raising of the curtilage of the house to garage level. The maximum combined height of retaining walls and fence would be 4.6 m above existing ground level at the footpath, an increase of 400 mm. The Applicant's surveyor subsequently surveyed the site and determined 'natural ground level' to be about 1.4 m above the existing ground level at the south-east corner of the site. If accurate, this would result in the overall height of the proposed wall being 3.2 m above natural ground level.

Issues in dispute:

- a) The neighbour's consulting surveyor contended that some filling had been done over the site at some time in the past. The natural ground level in the south-east corner of the site was in fact approximately 0.5 m lower than the results shown in the survey conducted by J Parsons Consulting Surveyors.
- b) A power pole servicing the neighbour's house was recently installed in the neighbour's driveway at the south-east corner of the Applicant's property. An increase in the height of the retaining walls immediately adjoining the pole would jeopardise the 2.7 m vertical clearance required by Energex to the power supply.

## Material Considered

The material considered in arriving at this decision comprises:

- The application, including 'Form 10 – Notice of Appeal', lodged 13 June 2008, supporting plans and documentation;
- Siting Variation (Relaxation) Application *Part 2* Neighbour's Statement dated 23 April 2008;
- Ground Level Plan drafted by J Parsons Consulting Surveyors dated 9 May 2008;
- The Assessment Manager's refusal dated 25 June 2008;
- Council's concurrence agency response dated 27 May 2008;
- Verbal submissions from all the parties at the hearing;
- Subsequent written representations by Council's representative proposing a compromise design;
- Subsequent written representations lodged by the Applicant including extracts from a soil test report by APOD Soil Testing Pty Ltd and a proposal for an alternative compromise solution;
- Brisbane City Council mapping from eBimap and City Plan 2000;
- QDC – Part MP1.2; and
- The *Integrated Planning Act 1997*.

## Findings of Fact

The Tribunal makes the following findings of fact:

- The Tribunal accepts the natural ground levels shown on J Parsons Consulting Surveyors' Ground Level Plan.
- The subject site slopes down steeply from north to south and more gently from the centre of its southern boundary to both east and west. The lowest part of the site is the south-east corner ('the corner') but natural ground level at the corner is elevated above the footpath and the neighbour's driveway due to cuttings in the past to level the road and driveway.

- The provisions of QDC MP 1.2 are applicable to this proposal, in particular:
  - P1 A1 for the wall and fence abutting the street alignment;
  - P2 A2 for the wall and fence abutting the side boundary.
- Hence, that part of the wall and fence combination in excess of 2 m above natural ground level is the subject of this appeal:
  - Front – a length of about 11.5 m tapering from 1.2 m at the corner to 0 m;
  - Side – a length of about 7.8 m tapering from 1.2 m at the corner to 0 m.
- In its concurrence agency response, Council refers only to P1 of the QDC Part MP 1.2 but cites three reasons for refusal:
  - *P.1 (in part) The proposed retaining wall and fence will affect the streetscape due to the bulk of the structure and the outlook and views of neighbouring residents.*
  - *The construction of the road and southern side boundary retaining wall and fence will restrict the neighbours from reinstating their power pole.*
  - *Natural Ground Level is in dispute between two Surveyors.*
- The retaining walls are partially built: the corner pillar reaches a height of almost 2 m above natural ground. The proposal is to complete the wall, with capping, slightly above its current height and construct the fence – pillars filled in with transparent metal panels – above.
- Two compromise solutions have been proposed:
  - The Applicant has offered to truncate the corner, running the fence at an angle between the penultimate pillars on the front and side boundaries. The Applicant's proposal will result in:
    - 2.8 m length of wall, measured from the corner on both the front and side boundaries remaining compliant with the QDC;
    - the maximum variation will then be about 0.8 m at each of the aforementioned piers;
    - the truncated portion will not be readily accessible and is to be concreted for low maintenance;
    - the required Energex clearance to the neighbour's power supply will not be jeopardised.
  - The second compromise solution has been proposed by Council. The proposal is to:
    - reduce the height of the retaining wall to 9 courses of blockwork (1800mm) from current ground level with a 1 m high fence above – this option would result in the retaining wall/fence combination being a maximum of 1.4 m above natural ground level, or 600mm below the 2 m height permitted by the Acceptable Solution;
    - the ground to be retained would be lowered by way of a terraced 1.5 m wide garden strip along the boundaries, abutting a sloping driveway/manoeuvring area;
    - this option assumes that footpath level at the corner is natural ground level.

## Reasons for the Decision

### Natural Ground Height

The soil test report, which relies on three bore holes in various locations on the site, states, *No fill was encountered across the proposed site.* This appears to corroborate the consistencies between current Council mapping and the survey conducted by J Parsons Consulting Surveyors.

### QDC Performance Criteria P1

Non-compliance with Acceptable Solution A1 is limited to the 'fence' part of the structure along the street alignment. This is a largely transparent and decorative part of the wall, adding little to its appearance of bulk. The Applicant's compromise will result in a length of 8.7 m of fence tapering from 0mm up to about 900mm height above the 2 m limit.

The vicinity of the subject site is an old and hilly part of the city, historically characterised by high retaining walls on street alignments. Hence, the wall as proposed in the Applicant's compromise solution is consistent with the character of the area.

The fence will not significantly impact views of neighbouring residents as it is largely transparent and decorative.

As drainage has been installed, the fence will not result in nuisance to neighbours but will improve safety for the residents.

#### QDC Performance Criteria P2

Non-compliance with Acceptable Solution A2 is limited to the 'fence' part of the structure once again along the southern side boundary. The Applicant's compromise will result in a length of 5 m of fence tapering from 0mm up to about 800mm height above the 2 m limit. The fence is largely transparent and abuts a driveway access into the neighbour's rear allotment on steeply sloping terrain. Hence, it can have no impact on the amenity or privacy of the adjoining allotment.

As a fence, it will have minimal impact on daylight or ventilation to a neighbouring house which is about 7 m from the wall.

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**John Panaretos**  
**Building and Development Tribunal Chair**  
**Date: 31 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:

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