



Building and Development Dispute Resolution Committees—Decision

Sustainable Planning Act 2009

Appeal Number: 82-11

Applicant: Jacqueline Christine Savva

Assessment Manager: Brisbane City Council (the Council)

Concurrence Agency: NA
(if applicable)

Site Address: 104 Malcolm Street Hawthorne and described as Lot 299 on RP 12486 - the subject site

Appeal

Appeal under section 533 of the *Sustainable Planning Act 2009* (SPA) against a Brisbane City Council Enforcement Notice issued under Section 590 of SPA on the 21 September 2011. The Notice was issued for carrying out assessable development (construction of a retaining wall and filling) without an “effective Development Permit”

Date of hearing: 10am- Monday 07 November 2011

Place of hearing: Meeting Room 5C, Department of Local Government and Planning; Level 5 63 George Street, Brisbane

Committee: Mr. Massimo Ficca – Chairperson
Mr. Simon Forsyth - General Referee

Present: Ms Jacqueline Christine Savva – Applicant
Mr Michael Lynch – Observer
Mr. Glynn Verity – Brisbane City Council

Decision:

The Building and Development Dispute Resolution Committee (the Committee), in accordance with section 564 of the SPA **sets aside** the decision of Brisbane City Council to issue the Enforcement Notice and **directs** the Council to withdraw the Enforcement Notice.

Background

On the 21 September 2011, the Council issued an Enforcement Notice under Section 590 of SPA to the Applicant as the owner of the land.

The Notice alleged the Applicant had carried out assessable development, namely a block retaining wall and filling to a depth in excess of 100mm, without a Development Permit, therefore, committing an offence under section 578 of the SPA.

The Notice stated that the Council reasonably considered that the site had been filled to a depth greater than 100 mm, and as the site was partially below RL 2.5 AHD, the Waterway Code contained within the Brisbane City Plan 2000 applied. Section 2.3 of Chapter 3 of the Brisbane City Plan 2000 sets out development that is considered to be 'Exempt Development'. Exempt Development is defined in the Plan as development that does not require an application and need not comply with the codes or other requirements of the Plan. Filling and Excavation is identified as exempt development where: -

- To a depth of one vertical metre or less from ground level on land to which the Acid Sulfate Soil Code, Wetland Code and/ or Waterway Code do not apply, and where the site is not listed on the Contaminated Land Register or Environmental Management Register.

OR

- Top dressing to a depth of less than 100 vertical millimetres from ground level on land to which the Wetland Code and/ or Waterway Code applies.

The subject land is partially below 2.5m AHD and as such is captured by the Waterway code provisions. Accordingly, any fill greater than 100mm on the subject land, would not be considered 'Exempt Development' by the Plan and would require an Operational Works approval.

As Council had formed the opinion that greater than 100mm of fill had been placed on the subject site, Council considered an operational works (code assessable under the plan) approval was required for the works that had occurred on the land. As no approval was evident in Council's records, Council issued the Enforcement Notice to ensure works ceased and appropriate action was taken.

The Applicant argued that there was no fill placed on site and the wall was not a retaining wall (it was a dividing fence), therefore the works met the criteria for exempt development and the provisions of the plan (ie. the Waterway, Wetland and Acid Sulphate Codes) did not apply, and therefore the Enforcement Notice was invalid.

Material Considered

The material considered in arriving at this decision comprises:

1. 'Form 10 – Appeal Notice', grounds for appeal and correspondence accompanying the appeal lodged with the Registrar on 5 October 2011.
2. The Enforcement Notice issued to the Applicant on the 21 September 2011.

3. A copy of an Infringement Notice issued to the Applicant on the 21 September 2011.
4. A land surveyor's plan of the site prepared by Steve Cooper and Associates dated 16 September 2011.
5. A preliminary Stormwater Quantity Assessment Report by Storm Water Consulting dated 5 October 2011.
6. Printouts of the property information from the Brisbane City Council web page.
7. Verbal statements made by the parties at the appeal hearing.

Findings of Fact

The Committee makes the following findings of fact:

1. The site is a vacant site on which the concrete masonry wall constitutes the only structure.
2. The Committee found that the levels shown on the survey plan prepared by Steve Cooper & Associates closely reflected those on the map extracted from Brisbane City Council records. Based on this evidence the Committee formed the opinion that there had been no fill placed on the site and the activity of top dressing the site was 'Exempt Development' under the Plan.

Reasons for the Decision

1. The Committee was satisfied that the levels on the survey plan prepared by Steve Cooper and Associates closely resembled the levels on the extract of the Council maps. Therefore the Committee formed the opinion that the site had not been filled as alleged by the Enforcement Notice and Council's decision to issue the Notice is set aside.

During the hearing, the Council raised the question whether the Committee had the appropriate jurisdiction to hear this appeal. The Committee is satisfied that it had the appropriate jurisdiction as this hearing was on whether an enforcement notice should or should not have been issued by Council. Section 533 of the SPA provides for the Committee to hear matters relating to the giving of enforcement notices, which was the matter at hand in this appeal to the Committee.

Massimo Ficca
Building and Development Committee Chair
Date: 23 November 2011

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
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