



Building and Development Dispute Resolution Committees—Decision

Sustainable Planning Act 2009

Appeal Number:	03- 2010
Applicant:	Robin & Jack Watford
Assessment Manager:	Brisbane City Council (Council)
Concurrence Agency: (if applicable)	N/A
Site Address:	15 Okeden Street and described as Lot 12 on SP19774 – the subject site

Appeal

The appeal is against the decision of the Brisbane City Council to issue an Enforcement Notice as Council reasonably believes that the applicants have committed a development offence. The Enforcement Notice is about:

- Assessable development being carried out without the relevant permit/s
 - Fill on road reserve
 - Ceasing building work
-

Date of hearing:	2:00pm on Friday 26 February 2010
Place of hearing:	On site – 15 Okeden Street, Toowong
Committee:	Mr Leo Blumkie – Chair
Present:	Mrs Watford – Applicant Mr Sean Stamp – Council representative Ms Tania Smith – GMA Certification Group Pty Ltd

Decision:

The Committee, in accordance with section 564 (2) (b) of the *Sustainable Planning Act 2009* (SPA), **changes** the requirements of the Enforcement Notice dated 10 December 2009 by **deleting** under the second "TAKE NOTICE" (page 3) the following words and requirements:-

"that you are required to comply with the requirements of this Enforcement Notice within the following specified time periods after the giving of this Enforcement to you. The requirements are as follows:-

Immediately cease all building work unless directed by Council

AND

Within five (5) business days

- (a) Contact a Private Certifier and arrange for an effective development permit ("the building approval") for dwelling additions and a retaining wall
- (b) Remove all fill from road reserve

AND

Within thirty (30) business days

- (a) Carry out the works identified by the Building Certifier as a result of the development permit with regards to the dwelling additions and a retaining wall."

OR

Within thirty (30) business days

- (a) Engage a building certifier and obtain a development permit ("the building approval") to remove or demolish the retaining wall;
- (b) Carry out works to remove or demolish the retaining wall in accordance in accordance with the building approval."

AND replacing them with the following words and requirements:-

" that you are required to comply with the requirements of the modified Enforcement Notice within the specified time periods nominated below. The requirements are as follows:-

Immediately cease all building work until an effective development permit is given by a Building Certifier

AND

Within five (5) business days of the date of this decision

Contact a Private Certifier and arrange for an effective Development Permit ("the building approval") for the modified dwelling additions, retaining wall and fence.

NOTE the existing fence on the Northern boundary to be reduced in height by 400mm for a distance of 10 metres measured from the front Okeden Street boundary line.

AND

Within thirty (30) business days of the date of the new effective Development Permit

Carry out the works identified by the Building Certifier as a result of the new effective development permit with regards to the dwelling additions, retaining wall and fence."

AND

Within sixty (60) days (not business days) of the date of this decision

Remove all fill from the road reserve."

Background

The subject site is an "L" shaped corner block located at 15 Okeden Street, Toowong described as Lot 12 on RP 19774.

Approximately 100m² of the McGrath Street and Okeden Street corner is designated as road reserve. The owners are in the process of purchasing this corner from the Department of Environment and Resource Management.

Finalising the purchase of the land is anticipated to take up to twelve months.

The site is located in a Low-Density Residential Area and Demolition Control Precinct as shown on Council's Planning Scheme Maps and the area is subject to the Toowong/Indooroopilly Local Plan.

On the 19 September 2007, approval was given by a private certifier to modify and extend the existing residence. The approval included conditions including:-

- 12 months to commence; and
- 2 years to complete.

Substantial building work has been undertaken on the site most of which is in accordance with the building approval. It would appear that building work commenced on or before the approval date. Hence the time to complete expired on the 19 September 2009.

An extension of time to complete was requested before the expiry date. However it would appear that, owing to the proposed modifications to the original approval and the need for a relaxation of the Okeden Street boundary setback, the matter of the extension was overlooked.

The Council representative had no concerns regarding the lapsing of the original approval.

Application was made to the Council on the 20 August 2009 for a reduced setback for a garage.

The application was successful and approval was given, with conditions, on the 9 December 2009. One of the conditions of the approval related to "Front Fence Materials and Design" i.e Item 7 of the approval.

However, additional assessable building work not included in the original approval has been undertaken. This includes the following:-

- Substantial fill on the road reserve with no operational works approval
- Retaining wall and fence on the Northern boundary facing the road reserve.

Council issued an Enforcement Notice on the 10 December 2009 in relation to:-

- Assessable development being carried out without the relevant permits.
- Fill on the road reserve.
- Ceasing building work.

An appeal was lodged with the Registrar on the 7 January 2010.

The A/Registrar advised the Council on the 11 January 2010 that an appeal had been lodged in relation to the Enforcement Notice.

On the 11 February 2010 the A/Registrar advised the applicant, certifier and Council that a Building and Development Dispute Resolution Committee has been established.

On the 11 February 2010 the Building and Development Dispute Resolution Committee Chairperson advised the council, certifier and applicant of the date, time and place for the hearing.

Material Considered

The material considered in arriving at this decision comprises:

- 'Form 10 – Notice of Appeal' and grounds for appeal, drawings, extracts and correspondence accompanying the appeal lodged with the Registrar on 7 January 2010.
- Enforcement Notice issued by the assessment manager dated 10 December 2009.
- Verbal submissions from the applicant at the hearing.
- Verbal submissions from the Council representatives at the hearing.
- Verbal submissions from the certifier at the hearing.
- Conditions of Development Approval (MCU) pages 1 to 8 tabled by the Council representative.
- E'mail from Department of Environment and Resource Management dated 16 February 2010 regarding the road closure.
- Brisbane City Council Town Plan.
- *Building Act 1975*.
- *Building Regulation 2006*.
- *Sustainable Planning Act 2009*.

Findings of Fact

The Committee makes the following findings of fact:

- The site is located in a Low-Medium density residential area and Demolition Control Precinct and is subject to the Toowong Indooroopilly Local Plan.
- The purchase by the applicant of the area of road adjoining the site is proposed to be permanently closed, has not been finalised.
- Fill has been placed on the road reserve not yet purchased by the applicant.
- Operational works approval is required for fill on a road reserve.
- No operational works approval has been obtained for the fill on the road reserve
- The excavation to the front of the site is greater than 1000mm in depth and no approval has been obtained for the excavation as required by building legislation
- The retaining wall, greater than 1000mm in height, constructed to retain the excavation up to the Northern boundary to the front of the site, has been constructed without an approval.
- The fence above the retaining wall to the front of the site does not satisfy the conditions of the Development Approval (Material Change of Use) MCU.
- The Council is correct in asking the owner to cease building work because a Development Approval has not been obtained for the building work to the front of the site.
- Section 474 (2)(b) of SPA allows an assessing authority to issue an Enforcement Notice without first issuing a Show Cause Notice where the notice is about "ceasing building work".

Reasons for the Decision

The Council is correct in requiring the owner to :-

- cease building work - however, once an approval has been given by a building certifier for the proposed building work to the front of the site, work should be able to continue. There is no need for the Council to give a direction for the work to continue.
- contact a certifier and arrange for an effective development permit for the dwelling additions and retaining wall. However, the wall above the existing ground line on the Northern boundary is (once the fill is

removed) a fence not a retaining wall. The Council representative agreed with this.

- The fence mentioned above under (b) can be made to comply with the conditions mentioned in the MCU approval, provided it is not greater than 1200mm height. The Council representative agreed with this.
- The Building Certifier can condition the height of the fence in an effective development permit as outlined in (b) above.
- The above changes would satisfy the required conditions of the MCU. The Council representative agreed with this.
- It is reasonable to allow the owner:-
 - 5 days after the date of this decision to contact a Building Certifier to arrange for an effective development permit and
 - 30 days after the effective development is given to complete the works as required by the development permit. The owner and certifier accepted this.
- Remove the fill from the road reserve, as such fill requires an operational works approval.
 - To require the fill to be removed within 5 days of the notice is considered unreasonable. The Council representative agreed that removal of the fill from the road reserve within 60 days (not business days) of the date of the appeal decision was an acceptable time frame.

As both the owner and Council representative agreed to the above changes to the Enforcement Notice, there was no need to retain the option of obtaining an approval to remove or demolish the retaining wall, hence it was agreed to remove this option from the Notice.

NOTE

The certifier in granting approval for the modified alterations needs to maintain the required the street boundary setbacks. It is acknowledged these setbacks may change if and when the road reserve is transferred to the applicant in the future.

Leo Blumkie
Building and Development Committee Chair
Date: 24 March 2010

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
Building Codes Queensland
Department of Infrastructure and Planning
PO Box 15009
CITY EAST QLD 4002
Telephone (07) 3237 0403 Facsimile (07) 3237 1248