



## Building and Development Tribunals—Decision

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### *Integrated Planning Act 1997*

**Appeal Number:** 3—09-045

**Applicant/Appellant:** Salvatore Allocca

**Assessment Manager:** Gold Coast City Council

**Concurrence Agency:** Nil

**Site Address:** 25 Pine Avenue, Surfers Paradise and described as Lot 2 on SP114434 (Community Titles Scheme) — the subject site

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### Appeal

Appeal under section 4.2.13 of the *Integrated Planning Act 1997* (IPA) against the decision of Gold Coast City Council to issue an Enforcement Notice (PN225215/16) in relation to a boundary fence in that:-

- The common boundary masonry fence is currently in a dilapidated state and is being used as a retaining wall;
  - The fence is showing signs of rotation due to the fill placed behind the fence to a depth of 1 m; and
  - The fence is no longer fit for its intended purpose.
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**Date of hearing:** 18 August 2009

**Place of hearing:** 25 Pine Avenue, Surfers Paradise – the subject site

**Tribunal:** Mr David Whittaker – Chair  
Mr Rami Hughes – Member

**Present:** Mr Salvatore Allocca – Appellant  
Mr Martin Roberts – Senior Compliance Officer, Gold Coast City Council  
Ms Anna Darcey – Building Compliance Officer, Gold Coast City Council

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### Decision

The Tribunal orders, in accordance with section 4.2.34 of the *Integrated Planning Act 1997* (IPA), the withdrawal of the Enforcement Notice (PN225215/16), dated 7 May 2009, issued by Gold Coast City Council to the Appellant, Mr Allocca.

## **Background**

The subject fence is estimated to have been constructed in excess of 30 years ago. At the rear of the property, the fence becomes the boundary wall of a garage on the adjacent property to the east. This indicates that the fence is completely on the adjoining property but this is subject to confirmation by an appropriate survey. The fence is approximately 2.2 metres high.

The building on the subject site is a two storey duplex subdivided longitudinally into two separate units. It was completed around May of 1999 with the survey plan, SP114434, being registered on 31 May 1999. It replaced an old, existing residence that was demolished in late 1998/early 1999. It has been constructed with a timber ground floor approximately 1.2 metres above ground instead of a slab on the ground due to a Gold Coast City Council minimum floor height requirement for flood reasons.

The approved drawings for the building show the entry to Mr Allocca's unit to be mid way down the side of the building with the access being by stairs. The stairs, as designed, do not comply with the provisions of the *Building Act 1975* and the *Building Code of Australia* in that there is no provision for a landing.

The builder has varied the design of this access by using earth fill approximately 1.0 metre high to create a landing at the entry door with earth fill ramps leading to the front and the rear of the building. This earth fill is retained by the subject fence.

The builder has not made any attempt to erect a suitably designed structure to retain this earth fill.

Mr Allocca purchased the unit, in good faith, in 2002 with the earth filled access ramps and landing in place.

Mr Allocca advised the Tribunal that a burst water pipe on the adjacent property to the east created significant damage to that property beside the subject fence. The cost of the repair of this damage was borne by an Insurance company. He also contends that this burst water pipe and the subsequent repair work involving machinery initiated and contributed to the damage to the fence.

The engineer's report indicates that the rotation of this fence began around May 2008. This was after the damage to the adjacent property was repaired. The damage to the fence is most evident adjacent to the landing and reduces either side as the depth of fill in the ramps reduces. There is no apparent damage to the section of the fence which becomes the wall of the garage on the adjacent property.

## **Material Considered**

The material considered in arriving at this decision comprises:

1. The application form, (Form 10 - Building and Development Tribunals Appeal Notice), lodged with the Registrar on 1 June 2009.
2. Show Cause Notices issued to Mr Allocca by Gold Coast City Council dated 30 September 2008 and 6 January 2009.
3. Enforcement Notice PN225215/16 issued to Mr Allocca by Gold Coast City Council dated 7 May 2009.
4. Facsimile from Mr Allocca to Gold Coast City Council dated 21 November 2008.
5. Letter from Mr Allocca's lawyers, Walsh Halligan Douglas, to Gold Coast City Council dated 9 March 2009.
6. Letter to Mr Allocca from NJA Consulting Pty Ltd, Consulting Engineers, dated 31 October 2009.
7. Survey plan SP114434 being the registered survey plan of 25 Pine Avenue, Surfers Paradise.

8. The *Dividing Fences Act 1953*.
9. Verbal submissions from those present at the hearing.

### **Findings of Fact**

The Tribunal makes the following findings of fact:

1. The Appeal was lodged with the Registrar within the prescribed time frame.
2. Mr Salvatore Allocca, the owner of Lot 2 SP114434, has no interest in, nor responsibility for the subject fence.
3. Mr Allocca owns the eastern portion of the building only. This ownership ceases at the outside face of the exterior wall.
4. The body corporate (25 Pine Avenue Community Title Scheme 26939) is the registered owner of the subject land (Lot CP SP114434) on which the building has been constructed. It is a joint owner of the subject fence under the terms of the *Dividing Fences Act 1953*.
5. The owner of the property to the east (23 Pine Avenue Surfers Paradise) is a joint owner of the subject fence under the terms of the *Dividing Fences Act 1953*.
6. The earth fill placed by the builder has subjected the dividing fence to loads for which it was not designed and constructed.
7. The fence exhibits significant damage as detailed in the letter of NJA Consulting Pty Ltd.
8. The damage to the fence was not caused by any actions of the Appellant, Mr Allocca.

### **Reasons for the Decision**

The Gold Coast City Council erred in issuing the Show Cause Notices and the Enforcement Notice to Mr Allocca.

Any Show Cause Notices and any subsequent Enforcement Notices should have been issued to **both** the body corporate for 25 Pine Avenue Surfers Paradise and to the owner of the adjacent property to the east (23 Pine Avenue Surfers Paradise) as joint owners of the subject fence.

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**David Whittaker**  
**Building and Development Tribunal Chair**  
**Date: 26 August 2009**

## **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  
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