



## Building and Development Dispute Resolution Committees—Decision

---

### *Sustainable Planning Act 2009*

<b>Appeal Number:</b>	<b>01- 16</b>
<b>Applicant:</b>	Soleor Pty Ltd ATF The Noble Family Trust
<b>Assessment Manager:</b>	Queensland Building Approvals
<b>Referral Agency:</b> (if applicable)	Gold Coast City Council (Council)
<b>Site Address:</b>	36 Royal Albert Crescent, Paradise Point and described as Lot 646 on SP 156111 – the subject site

---

### Appeal

Appeal under section 527 of the *Sustainable Planning Act 2009* (SPA) against a Decision Notice issued by Queensland Building Approvals as the Assessment Manager, refusing an Application for a Building Development Application for a “fence” (Class 10B structure), compliant with the decision of Gold Coast City Council as the Concurrence Agency.

Council was deemed a Referral Agency triggered by aspects of the Gold Coast Planning Scheme 2003.

---

<b>Date and time of hearing:</b>	17 February 2016 at 10.00am
<b>Place of hearing:</b>	The subject site
<b>Committee:</b>	John Panaretos – Chair Joanna Lee – General Referee
<b>Present:</b>	Elmona Noble – Applicant representative Zoran Zivanovic – Architect Roger Noble – Builder  Darren Wright – Assessment Manager  Stephanie McNicholl – Council representative Wiremu Sherrington – Council representative Morgan Randle – Council representative Glenn Liscombe – Council representative

---

### Decision:

The Building and Development Dispute Resolution Committee (Committee), in accordance with section 564 of the SPA **sets aside** the decision of the Assessment Manager on 25 November 2015 to refuse the Application for a ‘fence’, and approves the Application for a Development Permit for Building Work in accordance with the submitted plan.

## Background

On 26 February 2015, Council issued a Show Cause Notice to the Applicant, identifying 'building work' in the form of a "...concrete masonry block wall adjacent to 34 Royal Albert Crescent in excess of 1.2m in height from natural ground level within the water front setback clearance." as not complying with the acceptable solution of the Canals and Waterways Constraint Code Part &, Division 3 of the then current City of Gold Coast planning scheme. The block wall had been constructed thus giving rise to a possible development offence as it had not previously received development approval.

After responding to the Show Cause Notice and further correspondence between the Applicant and Council, the Applicant lodged a Building Development Application (Application) to have the wall retrospectively approved. As Referral Agency, Council refused the Application on 25 November 2015, for the following reasons:

1. *Council deems that the siting of the ...works would be in conflict with and not comply with performance criteria PC4 for the Residential Choice Domain under Chapter 5 of the Gold Coast Planning Scheme 2003 on the following grounds: a. The 2.6 metre high ...wall is a solid... structure that extends within the 1.5 metre side setback from the northern boundary impacting the adjoining property...*
2. *Council deems that the siting of the ...works would be in conflict with and not comply with performance criteria PC1 for the Canals and Waterways Constraint Code...*

On 7 January 2016, the Assessment Manager issued a Decision Notice refusing the Application as directed by Council.

On 7 January 2016, the Applicant lodged an appeal with the Registrar of the Building and Development Committees citing a range of grounds of appeal. The grounds of appeal centred on the privacy function provided by the wall given the rear podium of the adjoining site at 34 Royal Albert Crescent is almost 1 metre higher than the acceptable solution prescribed by the relevant code and the height of the rear podium of the subject site.

The appeal hearing was held on the subject site on Wednesday 17 February 2016 at 10.00am. Although argument from both parties focused on substantive code compliance matters (i.e. height of wall, side and rear boundary setbacks and lack of transparency of the wall, and its perceived impact on the adjoining property) the Committee was first required to establish the extent of Council's authority as Concurrence Agency, in particular the Codes it was authorised to assess the Application against under the SPA. The parties presented arguments for and against the wall being defined as a Class 10 structure.

Under s33 of the *Building Act 1975*, planning scheme setback provisions can supersede setback provisions of the Queensland Development Code (QDC) to the extent they differ. In this case, Council applied not only side and rear setbacks from the planning scheme codes, but also the wall height acceptable outcome.

The Committee however found the planning scheme codes are not applicable in this case. Council was indeed a Concurrence Agency but was limited to assessing the siting provision under the QDC. The reasons for this decision are detailed further under the 'Findings of Fact' section of this decision. Hence, the Committee was required to assess the Application against the QDC MP1.2 siting provisions in making their decision.

## 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 Committees Registrar on 7 January, 2016.
2. Show Cause Notice issued to Soleor Pty Ltd by GCCC dated 26 February 2015 relating to construction of an unauthorized “...*concrete masonry block wall ...in excess of 1.2m in height ...within the water front setback clearance.*”
3. Response to Show Cause Notice by Zoran Architecture dated 20 March 2015
4. Information Request to Building Application #201505081 issued by GCCC dated 15 June 2015
5. Response to the Information Request by Zoran Architecture dated 10 September 2015
6. Further Response to the Information Request by Zoran Architecture dated 22 September 2015
7. IDAS application forms 1 and 2 receipt dated 7 December 2015
8. Oral submissions by all parties at the hearing
9. “Further Submission” made in writing by Council dated 22 February 2016
10. The architect’s written response to Council’s submission dated 22 February 2016,
11. The architect’s written comments in pdf and email form dated 2 March 2016
12. The Applicant’s email of 4 March 2016 offering further comment
13. The Council’s response dated 10 March 2016 to the Committee’s enquiries
14. Gold Coast Planning Scheme 2003
15. Building Code of Australia (BCA) and National Construction Code (NCC)
16. Queensland Development Code MP1.2 (QDC)
17. *Sustainable Planning Act 2009* (SPA)
18. The Sustainable Planning Regulation 2009 (SPR)
19. *Building Act 1975* (BA)
20. The Building Regulation 2006 (BR)

## **Findings of Fact**

The Committee makes the following findings of fact:

1. The wall in question is a constructed, rendered solid block wall 2.6 metres in height above the designated ‘natural ground level’. It is setback 1.1 metres from the side boundary and extends to within 6 metres of the rear (canal) boundary of the site.
2. The wall represents assessable development under both the SPA and the BA.
3. Under s21 of the BA the work must comply with any relevant deemed to comply provisions of the BCA or relevant acceptable solutions under the QDC for the building work.
4. Pursuant to s78A of the SPA and s33 of the BA, planning scheme provisions (alternative provisions) may take precedence over BCA requirements in respect of the siting provisions of Class 1 and Class 10 structures

5. The Application was for a Development Permit for Building Work only, lodged on 7 December 2013, when the Gold Coast Planning Scheme 2003 was operational.
6. Under Section 4.5 of Part 5 Division 1 Chapter 2 of that scheme, Building Work not associated with a Material Change of Use does not trigger assessment, as follows:

**4.5 Building Work and the Planning Scheme**

*Building Work, when referred to in a Table of Development, means Building Work associated with a Material Change of Use. Both the Material Change of Use and Building Work components are subject to assessment under this Planning Scheme. It does not refer to Building Work not associated with a Material Change of Use, such Building Work is only subject to assessment and compliance with the Building Act 1975.*

7. Section 10 of the same division appears to apply a specific level of assessment for the Building Work exempted by Section 4.5, as follows:

**10.0 Relationship with the Building Act 1975**

*For self-assessable building work, where the Planning Scheme provisions are alternative to the Queensland Development Code siting provisions, the Planning Scheme provisions shall apply. A performance solution to any of the siting provisions is to follow the process identified in the Building Act 1975.*

8. The question arises as to whether the work is self-assessable development. Under the SPR (Part 3 Division 1 Section 9(1)(b) and Schedule 3 Part 2 Table 1) Building Work is declared to be self-assessable development for the purposes of assessing it against the BA if the BA declares it to be so.
9. Section 21(2) of the BA declares Building Work to be self-assessable where prescribed by regulation and, where it is subject to alternative provisions under s33 of the BA (i.e. where planning scheme provisions override QDC provisions), it complies with those provisions. The BR, Part 2 and Schedule 1 prescribes the following to be self-assessable:

*(1) Building work for a fence is prescribed if the fence—*

*(a) is no higher than 2m above the fence's natural ground surface*

10. Since the wall does not conform to qualifications prescribed in either the BR or the alternative provisions, the work cannot be categorised as self-assessable.
11. Further, there is nothing in the planning scheme that categorises the work as self assessable. Indeed, s4.5 quoted above specifically excludes such work from assessment against the scheme.
12. In these circumstances, the alternative provisions which purport to apply to the Building Work in question, do not apply. Hence, the QDC MP1.2 siting provisions continue to apply, as follows:
  - Acceptable Solution A2 prescribes minimum side and rear boundary setbacks of 1.5m each.
13. The constructed side setback, at 1.1m, seeks to satisfy Performance Criteria P2. The rear setback exceeds the minimum of 1.5m, hence does not need assessment against the Performance Criterion.

## **Reasons for the Decision**

1. The subject Building Work is not compliant with the criteria for self-assessable development under the BA and the SPA, nor is it compliant with all Acceptable

Solutions of QDC MP1.2. For the purposes of the Gold Coast Planning Scheme 2003, it is not self-assessable development and is therefore exempt from assessment under the Domain provisions and the Codes that purport to apply to this form of development;

2. Consequently, the work is assessable against QDC MP1.2 Performance Criteria P2;
3. Since the wall is approximately 2.6m above 'natural ground height', it is approximately 1.7m above the podium of the adjoining house at 34 Royal Albert Crescent;
4. At 1.7m above the adjoining podium, and on the southern boundary of that adjoining lot, it does not significantly impact that lot's access to daylight or ventilation; nor does it impact access to daylight or ventilation of the subject lot, located as it is, at the rear of the lot; it improves privacy of residents of both lots;
5. It is therefore arguable that the visual screen imposed by the wall prejudices the amenity of the adjoining lot since it would partially obstruct the view down the canal from positions within the dwelling and rear podium. However, the Committee views this impact is limited and balanced against improved privacy for both dwellings.

---

**John Panaretos**  
**Building and Development Committee Chair**  
**Date: 5 April 2016**

## **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 Housing and Public Works  
GPO Box 2457  
Brisbane QLD 4001  
**Telephone (07) 1800 804 833 Facsimile (07) 3237 1248**