



**APPEAL**  
*Integrated Planning Act 1997*

**File No. 3/02/035**

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## **BUILDING AND DEVELOPMENT TRIBUNAL - DECISION**

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**Assessment Manager:** Brisbane City Council

**Site Address:** 147 Rubicon Crescent Kuraby

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### **Nature of Appeal**

The appeal is against the decision of the Brisbane City Council not to grant approval for the siting of a retaining wall constructed at a height of 3000mm on land described as Lot 186 on SP No 113035 and situated at 147 Rubicon Crescent, Kuraby.

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**Date and Place of Hearing:** 10.30 am Friday 16 August 2002  
147 Rubicon Crescent,  
Kuraby.

A telephone discussion was held with the owner of 143 Rubicon Crescent Kuraby on Monday 19 August 2002.

**Tribunal:** L F Blumkie

### **Present:**

Applicants / Owners	
Mr Daniel Oliver	- Brisbane City Council representative
Mr Gregory Schonfelder	- Brisbane City Council
Mr L Blumkie	- Tribunal Referee

### **Decision**

In accordance with Section 4.2.34 (2)(b) of the Integrated Planning Act I **change** the decision of the Brisbane City Council as contained in its letter of 11 July 2002 (File Ref: DRS/BLD/A02 – 1182418) and grant a relaxation of the siting requirements to allow the retaining wall to be greater than 1000mm in height and within the minimum side boundary clearance of 1500mm and remain as constructed, subject to the following wall alterations and conditions: -

- (a) The existing retaining wall closest to the front of the allotment from the front line of the dwelling to a point (Point A) in line with the rear corner of the dwelling remains as constructed.
- (b) The remaining retaining wall is lowered in height by approximately 1000mm from a point (Point A) on the boundary of 143 Rubicon Crescent Kuraby in line with the rear corner of the dwelling and measured at 90 degrees to the boundary and a point (Point B) in line with the side wall of the existing dwelling and located on the existing rock retaining wall approximately 4000mm from the rear of the existing dwelling.
- (c) Adequate precautions are taken to avoid the discharge of rainwater and seepage onto the adjoining allotment; and
- (d) A 1200 high open safety fence (pool fencing type design) is located on top of the existing retaining wall from a point in line with the front wall of the existing house, for condition (a) and on top of the repositioned wall for condition (b) and joining the two points described in that condition.
- (e) The type and extent of safety fence may be changed by agreement with the owner of 143 Rubicon Crescent Kuraby.
- (f) The modifications to the retaining wall and the erection of the safety fence are to be completed within four months of the date of this decision.

The above conditions are to be in accordance with the attached plan.

## **Background**

### *A Existing development.*

The development is a new residence, which at the date of the hearing was close to lock-up stage. Private certifiers approved the residence and the approved site plan indicated 1000mm high retaining walls along the side and rear of the residence. The residence is two storeys and is positioned on a level platform, which I am advised has piers through the fill down to the natural ground.

The allotment has a 'development envelope' which has been established under the Planning Scheme. A relaxation was granted to the 'development envelope' for a reduction in the boundary clearance of 2000mm to 1800mm for the front corner of the residence.

Due to the slope of the land it is necessary to retain the fill to the platform, which starts at ground level to the front of the residence and is approximately 2000mm at the rear corner of the residence.

As the residence is the minimum distance from the side boundary it is necessary to retain the fill to the platform by some means. The location and height of retaining walls were shown on the approved site plan as being 1000mm. However, they were not part of the dwelling approval and were noted on the approved plan as the responsibility of the owner.

The owner obtained advice from the "general enquiries" section of the Brisbane City Council regarding the retaining walls, and appears to have been misinformed regarding the necessary approvals and relaxations required for retaining walls above 1000mm in height.

Based on this verbal advice the owner engaged contractors to construct boulder retaining walls and obtained an engineers certificate on completion of same. The owners therefore, believed they had complied with the requirements of the Brisbane City Council.

On 20 June 2002 the Brisbane City Council advised the owners that the retaining walls did not comply with certain aspects of the Brisbane City Council Town Planning Scheme, Standard Building Regulation and the Building Act 1975.

Application was then made to the Brisbane City Council for a relaxation of the siting requirements for the completed retaining walls. Council refused the request as outlined in correspondence dated 11 July 2002.

#### *B Adjoining development*

The neighbouring property, 143 Rubicon Crescent is developed with a new residence. The owners are currently preparing to concrete under the residence and commence landscaping and concrete paths etc along the subject boundary.

#### *C General Topography*

Both 143 and the subject property have substantial fall from the street to the rear of the property.

### **Material Considered**

In coming to a decision, consideration was given to the following material: -

- (1) Application to Brisbane City Council for relaxation of boundary clearance;
- (2) Brisbane City Council correspondence dated 20 June 2002 stating non compliance and 11 July 2002 refusing the relaxation request;
- (3) Brisbane City Council internal Memorandum dated 10 July 2002 regarding the application of the Planning Scheme to the retaining walls;
- (4) Approved building site plan;
- (5) Photographs of the subject retaining walls and adjoining property;
- (6) Written submission from neighbours dated 10 and 30 July 2002;
- (7) Verbal submissions from Applicant and Council representative;
- (8) The Building Act 1975;
- (9) The Standard Building Regulation 1993;
- (10) The Integrated Planning Act 1997;
- (11) The Building Code of Australia;
- (12) Phone call submissions from the owner of 143 Rubicon Crescent Kuraby on Monday 19 July 2002.

### **Findings of Fact**

The Brisbane City Council in their correspondence dated 20 June 2002 stated that the retaining walls did not comply with the Brisbane City Council Town Planning Scheme.

The Council representative advised at the hearing, (also confirmed by an internal memorandum of Council) that the retaining walls were no longer a consideration under the planning scheme.

Building and Development Tribunals are established under the Integrated Planning Act but have no jurisdiction on planning matters. The Council representative confirmed the matter to be decided under this appeal was now limited to matters dealt with under the building legislation.

The siting requirements for Class 1 and 10a buildings are contained in Part 3 of the Standard Building Regulation.

Part 3 Siting requirements, in particular Division 2 Boundary Clearances establishes, amongst other things, minimum boundary clearances for class 1 buildings and associated retaining walls.

Under Section 42, retaining walls up to a 1000mm in height are permitted within the minimum boundary clearance of 1.5 metres.

The local government has the power to vary these requirements under both Sections 45 and 48 of the Regulation.

## **1. Part 3 Siting requirements of the Standard Building Regulation**

### **A Section 45**

The local government has the right to prescribe alternative siting requirements under Section 45 of the Standard Building Regulation for Class 1 and 10 buildings or structures.

The Brisbane City Council representative advised that Council had not prescribed alternative siting requirements.

### **B Section 48**

Section 48 of the Standard Building Regulation provides power for the local government to vary the requirements of Division 2. In considering the variations to the requirements the local government must consider the criteria as set out in Sections 48(3) and 48(4).

### **Reasons for the Decision**

Consideration of this criteria is as follows: -

#### **1 Section 48(3) from (a) to (f)**

*(a) the levels, depth, shape or conditions of the allotment and adjoining allotments.*

The subject and adjoining allotment both have substantial fall from the street to the rear of each allotment. In order to have house platforms and level areas it is therefore necessary to have retaining walls.

With proper design of the subject property it would, in my opinion, have been possible to have 1000mm high retaining walls and not require relaxations. This is now not possible as the house is substantially completed on a platform and the platform fill requires some form of retainment.

*(b) the nature of any proposed building or structure on the allotment.*

The partially constructed residence is located generally with the minimum boundary clearance on a platform, which is at natural ground level at the front and approximately 2000mm at its highest point at the rear of the residence. The platform fill requires retainment along the side and rear of the dwelling.

The building approval site plan indicated 1000mm high retaining walls. In my opinion 1000mm high walls were never possible due to the particular design of the dwelling, its location on the allotment and floor levels of the proposal.

The retaining walls were noted on the plan as not forming part of the approval.

The existing boulder retaining wall, which is the subject of this appeal, I believe, should be considered in two sections namely:-

- That section along the side boundary adjacent to the residence; and
- The remaining section to the rear of the dwelling.

The section adjacent to the residence starts at approximately natural ground level and rises to approximately 2000mm at the rear of the residence. It is now not practical to comply with the siting requirements of the Standard Building Regulation for retaining walls for this section of the wall i.e. walls no greater than 1000mm in height within 1500mm of the side boundary.

In view of the fact that the adjoining neighbour preferred the standard fence being constructed along the boundary (the standard fence in the neighbourhood being a 1800mm solid timber fence with no gaps to palings) then with this type of fence the view of the retaining wall would be almost blocked by the fence. Such a fence would also block sunlight, breeze and view.

Hence, after taking into account the circumstances of this development, in my opinion this front section of the wall warrants a relaxation and in my opinion is satisfactory in its current form.

The remaining section is different. In my opinion, it could be altered to comply with the siting requirements. However, again in view of the preferred fence on the boundary (1800mm solid timber) it would have no less an effect than the standard fence if it were to be permitted to remain at approximately 2000mm at its highest point above the natural ground.

The majority of the wall would then be less than 2000mm as the adjoining owners are both excavating and filling against the existing boulder wall to obtain the desired levels for their development.

This will require a section of the wall to be reduced in height by approximately 1000mm.

*(c) the nature of any existing or proposed building or structures on adjoining allotments.*

The adjoining allotment has an existing residence. As mentioned above the owner is concreting under the residence and undertaking landscaping within the side boundary clearance. The Council representative advised the area under the dwelling would be used as entertainment and play area for children.

*(d) whether the allotment is a corner allotment*

It is **not** a corner allotment.

*(e) whether the allotment has two road frontages*

The allotment does **not** have two road frontages.

*(f) any other matter it considers relevant.*

The height of the retaining wall above 1000mm is a safety issue and should have a safety fence erected on the top of the wall.

Stormwater run-off and seepage is also an issue and both should not have a detrimental effect on the neighbour.

### **3 Section 48(4) from (a) to (g).**

In considering these criteria it is important to note that the legislation requires that any relaxation should not **unduly** affect the following criteria.

*(a) obstruct the natural light or ventilation of an adjoining allotment.*

Taking into account the use and location of the adjoining development, the existing retaining wall, in my opinion, will unduly obstruct natural light and ventilation to the adjoining allotment. It would increase shade on the adjoining allotment for a small period of the day, however this would be quickly overtaken by the shade from the complying two-storey section of the residence. Ventilation would also be reduced.

However, after considering the effect of a 1800mm solid timber fence on the boundary, in my opinion a 2000mm retaining wall above the natural ground would not unduly affect the adjoining development.

*(b) interfere with the privacy of an adjoining allotment.*

The existing wall will not unduly interfere with the privacy of the adjoining allotment. If the walls were to be located in accordance with the Standard Building Regulation it would still be possible to stand and look onto the adjoining allotment. It is currently possible to stand on the veranda and look onto the adjoining allotment.

Similarly, it is possible to stand on the veranda of the adjoining residence and look onto the subject allotment.

A relaxation to allow a retaining wall height at 2000mm will, in my opinion, not unduly interfere with the privacy of the adjoining allotment.

*(c) restrict the areas of the allotment suitable for landscaping.*

The existing wall would not unduly restrict the areas of the allotment suitable for landscaping.

*(d) obstruct the outlook from adjoining allotments.*

The existing retaining wall at 3000mm above the natural ground will unduly obstruct the outlook from the lower level of the adjoining allotment.

However if the wall were to be reduced to 2000mm above the natural ground at its highest point, it would, in my opinion, have no greater effect than a solid timber fence.

*(e) overcrowd the allotment.*

In my opinion, the proposed relaxation with terracing will not unduly overcrowd the allotment.

*(f) restrict off-street parking for the allotment.*

The existing retaining wall does **not** restrict off-street parking.

*(g) obstruct access for normal building maintenance.*

The existing retaining wall would not obstruct access for normal building maintenance.

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Taking into account the particular circumstances of the development and the submissions from both the applicant and neighbour and all the matters referred to under Section 48 of the Standard Building Regulation, I am of the opinion it would be reasonable to grant a relaxation of the siting requirements to allow the retaining wall within the minimum side boundary clearance of 1500mm and remain as constructed, subject to the following wall alterations and conditions: -

- (a) The existing retaining wall closest to the front of the allotment from the front line of the dwelling to a point (Point A) in line with the rear corner of the dwelling remains as constructed.
- (b) The remaining retaining wall is lowered in height by approximately 1000mm from a point (Point A) on the boundary of 143 Rubicon Crescent Kuraby in line with the rear corner of the dwelling and measured at 90 degrees to the boundary and a point (Point B) in line with the side wall of the existing dwelling and located on the existing rock retaining wall approximately 4000mm from the rear of the existing dwelling.

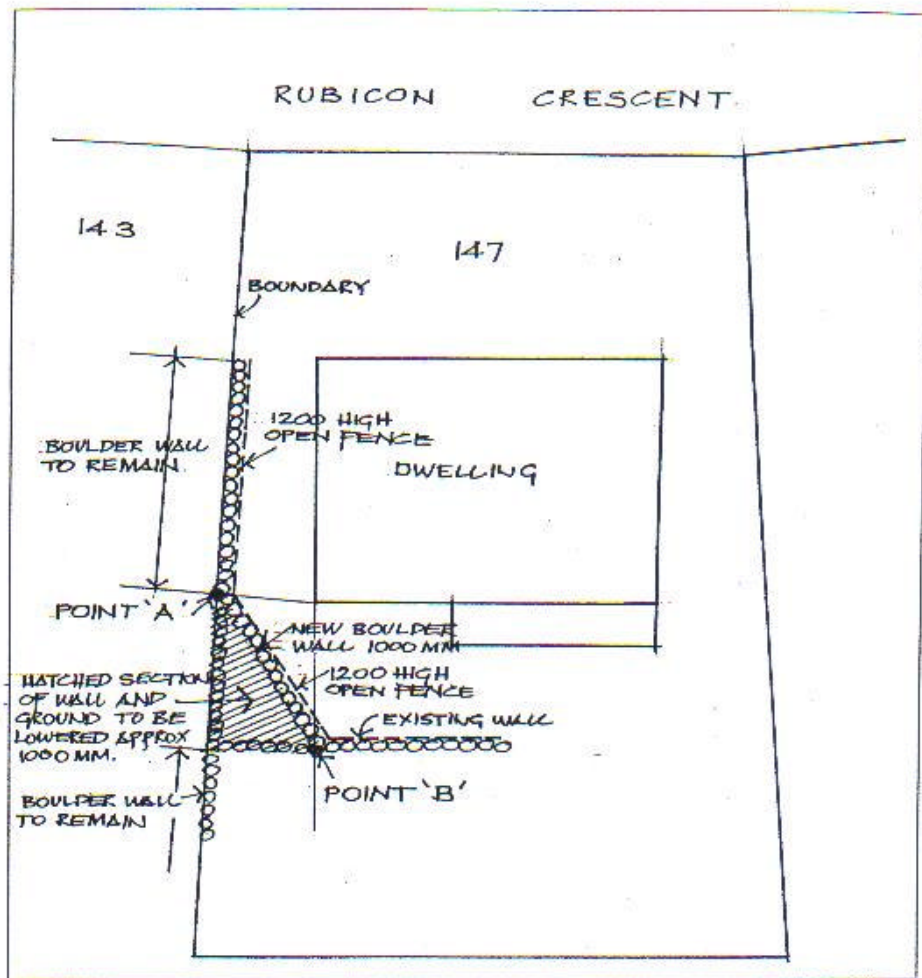
- (c) Adequate precautions are taken to avoid the discharge of rainwater and seepage onto the adjoining allotment; and
- (d) A 1200 high open safety fence (pool fencing type design) is located on top of the existing retaining wall from a point in line with the front wall of the existing house, for condition (a) and on top of the repositioned wall for condition (b) and joining the two points described in that condition.
- (e) The type and extent of safety fence may be changed by agreement with the owner of 143 Rubicon Crescent Kuraby.
- (f) The modifications to the retaining wall and the erection of the safety fence are to be completed within four months of the date of this decision.

The above conditions are to be in accordance with the attached plan.

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**Leo F Blumkie**  
**Building and Development**  
**Tribunal Referee**  
**Date: 22 August 2002**





□ SITE PLAN NOT TO SCALE.

APPEAL N<sup>o</sup> 3-02-035  
 KERRY M CHERAS vs BRISBANE CITY COUNCIL

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## **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 Local Government and Planning  
PO Box 31  
BRISBANE ALBERT STREET QLD 4002  
**Telephone (07) 3237 0403: Facsimile (07) 32371248**