



Building and Development Dispute Resolution Committees—Decision

Sustainable Planning Act 2009

Appeal Number:	09-14
Applicant:	Mr Andrew Parker and Mrs Suzanne Parker
Assessment Manager:	Professional Certification Group Pty Ltd
Concurrence Agency: (if applicable)	Brisbane City Council (Council)
Site Address:	15 Ivy Street, Indooroopilly and described as Lot 28 on SP 139894 – the subject site

Appeal

Rehearing of an appeal under section 527 of the *Sustainable Planning Act 2009* (SPA) against the refusal of an Application for building works for a retaining wall and fence made at the direction of Brisbane City Council as Concurrence Agency for design and siting under the *Queensland Development Code*, the appeal having been remitted pursuant to section 480 of SPA by order of the Planning and Environment Court in Appeal No 4537 of 2012 made 24 March 2014.

Date and time of hearing:	27 June 2014 at 10.00am
Place of hearing:	Meeting Room Building Codes Queensland Level 16, 41 George St Brisbane 4001
Committee:	Danyelle Kelson – Chair Geoffrey Mitchell - Member
Present:	Andrew Parker – Applicant Adrian Low – Strathpine Design & Drafting Matthew Wighton, Senior Built Environment Officer, Brisbane City Council John Grimsey, Paratechnical Officer, Built Environment & Land Use, Brisbane City Council

Decision:

The Building and Development Dispute Resolution Committee (Committee), in accordance with section 564 of the SPA, **sets aside** the decision and approves the Application subject to the following conditions:.

The parties must notify the Committee **within 7 days** of being given written notice of this decision if they have any objections or representations about the conditions of this approval, otherwise this decision is deemed to have been given to the parties as the expiration of that 7 day period for the purposes of section 479 of the SPA.

CONDITIONS

1. The proposed development must be carried out generally in accordance with the following plans:
 - Strathpine Design & Drafting Centre Drawing DO3936/10 "Proposed Fence and Retaining Wall", Sheet 1
 - Crichton Engineering Drawing 751-12271-1 Sheets 1-3
2. The following certificates are to be supplied to the Private Certifier within 5 working days of the inspection:
 - (a) Footing Stage 1 Engineer – Retaining Wall Core Fill Inspection
 - (b) Footing Stage 2 Engineer – Retaining Wall Footing Inspection
3. The building work is approved for the *Building Act 1975* and the Building Code of Australia (BCA) requirements only.
4. Services to be located prior to commencement of work and where applicable reinstated. Builder to ensure any Council services are not damaged during construction.
5. Drainage is to be installed to retaining walls in accordance with the BCA and Engineers requirements. This drainage is to be discharged to the Legal Point of Discharge on the site.
6. Any cutting or filling of the site or construction of retaining walls or other structure on the site, shall not jeopardise any existing overland flow drainage system or cause ponding or nuisance stormwater to neighbouring properties.
7. Mandatory Condition as per *Standard Building Regulation 1993* Section 32: The Applicant must ensure that one legible set of the current approved drawings for the development is available for inspection on the building site while the building work is in progress.
8. Compliance with the conditions of the Brisbane City Council's Build Over/Near Sewer Approval, File No: A002871989
9. Compliance with Brisbane City Council Approval for Preliminary Approval to Carry out Building Work – House on a Small Lot and Development Permit for Material Change of Use – House on a Small Lot, File No A002682461 so far as is relevant to the design and siting of the works

Background

This was a re-hearing of an appeal brought under section 527 of the SPA. The appeal was originally heard on 16 July 2012 and the decision of the Committee was published on 22 October 2012 confirming the decision of the Professional Certification Group to refuse a Development Application for a combined retaining wall and fence. An appeal to the Planning and Environment Court against the Committee's decision was commenced on 19 November 2012 under section 479 of the SPA. The Planning and Environment Court delivered its judgement in the appeal on 24 March 2014, allowing the appeal and remitting the matter to be reconsidered according to law by a differently constituted Committee.

The subject site is located in an established residential street containing a mixture of traditional and modern detached housing. The houses on the southern (lower) side of Ivy Street, which includes the subject site, are bounded by the Brisbane River. It might be observed that on this lower side of the street more contemporary homes on narrow allotments tend to predominate.

The subject site is situated on a redeveloped narrow allotment. In or about 2007 an existing pre-1946 dwelling apparently constructed over the subject site and an adjacent lot was demolished. The subject

site was classified as a “small lot” under the Brisbane City Plan 2000 as its average width was less than 15 metres. An Application pursuant to Brisbane City Plan 2000 was made to develop the subject lot with a single dwelling and on 13 May 2010, Council issued a development approval for a Preliminary Approval under s3.1.5 – House on Small Lot and Development Permit for Material Change of Use – House on Small Lot to facilitate that development to occur (the **Planning Approval**).

Subsequently on 17 January 2011, a development approval for building works was issued by Collins Certification Group for the construction of a house and pool upon the land (the **Building Approval**). By accounts, construction of the house commenced shortly thereafter and was apparently completed in early 2012.

The construction works included a retaining wall and fence structure along the subject site’s western boundary. Although a retaining structure is indicated on the approved plans for both the Planning and Building Approvals, neither of these approvals actually approved the structure. The retaining structure had been completed before the landowners became aware that a separate approval was required for it, it seems as a result of a series of complaints from the owners of the adjoining property at 19 Ivy Street Indooroopilly, who took possession of the property after the structure had been constructed.

An Application for a Concurrence Agency response for the design and siting variation for the retaining wall and fence against the Queensland Development Code was made to the Council on 15 February 2012, ahead of a Development Application for building work.

The Council made its assessment against the Queensland Development Code Part MP1.1 Design and Siting Standard for Single Detached Housing – On Lots under 450 m² (QDC MP1.1). Although it is noted that this was the incorrect part of the QDC to be applied in the circumstances, (the correct part being Part MP1.2 Design and Siting Standard for Single Detached Housing – On Lots over 450m²) for material purposes, the code provisions against which the Application was to be assessed are materially similar. As part of its assessment process, the Council received and considered a submission from the owners of the property adjoining the subject site at 19 Ivy Street Indooroopilly.

The Council’s response as Concurrence Agency was issued on 30 March 2012. The Council advised that the retaining wall and fence failed to comply with QDC MP1.1, Performance Criteria P1, P2, P3 and P6 and directed the Assessment Manager to include the advice on their Decision Notice.

A notice of appeal was originally received by the Committees’ Registry on 2 May 2012 against the Council’s advice response. Subsequently on 10 May 2012 the Assessment Manager issued a Decision Notice refusing the development permit for building works based on the Council’s response and the appeal before the Committee proceeded as an appeal against the Assessment Manager’s decision to refuse the Application.

The Committee originally constituted to hear the appeal (Appeal 18-12) confirmed the decision of the Assessment Manager. This decision was appealed to the Planning & Environment Court, which remitted the matter back to the Committee on 24 March 2014 to be determined according to law, having found that the Appellants had not been afforded procedural fairness and a reasonable opportunity to be heard.

A new Committee was established to hear the matter on 9 April 2014. The hearing was initially put on hold at the request of the parties to allow without prejudice discussions to proceed.

On or about 16 December 2013, Council issued a Development Approval for the neighbouring property at 19 Ivy Street permitting demolition of the pre-1946 house. This was followed on or about 11 April 2014, by a Preliminary Approval to Carry Out Building Work for a House in a DCP (Demolition Control Precinct) and House over 8.5m and a Development Permit for Material Change of Use for a House in a DCP and House over 8.5m.

When the matter came to hearing before the Committee on 27 June 2014, the neighbours' approvals had been acted upon, the existing house on the neighbouring block had been demolished and earthworks for the construction of a new residence on the land had been commenced.

Material Considered

The material considered in arriving at this decision comprises:

The legislative instruments:

1. The *Building Act 1975* (BA)
2. The *Sustainable Planning Act 2009* (SPA)
3. The Sustainable Planning Regulation 2009 (SPR)
4. The Building Regulation 2006 (BR)
5. Volume One and Two of the National Construction Code Series - The Building Code of Australia (BCA)
6. Brisbane City Plan 2000 (City Plan)
7. Queensland Development Code (QDC) Part MP1.1 Design and Siting Standard for Single Detached Housing – On Lots under 450m²
8. Queensland Development Code (QDC) Part MP1.2 Design and Siting Standard for Single Detached Housing – On Lots 450m² and Over

The refusals:

9. Referral Agency Response issued by the Brisbane City Council (as concurrence agency) dated 30 March 2012
10. Development Application Decision Notice dated 10 May 2012 issued by the Professional Certification Group

The approvals:

11. Brisbane City Council's Approval Package A002682461 dated 15 May 2010 for carrying out building work, preliminary approval under s3.1.5 – House on Small Lot and Material Change of Use Development Permit – House on Small Lot including architectural drawings No. 21129 Sheets A01-A05 prepared by Ferrier Baudet Architects dated July 2009, stamped approved by Brisbane City Council 13 May 2010
12. Collins Certification Group Decision Notice for New Dwelling and Pool dated 17 January 2011 including Structural Plans Nos 751--12227 Sheets 1-3 by Crichton Engineering dated 20 July 2010 and architectural plans Nos DO3936/10 Sheet 1-7 of 7 Drawings prepared by Strathpine Design and Drafting dated 9 September 2010

The appeal file:

13. Original 'Form 10 – Appeal Notice', grounds for appeal and correspondence accompanying the appeal lodged with the Committees Registrar on 2 May 2012;
14. Contents of the appeal file including photographs, emails, additional material supplied by the parties;

15. Reasons for Decision, Building and Development Dispute Resolution Committee in Appeal 18-12 dated 22 October 2012;
16. Decision of Judge Rackemann of the Planning & Environment Court in *Andrew Park and Anor v Professional Certification Group Pty Ltd and Anor* [2014] QPEC 9 made 24 March 2014;
17. The oral submissions made at the hearing by the Applicant and his representative and the Council
18. Additional written submissions received from the Applicant at the hearing on 27 June 2014.

Other material:

19. Google Street View and Nearmaps aerial views
20. Brisbane City Council's PD Online
21. Notice of Appeal and Appellants' Outline of Argument from Planning & Environment Appeal File No 4537/2012
22. Brisbane City Council's Approval Package A00374864 dated 16 December 2013 2014 for a Preliminary Approval to Carry Out Building Work Demolition of a pre-1946 House in a DCP (Demolition Control Precinct) and House over 8.5m and a Development Permit for Material Change of Use for a House in a DCP and House over 8.5m including plan and documents referred to in the approval
23. Brisbane City Council's Approval Package A003828116 dated 11 April 2014 for a Preliminary Approval to Carry Out Building Work for a House in a DCP (Demolition Control Precinct) and House over 8.5m and a Development Permit for Material Change of Use for a House in a DCP and House over 8.5m including plan and documents referred to in the approval

Findings of Fact

The Committee makes the following findings of fact:

1. At all material times the relevant plans and drawings contemplated the construction of a block retaining wall along the boundary of the subject site with 19 Ivy Street Indooroopilly and that in parts, the wall was to exceed 2 metres in height above the natural ground level indicated on the plans.
2. At the heights proposed, the retaining structure required separate assessment and building approval. Notwithstanding this, the structure was completed without an approval. Approval was sought in 2012 and is the subject of this appeal.
3. At least some portion of the retaining wall performs a structural retaining function for the footings of the dwelling on the subject site. In other places it supports fencing for privacy and pool safety reasons.
4. The retaining wall and fence structure as constructed are structurally adequate and fit for the purpose for which they have been designed, based on statements provided by the design engineer Peter Mackay of Crichton Engineering Pty Ltd.
5. In places the structure is in excess of 3m above the natural ground level, however having regard to:
 - a. the existing and future streetscape;
 - b. development on the subject site; and

- c. proposed future development of the adjoining property

the development meets the performance criteria of MP1.2 Design and Siting Standard for Single Detached Housing on Lots 450m² and over.

Reasons for the Decision

The subject site is located in an established residential area comprising a mix of modern and more traditional single detached housing. The subject site is located on the southern (lower) side of Ivy Street, where the allotments are bounded by the Brisbane River. The houses along this stretch of Ivy Street are predominantly of contemporary construction, pre-1946 dwellings previously characteristic of the area having been demolished and the allotments redeveloped. In many cases, the redevelopment has resulted in development upon narrow allotments. The subject site itself represents such a redevelopment scenario, with the original pre-1946 house being demolished in about 2007 to make way for two narrow allotments. The subject site has been developed with a large contemporary residence and pool pursuant to the Planning and Building Approvals.

On the boundary the subject site shares with its eastern neighbour, 19 Ivy Street, a retaining structure comprising a block retaining wall and fence has been constructed. The retaining structure is shown on the plans appended to both the Planning and Building approvals, but it is not approved by either of those approvals.

It is clear from the plans that in some parts, the proposed retaining structure was to exceed 2 metres above natural ground level. Both the Planning and Building Approvals are also clear that retaining walls exceeding 1 metre in height above natural ground level would require a separate Development Permit for Building Work. Notwithstanding the terms of the Planning and Building Approvals, no approval was sought before construction of the retaining wall and fence structure. The Application the subject of this appeal (the **application under appeal**) was made to regularise the situation by obtaining approval for the existing structure.

The Application under appeal was refused on 10 May 2012 by the Professional Certification Group at the direction of Council, which in its Concurrence Agency response dated 30 March 2012 found:

“ ... that the proposed design and siting variation does not comply with the QDC performance criteria for the following reasons;

P1

- (a) The subject site and neighbouring site of 19 Ivy Street has double access and outlook i.e. Ivy Street and Brisbane River. A section of the solid block fence/wall and solid built wall will add to the riverscape and streetscape. Both sites have river access.*
- (c) The subject site and neighbouring site at number 19 Ivy Street has double access and outlook, Ivy Street and Brisbane River. The solid block fence/wall will restrict the owners of 19 Ivy St view and outlook to the riverscape and streetscape.*

P2

- (c) The solid block retaining wall and fence over 3 metres high will take away the pleasant amenity and outlook from the property at 19 Ivy Street.”*

In reaching its decision the Council stated that it had assessed the Application against the QDC MP1.1, Performance Criteria P1, P2, P3 and P6. This assessment was in error, as the relevant part of the QDC is MP1.2, which relates to sites of 450m² and over. The subject site is 814m². Little turns on the issue however, as the relevant performance criteria are in form the same.

It may be presumed that in expressing the response as it did, the Council considered the Application to have met performance criteria P3 and P6 (for the sake of completeness, P3 relates to the provision of adequate open space for recreation, service facilities and landscaping and is concerned with the maximum area covered by all buildings and structures with impervious roofs on a site and P6 relates to locating a structure so that normal maintenance is facilitated). For that reason, the Committee focused only on P1 and P2 of MP1.2 and whether the Application can be said to be compliant with those provisions.

It is noted that the Decision Notice of the Assessment Manager dated 10 May 2012 records conditions that would, but for the Council finding the Application did not comply with the QDC, have applied to an approval of the Application. This suggests that the Assessment Manager had assessed the Application and but for the direction, found it compliant with the BCA, SBR and BA.

The Committee is also satisfied that the structure, as constructed, is structurally adequate and fit for the purposes for which it was designed, based on statements provided by the design engineer, Peter Mackay of Crichton Engineering Pty Ltd to the original Committee on 21 and 23 August 2012.

At the time the Application under appeal was made and at the date the matter was first considered by the Committee as originally constituted, the adjoining property at 19 Ivy Street was developed with a large pre-1946 dwelling of fairly traditional/typical "Queenslander" construction set well back from Ivy Street. The Council's original response and the original decision of the Committee were both concerned with the impact the retaining structure had on the amenity and outlook of 19 Ivy Street.

It is material to the decision of this Committee to note that in December 2013 the Council approved demolition of the pre-1946 dwelling and in April 2014 approved the construction of a new house in a Demolition Control Precinct. Together, these approvals change both the current context and future streetscape against which assessment of the Application under appeal may be made.

At the date of hearing of this appeal, the pre-1946 house had been demolished and works to construct the new residence were underway. The site had been cleared and site works had apparently commenced.

The plans approved for the development on the neighbouring property show that along the common boundary with the subject site at ground level, there will be a driveway and garage, a laundry and drying area, a small powder room and a TV room, which on the elevations supplied has no openings to the western boundary with the subject site. The upper floor has limited openings to the western boundary and is set above the level of the retaining structure.

The purpose of MP1.2 is *"to provide good residential design that promotes the efficient use of a lot, an acceptable amenity to residents and to facilitate off street parking."* The main thrust of the Code as it relates to this context is the amenity of the residents of the adjoining lot.

P1 provides,

"The location of a building or structure facilitates an acceptable streetscape appropriate for –

- (a) the bulk of the building or structure; and*
- (b) the road boundary setbacks of neighbouring buildings or structures; and*
- (c) the outlook and views of neighbouring residents; and*
- (d) nuisance and safety to the public."*

The structure is certainly lengthy and in places up to 3 metres above natural ground level. Although there is extensive historic fill, the land does nevertheless naturally fall from the street boundary to the

River. From the street, the structure is much in keeping with other similar retaining structures and entry treatments.

Currently, neither of the neighbouring properties is developed with buildings or structures. The proposed residence on the neighbouring property will ultimately be set back some distance from the road boundary, however, the frontage of the proposed residence is intended to be treated with its own retaining structures (assumed for the construction of an elevated tennis court) within that set back. The enjoyment of such a facility is not likely to be affected by the presence of the wall and will itself provide visual amelioration of the structure from the perspective of the streetscape and from the residence itself.

The outlook and views of the residents of 19 Ivy Street will be dominated at the street frontage by their own recreational and other landscaping treatments. At the river frontage, the height of the proposed building above the finished height of the constructed wall will mean that views and outlook will not be affected.

P2 provides,

“Buildings and structures –

- (a) provide adequate daylight and ventilation to habitable rooms; and*
- (b) allow adequate light and ventilation to habitable rooms or buildings on adjoining lots;*
- (c) do not adversely impact on the amenity or privacy of residents on adjoining lots.*

The proposed new residence to be constructed at 19 Ivy Street is designed such that no habitable rooms (as defined in the QDC and BCA) are located adjacent to the wall or have openings that would be affected by shadowing or impeded ventilation. The upper floor and ground floor balcony to the indicated TV Room are above the height of the existing structure and hence views from those aspects are unlikely to be adversely affected by the structure.

The building is set above the height of the finished structure so there will be no impact on the privacy of the adjoining owners by overlooking other than would be the case occasioned by the natural fall in the land between the two properties. The structure is therefore not considered to have an adverse impact on the privacy of the residents of the adjoining property.

The area of the adjoining allotment immediately adjacent to the structure is proposed to be utilised for almost its entire length for a variety of necessary, but utilitarian uses such as the driveway, refuse bin storage and clothes drying. None of these uses is adversely impacted by the structure.

The Committee considers that having regard to the circumstances now applicable, including the

- a. existing and future streetscape;
- b. development on the subject site; and
- c. proposed future development of the adjoining property (evidenced by the recent approvals permitting its redevelopment),

the retaining wall and fence structure the subject of this appeal meet the performance criteria P1 and P2 of QDC MP1.2. It is the view of the Committee that the Application for building works for a retaining wall and fence at the subject site to regularise the already existing structure should be approved, subject to the conditions noted in the Decision Notice of Assessment Manager dated 10 May 2012.

It is noted that in oral submissions before the Committee, the Council representatives were of the view that the circumstances had changed in the years since the initial decision in this matter was made and that it would likely now consider the structure to be compliant with the QDC.

Danyelle Kelson, Chairperson
Building and Development Committee Chair
Date: 16 September 2014

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
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