



**APPEAL**  
*Integrated Planning Act 1997*

**File No. 3/02/043**

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

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**Assessment Manager:** Redland Shire Council  
**Site Address:** 16 Thornlands Road, Thornlands  
**Applicant:** Ken Wilcox of Queensland Building Consulting Group

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### **Nature of Appeal**

Appeal under Section 21 of the Standard Building Regulation 1993 against the decision of Redland Shire Council to refuse an application for a relaxation of the siting provisions required to enable the construction of a retaining wall and fence, exceeding a total height of 2.0 metres, within the rear boundary setback of a property described as Lot 126 SP 144851, situated at 16 Thornlands Road, Thornlands.

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**Date and Place of Hearing:** 8.30 am on 19 November 2002  
at 16 Thornlands Road, Thornlands.  
By request, a meeting was held at 8.15am on 19 November 2002  
with an affected rear neighbour in Bush Cherry Place.

**Tribunal:** Geoff Cornish

**Present:** Ken Wilcox – Queensland Building Consulting Group  
Paul de Kruyf – Queensland Building Consulting Group  
Mike Ryan – Redland Shire Council  
Ken Rauber – Redland Shire Council  
Lawrence Camilleri – Redland Shire Council  
John McKennarney – Redland Shire Council

### **Decision**

In accordance with Section 4.2.34 [2] of the Integrated Planning Act 1997, I hereby set aside the decision appealed against and grant a siting concession to enable a retaining wall and fence to be

erected at the rear boundary of the property described as Lot 126 SP 144851, situated at 16 Thornlands Road, Thornlands, subject to the following conditions:-

1. The maximum height of the combined retaining wall and fence shall not exceed 2.7 metres above natural ground level.
2. The maximum height of the retaining wall shall not exceed 1.6 metres above natural ground level.
3. The minimum height of the fence above the retaining wall shall be 1.0 metre.

### **Background**

The matter concerns an application for a concession to enable the validation of the erection of an existing retaining wall and fence, exceeding a total height of 2.0 metres, and constructed on the rear boundary of this property. The matter came to Council's attention as the result of a complaint. Erection of the retaining wall at a height of 1.8 metres was undertaken without a siting approval and in contravention of the development approval given for building work on the site. That approval expressly limited the height of any retaining wall on the boundary to 1.0 metre without a further development approval. The addition of a 1.5 metre high fence to the top of the wall was made without a siting approval or development approval. Council subsequently investigated the matter and drew it to the attention of the private certifier concerned who, in turn, made the application to Council for the necessary concession. The owner, a builder, should have been aware that these approvals were necessary in order to undertake the work lawfully.

### **Material Considered**

1. A design report from the applicant's engineer dated 2 June 2002 in relation to the structural adequacy of the wall.
2. Council's letter of 2 October 2002 refusing the application for a siting variation for the wall and fence.
3. Building and Development Tribunals Appeal Notice dated 30 October 2002.
4. Verbal submission by the affected rear neighbour on 19 November 2002 setting out his concerns with the wall and fence.
5. Verbal submission by the applicant on 19 November 2002 setting out why the application should have been granted and the appeal should be allowed.
6. Verbal submissions by the attending officers from Redland Shire Council on 19 November 2002 setting out Council's reasons for refusal.
7. A written submission from Redland Shire Council, dated 12 November 2002, supporting the statements made in item 5 above.
8. Standard Building Regulation 1993.
9. Building Act 1975.
10. Integrated Planning Act 1997.

## Findings of Fact

I made the following findings of fact:

1. The retaining wall was erected in direct contravention of a condition of a development approval issued for building work on the site. The development approval required that a retaining wall in this location not exceed a height of 1.0 metre without an approval.
2. The retaining wall was erected without the approval of a siting variation required by the Standard Building Regulation.
3. The retaining wall was erected without a Development Permit for building work.
4. Both of the above approvals were necessary for the lawful erection of the wall.
5. The breach of the development approval for building work in relation to the wall was not identified by the certifier until notified at final inspection stage due to the fact that the certifier failed to undertake the mandatory footing or slab or frame inspections required by section 65 of the Standard Building Regulation. Instead the certifier chose to have inspections carried out and certified by an engineer, as a competent person, when that person was known not to be inspecting all of the matters to which the mandatory inspections relate.
6. The fence on top of the retaining wall was erected without the approval of a siting variation required by the Standard Building Regulation.
7. The fence on top of the retaining wall was erected without a Development Permit for building work.
8. Both of the above approvals were necessary for the lawful erection of the fence.
9. The matter came to the attention of the Council as the consequence of a complaint lodged by a neighbour.
10. This Tribunal has no jurisdiction to make a determination in relation to the impact upon a neighbour of the aesthetics of the subject wall and fence.
11. The height of the retaining wall was not consistent with the heights of retaining walls on adjacent properties as approved by Council pursuant to specific development applications for a Material Change of Use relating to those sites.
12. The owner and builder of the wall in question had also contravened the development approval for the wall at the rear of the adjoining property to the east by exceeding the approved height. The height of that wall, therefore, could not be considered as setting a lawful precedent for the subject wall.
13. The slope of the land and the desire of the owner to construct a slab-on-ground dwelling on the site require that the site be cut and filled and retaining walls constructed to retain the property.

14. The resultant height difference between the subject property and that to the north requires protection by way of a fence at least equivalent to a balustrade conforming to the Building Code of Australia.
15. The retaining wall, as erected, is capable of modification, due to the nature of its design and construction, to a height consistent with that approved by Council for the adjacent properties.
16. Council is prepared to vary the height approved for the wall on the adjacent property to a maximum of 1.6 metres.
17. The fence is capable of being dismantled, reduced in height and being re-erected on a lowered retaining wall.
18. A combined retaining wall of 1.6 metres in height and a fence 1.1 metres in height will satisfy the requirements for retaining the embankment of the subject property and provide safety for the residents of the property while at the same time meeting the submitted objectives of Council.
19. The additional height of fill placed over Council's sewer line required consideration by Council and approval by Council's Sewerage Engineer. That approval has been given.

### **Reasons for the Decision**

After assessing the facts and the submissions of the parties, I have reached the following conclusions:

1. Approval to subdivide the land did not include a provision for retaining walls to be constructed between the subject property and that to the north as part of the approval.
2. As slab-on-ground is currently the predominant form of construction for dwellings, it is reasonable to conclude that the natural desire of an owner of an allotment in this subdivision would be for the construction of a slab-on-ground dwelling with its attendant need for cutting and filling of the site.
3. Given the natural slope of the land, any cut and filled site would require the provision of a retaining wall in excess of 1.0 metre in height at the rear boundary in order to optimise the useable area of the site for building purposes.
4. A fence of at least 1.0 metre in height could reasonably be required to protect the level difference between the top of a retaining wall and the adjacent benched level of an adjoining allotment in a similar way to the protection of level differences under the Building Code of Australia.
5. The approved height of any retaining wall should be consistent with that agreed by way of negotiated decisions for adjoining properties.
6. The outlook from the property to the north requires to be balanced against the need to protect its privacy from viewing directly from the dwelling on the subject property. This is done through maintaining an overall height of 2.7 metres for the combined wall and fence.

7. The previous matters dictate that an approval is necessary for development consisting of a combined wall and fence 2.7 metres in height. That approval would include a requirement for the granting of a concession in relation to the overall height.

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**G.S.Cornish**  
**Building and Development**  
**Tribunal Referee**  
**Date: 3 December 2002**

## **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**