



Building and Development Dispute Resolution Committees—Decision

Sustainable Planning Act 2009

Appeal Number:	02-13
Applicant:	Ms D Jeays
Assessment Manager:	Sunshine Coast Regional Council (Council)
Concurrence Agency: (if applicable)	Not Applicable
Site Address:	5 Theodore Court Moffat Beach Q 4551 described as Lot 3 RP 135585 – the subject site.

Appeal

Appeal under section 533 of the *Sustainable Planning Act 2009* (SPA) against the decision of Sunshine Coast Regional Council to give an Enforcement Notice under Section 590 of SPA requiring the construction of a new retaining wall to replace an existing structure that Council considered dangerous.

Date of hearing:	10.00am - 07 February 2013
Place of hearing:	The subject site
Committee:	Mr Don Grehan – Chair Mr John Dunn - General Referee
Present	Mr Michael Jeays – Applicant representative Mr Steve Tucker – Council representative Mr Gary Sheffield – Council representative

Decision:

The Building and Development Dispute Resolution Committee (Committee), in accordance with section 564(2)(c) of the SPA, **sets aside** the enforcement notice issued by Council dated 09 January 2013 (Ref No. ENF COM 12/2410) and, in accordance with section 564(1) of the SPA, **makes the following directions** as considered appropriate:

1. Council may re-issue an enforcement notice requiring the owner of the subject site to:
 - (a) Either repair or replace the existing dilapidated retaining wall forming part of the swimming pool safety barrier to a standard that satisfies Performance Criteria P2.1 of the Building Code of Australia 2012; AS 1926.1-2007 and M.P 3.4 of the Queensland Development Code;
 - (b) Prior to commencing the repair or replacement of the retaining wall/pool barrier, undertake an Identification Survey of Lot 3 on RP135585 to establish the location of property boundaries relative to the existing structure;
 - (c) Prior to commencing the repair or replacement of the retaining wall/pool barrier structure obtain a Development Approval for Building Work.

2. In framing the time period for compliance with the requirements of a re-issued Enforcement Notice, Council must give due consideration to the structures function as a swimming pool safety barrier and the subsequent obligations imposed on the owner of the subject site under sections 245XG, 245XM and 245XQ of the *Building Act 1975* (BA), including the possibility of a referral to the Queensland Civil and Administrative Tribunal (QCAT).
3. Subsequent to any re-issued Enforcement Notice and the results of the Identification Survey, the owner of the subject site shall obtain independent legal advice regarding the consequence of any encroachment onto the adjoining allotment prior to deciding the possibility, and or practicality, of repairing the existing structure. Such advice shall be submitted to Council for inclusion on the property records.
4. If, having considered all relevant matters, it is not practical or possible to repair the structure to the required standards or if repair is contrary to the independent legal advice, the entire replacement structure, including footings, shall be wholly located within the prescribe boundaries of the subject site.

Background

A masonry block retaining wall/pool barrier, located on or adjacent to western boundary of the subject site, has, for unidentified causes, fallen into a state of gradual disrepair.

The structure has been the subject of various requisitions from Council over a number of years and given its current condition and the documented progression of its failure, Council seeks the replacement of the structure in the belief that it is dangerous.

The Applicant was dissatisfied with Council's enforcement action given the belief that it is possible to repair the existing structure in lieu of replacement and subsequently appealed the Enforcement Notice to the Committees.

Material Considered

The material considered in arriving at this decision comprises:

- Form 10 – Application for Appeal/Declaration and Applicant's correspondence accompanying the appeal lodged with the Registrar on 17 January 2013.
- Suncoast Regional Council Enforcement Notice, Reference No. ENF COM 12/2410 dated 09 January 2013.
- Verbal submissions from the Applicant's representative given at the hearing.
- Verbal submissions from Council's representative given at the hearing.
- The *Sustainable Planning Act 2009* (SPA).
- The Sustainable Planning Regulation 2009 (SPR)
- The *Building Act 1975* (BA).

Findings of Fact

The Committee makes the following findings of fact:

- A masonry block wall is located on or adjacent to western boundary of the subject site, the wall serves dual functions namely: (a) acting as a retaining structure supporting the swimming pool located it is east and (b) acting as the primary element of the swimming pool barrier which preventing access to the pool from the adjoining property (4 Theodore Crt, Moffat Beach Lot 2 RP 135585).

- The block retaining wall/pool barrier has, for unidentified causes, fallen into a state disrepair and exhibits signs of both longitudinal differential subsidence and lateral displacement. The rate of progression of these modes of failure is an area of contention between the Applicant and Council.
- There is a significant history of neighbourhood dispute and investigation and requisition from Council in relation to the retaining wall/pool barrier.
- Council, on the ninth of January 2013, issued an Enforcement Notice, Ref No. ENF COM 12/2410) stating that:

Council reasonably believes the retaining wall is dangerous because it, with pool fence attached, is structurally unsound and at risk of collapse and requiring the Applicant to:

1. Apply for a building development approval to construct a new retaining wall on the western side boundary alignment and reinstatement of the existing pool fence by 4.00pm on 8 February 2013: and
2. Provide temporary pool fencing around the in ground pool until the retaining wall has been replaced and the pool fence is reinstated back on top of the wall.

- Despite the particulars of Enforcement Notice, Council acknowledges that the integrity of the swimming pool barrier is not currently compromised by the condition of the structure.
- The parties to the appeal agree that the block retaining wall/pool barrier requires repair or replacement as a matter of priority to ensure both structural adequacy and the ongoing compliance of swimming pool barrier.
- The Applicant contends that it is possible and practical to repair the existing block retaining wall/pool barrier in lieu of replacing the structure.
- The Applicant has concerns relating to the availability of access onto the adjoining property to enable either repair or replacement of the existing block retaining wall/pool barrier.
- Council has concerns relating to the location of the existing structure relative to the property boundaries and the legality of repairing a structure which may encroach onto the adjoining property.
- Sections 245X to 246 (inclusive) of the BA clarifies the procedures and processes associated with neighbours' rights and responsibilities for particular dividing fences.
- Section 248 of the BA clarifies the circumstances where Council may give an Enforcement Notice and the procedural requirements associated with the giving of the Enforcement Notice.
- Section 249(1) of the BA clarifies the specific requirements of an Enforcement Notice.
- Section 249(2) of the BA clarifies the specific circumstance whereby demolition of a building or structure can be imposed.

Reasons for the Decision

- In framing Enforcement Notice, Ref No. ENF COM 12/2410 Council have not fully considered the structures function as a swimming pool safety barrier and the subsequent obligations imposed on the owner of the subject site under Sections 245X to 246 of the BA (inclusive) which may predicate repair or replacement.

- While the Committee is satisfied that there is no immediate danger associated with the longitudinal differential subsidence and lateral displacement of the block retaining wall/pool barrier, it considers that repair or replacement of the structure is required as a priority to ensure both structural adequacy and the ongoing compliance of the swimming pool barrier.
- In requiring the Applicant to obtain a building development approval to construct a new retaining wall, Council has by default imposed the demolition of the existing structure and to this end, with reference to section 249(2) of the BA, the Committee cannot be satisfied that it is not reasonably possible and practical to repair, rectify or secure the existing retaining wall/pool barrier.
- While acknowledging Council's concerns, issues of encroachment over property boundaries are a civil matter that are beyond the jurisdiction of the Committee.

Donald Grehan

Building and Development Committee Chair

Date: 5 April 2013

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
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