



Building and Development Dispute Resolution Committees—Decision

Sustainable Planning Act 2009

Appeal Number:	26 - 11
Applicant:	[Detail Redacted]
Assessment Manager:	Sunshine Coast Regional Council (Council)
Concurrence Agency: (if applicable)	Not Applicable
Site Address:	[Detail Redacted]

Appeal

Appeal under section s533 of the *Sustainable Planning Act 2009 (SPA)* against the issuing of an Enforcement Notice by the Assessment Manager. The notice relates to an alleged development offence pursuant to section s578 of SPA (carrying out assessable development without a permit). That building work being, the construction of a boundary fence exceeding 2.0m in height.

Date of hearing:	10:00am on 8 July 2011
Place of hearing:	9 Pelican Street Tewantin, being the Tewantin Offices of the Sunshine Coast Regional Council.
Committee:	Debbie Johnson – Chair
Present:	[Detail Redacted] – Applicant Rob Wibrow – Council Representative

Decision:

The Building and Development Dispute Resolution Committee (the Committee), in accordance with section 564 of the SPA **confirms** the decision of the Sunshine Coast Regional Council to issue the enforcement notice as contained in their written notice dated 17 February 2011.

Background

The applicant's property is a suburban residential allotment, located at the end of a cul-de-sac. The site was developed approximately 12 years ago and a single storey, brick veneer home was built by a previous owner around this time. The existing home has neighbouring dwellings either side, to the north and south, but at the rear or eastern side there is a landscaped buffer between the site and another roadway.

The subject site has a cross fall of approximately 4m measured from the rear to the street. Hence the land has been cut and filled to accommodate the existing dwelling which has been constructed on a concrete slab. The yard is fenced along both the side and rear boundaries by timber paling, post and rail construction. The fencing height varies as the site is sloped.

Due to an ongoing and escalating situation between the applicant and one of the neighbouring property owners, Council were called upon to come out to the site and inspect the fencing. Council determined that the fencing was built to a height that exceeded 2m and, on 29 July 2010, issued a Show Cause Notice to the applicant.

The applicant responded to the Show Cause Notice, in writing and in person. A Council representative also attended the site to discuss and review the matter, however, Council subsequently issued an Enforcement Notice, dated 17 February 2011.

The applicant lodged an appeal with the Committee against the Enforcement Notice on 21 March 2011. The appeal was received 23 March 2011.

The Committee Chair inspected the subject site briefly from the street immediately prior to the hearing. Similarly, the Chair undertook a detailed site inspection on 4 August 2011. Whilst on site, the Chair advised the applicant that the *height* of the fence was determined in relation to *natural ground level* rather than *finished ground level*. Further it was discussed that only a licensed land surveyor would be able to determine the *natural ground level*. In the absence of this information, the Chair is only able to make a 'judgement call' on the height of the existing fencing.

The applicant was understandably reluctant to engage a land surveyor as she had already spent considerable amounts previously for land identification survey. Similarly, other professional costs associated with the dispute over the fencing.

Material Considered

The material considered in arriving at this decision comprises:

1. 'Form 10 – Application for Appeal/ Declaration', grounds for appeal and correspondence accompanying the appeal lodged with the Registrar on 23 March 2011.
2. Council's Enforcement Notices, dated 17 February 2011.
3. Written representations by the applicant both at the hearing and following.
4. Photographs of the subject.
5. Oral submissions by the applicant and the council representative at the hearing.
6. Oral submission by the applicant whilst undertaking an onsite inspection, 4 August 2011.
7. The Council approved architectural plans for both the subject site and the neighbouring site to the South.
8. Property details as available through Council's website.
9. The Noosa Plan
10. The *Sustainable Planning Act 2009* (SPA)
11. The *Building Act 1975* (BA)
12. The Building Regulation 2006 (BR)
13. The National Construction Code 2011

Findings of Fact

The Committee makes the following findings of fact:

The existing timber paling fence around the subject site measures more than 2m high in several places when taken from the top of the structure to the *finished ground level* within the subject site. However if the fence height were to be taken from the neighbouring site, it measures even higher as the finished ground level on the southern side of the fence is lower.

To determine the lawful height of the fence the following definitions from the Standard Building Regulation and the Noosa Plan have been considered.

Standard Building Regulation

Schedule 1 (Prescribed building work for Act, section 21); section 4

1 Work for particular fences

Building work for a fence is prescribed if the fence—

- (a) is no higher than 2m above the fence's natural ground surface; and
- (b) is not a for a swimming pool to which chapter 8 of the Act applies.

Schedule 4 - Dictionary

natural ground surface, for a building, device or structure.

means the ground surface located at site of the building or structure on the day the first plan of survey showing the relevant allotment was first registered.

The Noosa Plan

structure means any *building*, wall, fence or other *structure* or anything fixed to or projecting from any building, wall, fence or other structure. The term includes any part of any structure.

natural ground surface or **natural ground level** for an *allotment* means:

- a) the ground level of the allotment on the day the first plan of survey showing the allotment was registered; or
- b) if the ground level on the day mentioned in paragraph (a) is not known, the natural ground surface as determined by a cadastral surveyor.

The approved plans of the subject site do not provide any notation that *indicates the ground surface located at site of the building or structure on the day the first plan of survey showing the relevant allotment was first registered*. However, the approved plans for the neighbouring lot to the south do note the existing surveyed levels of the site. Therefore the survey levels of the common boundary between the subject site and the neighbouring lot are established.

Since these two lots were first registered the ground levels have been altered and have been cut and filled independently of each other to accommodate the respective homes now built on each lot. Whilst there are some relevant initial survey levels known, without the expertise of a licensed land surveyor, it is impossible to compare the current finished ground levels to those levels that were originally established (i.e. the natural ground level).

Reasons for the Decision

The height of the fencing is significantly more imposing on one side of the fence compared to the other because of the altered conditions on the subject site, resulting from the cut and fill work that has been undertaken.

Without reliable land survey work to prove otherwise, the Committee has established that the height of the existing fence is more than 2m and therefore the fencing is assessable development under Schedule 3 Part 1 of the Sustainable Planning Regulation 2009.

Building and Development Committee Chair
Date: 11 October 2011

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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Department of Infrastructure and Planning
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