



## Building and Development Dispute Resolution Committees—Decision

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### *Sustainable Planning Act 2009*

<b>Appeal Number:</b>	<b>18 -14</b>
<b>Applicant:</b>	K R Smith & Associates
<b>Assessment Manager:</b>	Bartley Burns Building Certifiers and Town Planners
<b>Concurrence Agency:</b> (if applicable)	Brisbane City Council (Council)
<b>Site Address:</b>	9-15 Waldo Street Norman Park and described as Lots 84,85 & 86 on RP 12495 – the subject site

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### Appeal

Appeal under section s526 of *Sustainable Planning Act 2009* (SPA) against the decision of the Assessment Manager to refuse a Building Development Application for an existing pool wall enclosure/structure. The decision followed a Concurrence Agency response by the Council, directing refusal of the Application due to noncompliance with performance criteria in relation to the design and siting of the wall enclosure/structure.

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<b>Date and time of hearing:</b>	26 June 2014 10.00am to 10.55am
<b>Place of hearing:</b>	The subject site
<b>Committee:</b>	Debbie Johnson - Chair Michael Walton - Member
<b>Present:</b>	Kevin Smith - Applicant Vince and Carol Schokman – Land owners Duncan Kirk – Council representative John Grimsey – Council representative

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### Decision:

The Building and Development Dispute Resolution Committee (Committee), in accordance with section 564 of the SPA **sets aside** the decision of the Assessment Manager to refuse the Application and approves the siting variation for the pool wall/ enclosure.

### Background

The subject site is a comparatively large residential property with an area of approximately 1217sq/m. The allotment sits on the crown of a hill and is elevated above all the surrounding sites. This position affords the residents both expansive and impressive views of the river and city beyond. The owners successfully sought planning and building approvals to allow them to construct a very large home, built over three levels. This home has recently been completed. However, nearing the completion of this development, it became evident that part of the works undertaken, had not been approved for construction.

Historically, there was an in ground pool constructed. At some stage that pool was filled in but the pool shell remained. This pool shell was excavated and refurbished as an integral part of the works

proposed for the new dwelling. A tiled area was designed and built surrounding the pool and this area was then enclosed by a rendered concrete block wall which was 1750mm above the finished surface level of the pool patio level. However, in building terms height is generally measured from natural ground level of the site. In this instance, the fall of the land slopes towards the road frontage and away from the pool.

The overall height of the wall varies in relation to the natural ground, and measures between 3m and 4m. Given the height of this wall and its siting within the 6m road and 1.5m side boundary setback area, a development approval for building works could not be issued for the pool wall/ enclosure without first being referred to Council as the Concurrence Agency for a siting variation.

On 24 April 2014, Council refused the request for a siting variation stating that the Application did not comply with the *Queensland Development Code* (QDC) MP1.2 Performance Criteria P1, P2, P3 and P6. Council stated that the bulk of the pool wall/ enclosure to the road setback was excessive and therefore considered not to be compliant with the requirements of Performance Criteria P1 (a).

The Assessment Manager subsequently refused the Application for the pool wall/ enclosure on the 7 May 2014 and the Applicant lodged an appeal with the Building and Development Committees Registrar on 14 May 2014. The sole ground of appeal was that the front pool fence and fence at the front of the subject site were constructed in accordance with Planning and Environment Court Approval No. 396 of 2014.

The owners originally obtained a planning approval, by way of a consent order of the Planning and Environment Court (appeal BD4667 of 2002) on 3 December 2009, for a development permit for a material change of use for house over 8.5m above ground level in the Demolition Control Precinct and a preliminary approval for building work for a house over 8.5m above ground level in a Demolition Control Precinct (the **Development Approval**).

On 20 February 2014, the Planning and Environment Court (No. 396 of 2014) declared that changes proposed by the owners to the Development Approval were permissible changes for the purpose of section 367 of the *Sustainable Planning Act* and ordered that the request be approved subject to conditions (the **Amended Development Approval**).

The approved site plan depicts a high block fence over the pool deck facing Waldo Street. However, condition 1 of the preliminary approval for building work of the Amended Development Approval provides that the preliminary approval does not include assessment against the Building Code of Australia and does not permit building work to occur and that prior to commencement of any building work, a development permit for carrying out building work will be required.

## **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 Committees Registrar on 14 May 2014.
2. Oral submissions by the Applicant and the Council representatives at the hearing.
3. The Committees' on site inspection of the subject site and immediate locality.
4. Property details as available through the Council's website.
5. The Brisbane City Plan.
6. The Queensland Development Code (QDC) Part MP1.2.
7. *The Sustainable Planning Act 2009* (SPA)
8. *The Building Act 1975* (BA).
9. The Building Regulation 2006 (BR).
10. The National Construction Code 2013.

11. Historic aerial photographs of the subject site as viewed through Google Maps.
12. Through the Registrar, the owner's written submission dated 30 June 2014.
13. Planning and Environment Court judgment no. 396 of 2014 dated 20 February 2014.

## **Findings of Fact**

The Committee makes the following findings of fact:

- Over previous years, the owners of this site have developed and sold homes on several of the adjoining lots with the exception of the neighbouring property to the south. Each of these homes was purposely designed and orientated to maximise the outlook whilst maintaining privacy. Given the owner's long history with this location and the expansive views afforded by the position and orientation of this land, considerable effort and expense has been invested to ensure that the new home capitalized on the site's development potential. As the pool wall/ enclosure was built and completed as part of the construction required for the new residence, any associated impacts can be observed rather than imagined. The Committee undertook careful inspection of the pool wall/ enclosure from varying perspectives that included the street aspect, adjoining property boundaries and up on the pool deck level.
- When viewed from the street, the pool wall/ enclosure blends seamlessly with the strong architectural form and overall layout of the home which effectively crowns the top of the hill. Directly opposite the site to the west is a large parcel of reserved land that is well covered in mature native tree species. This land falls away dramatically from the road and it will never be developed with a built form.
- To the northern side of the site there is a large two storey home that has been setback from the street. To maximise their views they have built on the natural rise of the land at the rear of their site. This home is orientated to the north so that it is unlikely that they are able to see the pool wall/ enclosure and therefore they are unaffected by the structure.
- Along the southern side of the subject site, there are two homes side by side that back onto the shared boundary. Their road frontage (Wynnum Road) is directly opposite the side boundary shared with the subject site. Their outlooks are to the south and therefore directed away from the subject site.
- However, one of these homes is positioned on a corner formed by the intersection of the road along their front boundary (Wynnum Road) and the street that runs along their side boundary (Waldo Street). Waldo Street is the street adjacent to the frontage of the subject site
- This property has a substantial slope or fall to their road frontage below. Given the potential for river views in this area and that the road is a major suburban connector; the home has been positioned well back on the block. Effectively the dwelling is in the rear or northern portion of the site. At some point this home has been elevated to allow two storeys and generally modified, however the original home is likely to have been established 80-100 years ago. It is unique in this location because the entire western side of this home, including an outdoor elevated timber deck to the rear and a covered verandah on the upper level at the front, is built alongside the street frontage to Waldo Street. That is, it is built to the boundary of the road frontage. Their pool and the pool deck area are affected by shadowing from the pool wall/ enclosure that has been built on the subject site. However there is an existing 3m high concrete block wall that already causes shadowing of their pool. Historically, the shared property line has been delineated by a solid concrete block fence with a 'hit and miss' block pattern through the top four courses.
- The in ground pool on the subject site was built many years ago while the site was used for the accommodation of persons with special needs. At some stage this pool was filled in and remained that way until the current home was built. The pool shell was emptied and refurbished.

- The finished level of the pool coping is built at the natural ground level on the subject site. From survey records and observations made on site, it is clear that the natural ground line around the pool is substantially higher (2.5m) than the footpath level along the street frontage.
- The roadway has been cut into the side of the hill so that the majority of the properties on the eastern side are substantially higher than the street. Similarly it was noted that the pool and deck levels on the adjoining southern property are well below (2.0m) the natural ground around the pool on the subject site. This area of the adjoining site has been cut down to provide a level yard in which to construct a pool. The resulting effect is that the new pool wall/ enclosure overshadows the pool area on the adjoining southern site to a greater extent than the existing 'hit and miss' block wall did previously.
- The QDC Part MP1.2 determines the design and siting standards for single detached housing and associated structures on lots 450sq/m and over.
- **Performance criteria P1** of the QDC Part MP1.2, relevantly provides that:
  - "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."*
- **Performance Criteria P2** provides
  - "Buildings and structures –*
    - (a) provide adequate daylight and ventilation to habitable rooms; and*
    - (b) allow adequate light and ventilation to habitable rooms of buildings on adjoining lots;*
    - (c) do not adversely impact on the amenity and privacy of residents on adjoining lots."*
- Acceptable solution A1 and A2 of the QDC Part MP1.2, states that screens, fences, retaining walls or a combination of screens, fences or retaining walls may be situated within the 6m road setback and the 1.5m side boundary areas, where the overall height measured above the natural ground level, does not exceed 2m.
- In this instance the pool wall/ enclosure exceeds 2m in height above the natural ground level and must be considered against the provisions of the performance criteria, P1 and P2 of the QDC Part MP1.2.
- **Performance Criteria P6** provides –
  - "The location of a building or structure facilitates normal building maintenance."*
 Acceptable solution A6 of the QDC Part MP1.2 provides that where a wall is situated less than 750mm to the boundary, it should be maintenance free, such as unpainted or untreated masonry or prefinished steel sheeting.
- On inspection it was found that the face of the new pool wall/ enclosure has been left as unpainted untreated masonry and therefore complies with the acceptable solution.

## Reasons for the Decision

It is considered that the structure complies with Performance Criteria P1 of the QDC Part MP1.2 for the following reasons:

1. When viewed from Waldo Street, the pool wall/ enclosure blends seamlessly with the strong architectural form and overall layout of the home. The bulk of the pool wall/ enclosure is in complete proportion with the development that has been previously approved for this site. The area between the structure and the front fence is well landscaped and the pool wall is attractively offset by a classic fence line along the property's frontage.

2. From an overall streetscape perspective, is it in proportion with the two storey home on the adjoining site that has been built entirely to the road boundary.
3. The Committee was able to carefully consider and assess the potential loss of any outlook or views from surrounding properties as the pool wall/ enclosure has already been constructed. There is no impact on the outlook or the view enjoyed by neighbouring properties due to the alternate orientation of each of the homes and the nature slope of the land.
4. The pool wall/enclosure appears to be well constructed and the nature of the structure is such that it is unlikely to cause any nuisance or safety issue for members of the public.
5. It is also considered that the structure complies with Performance Criteria P2. There is no evidence to suspect that the siting and height of the pool wall/ enclosure will cause any detrimental effect on the neighbouring properties, with respect to the natural light and ventilation that they enjoy or cause adverse impact on the amenity and privacy of residents on adjoining lots.

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Debbie Johnson

**Building and Development Committee Chair**

**Date: 8 August 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  
GPO Box 2457  
Brisbane QLD 4001  
**Telephone (07) 3237 0403 Facsimile (07) 3237 1248**