



**APPEAL**  
*Integrated Planning Act 1997*

**File No. 3-08-011**

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

**Assessment Manager:** Total Building Consult  
**Concurrence Agency:** Gold Coast City Council  
**Site Address:** *withheld*-‘the subject site’  
**Applicants:** *withheld*

### **Nature of Appeal**

Appeal under Section 4.2.7(2)(b) of the *Integrated Planning Act 1997* (IPA) against the decision of Total Building Consult Pty Ltd to refuse a development application for building works, namely a retaining wall and boundary fence. The decision is based on a concurrence agency response from Gold Coast City Council, pursuant to Section 9(a), Schedule 2, Table 1 of the *Integrated Planning Regulation 1998*.

**Date and Place of Hearing:** 10.00 am on Thursday 27 March 2008 at ‘the subject site’.

<b>Tribunal:</b>	Dennis Leadbetter John Panaretos	Chairman General Referee
<b>Present:</b>	Owner Applicant Rachael Duncan Andrew Powell Sarah Clarke Dale Schroeder Representative of adjoining owners	Gold Coast City Council Representative Gold Coast City Council Representative Gold Coast City Council Representative Gold Coast City Council Representative

### **Decision**

In accordance with Section 4.2.34 (2)(c) of the IPA, the Tribunal **sets aside** the decision of Total Building Consult Pty Ltd to refuse the development application and **replaces it with the following decision:-**

The Tribunal directs Total Building Consult to approve the development application subject to compliance with the following conditions:-

1. The height of the retaining wall/fence, to the full length of the northern side of swimming pool enclosure shall be reduced in height to a maximum of 1500mm above the current level of the pavement/tiles to the swimming pool surround.
2. The height of the garden wall, attached to the northern wall/fence, and located inside the swimming pool enclosure, shall be reduced in height, such that no part is less than 1200mm below the top of the main wall/fence, and there is no structure, ledge, lip or similar, that can provide a toe hold within that 1200mm dimension.
3. Translucent glazed panels are to be installed within the wall/fence to the northern side of the swimming pool enclosure at the rate of one glazed panel between each set of engaged piers. The glazed panels shall extend from the level of the pavement/tiles to the swimming pool surround, or where over the planter, from the top of the planter to the top of the wall. The glazed panels and their support frames shall contain no toe hold within the panel. Glazing to comply with the Australian Standard for glazing – AS1288.
4. The portion of the retaining wall/fence, east of the eastern wall of the swimming pool enclosure to a line where the wall is constructed only of clay blocks shall have the top 13 courses (2600mm) of blocks removed. The ground surfaces inside the wall shall be reshaped to suit the height of that portion of the remaining wall, and to prevent the concentrated discharge of surface water onto adjoining properties and provide a barrier in accordance with the provisions of the BCA for Balustrades above the height of the finished ground behind the wall to prevent persons falling.
5. The balance of the wall/fence on the northern alignment, extending to the eastern boundary, where constructed entirely from clay blocks, including the section with a sloping top, shall be reduced in height to a maximum of 2000mm above **natural ground level**, which is the ground level existing at the base of the wall on the northern face. Ground surfaces inside the wall shall be reshaped to suit the height of the wall, to prevent the concentrated discharge of surface water onto adjoining properties and to provide a barrier in accordance with the provisions of the BCA for Balustrades above the height of the finished ground behind the wall/fence to prevent persons falling.
6. The ground area on the site from the north face of the retaining wall extending to the northern alignment shall be paved with a concrete slab or other approved impervious pavement material, finished smooth and with a non skid finish and to levels with nominal falls to facilitate drainage and prevent ponding of water.
7. The northern face of the entire wall to the northern boundary shall be rendered and coloured to provide an aesthetic finish of comparable quality to that on the southern (inner) face of the wall.
8. All work necessary to comply with this judgement, including demolition works, shall not be undertaken without the necessary approvals in place **prior to the commencement of the rectification works**.
9. The works shall be completed within a period of 10 weeks from the date of this determination.

**# refer to drawings on pages 8 and 9.**

## **Background**

The appeal relates to an existing retaining wall/fence, built approximately 500mm from the northern boundary of a residential property in a low density residential area, up to a height of approximately 5800mm above natural ground level, without any approvals in place.

Gold Coast City Council responded to an enquiry and issued a show cause notice on 21 August 2007, as there were no approvals in place for the wall or the fill to the site, in compliance with Gold Coast City Council's planning scheme requirements. In response to that notice, the appellant lodged an application for a development approval and on 24 October 2007, a referral was made to the Gold Coast City Council through Total Building Consult, for a concurrence agency approval. Gold Coast City Council issued a refusal on 19 December 2007 to Total Building Consult, who then issued a decision notice refusing the application on 6 February 2008.

Council refused the application on the basis that it did not conform to the intent of the planning scheme, specifically the impact the structure has on the visual amenity of the neighbourhood.

The Tribunal has viewed the applications for both the residence and the swimming pool, and have noted that on the original residence approval, there is a specific notation that *all retaining walls assessable against the building regulation do not form part of this approval* and a further notation *pool requires a separate building approval*. The original house certification was carried out by Michael Ross Certifications Pty Ltd. The drawings submitted for the subsequent swimming pool application to Total Building Consult, contain no site levels or contours, and a specific notation added to the note on the original drawing of *retaining wall of concrete tilt panel fencing 1800 high* to the northern alignment. There are no indications of the significantly higher retaining wall, currently constructed on the site, in this approval.

The wall is also built some 500mm away from the northern boundary and that area of the site between the northern face of the wall and the northern alignment has extremely limited and difficult access from the site, and as such may become a weed patch and harbour for vermin, exacerbating the deterioration of the local residential amenity, specifically for the adjoining neighbours.

## **Material Considered**

1. 'Form 10 – Notice of Appeal' and grounds of appeal contained therein;
2. 'Form 18 – Notice of Election' provided to the Registrar 18 March 2008 from Gold Coast City Council;
3. Drawings and photographs submitted with the appeal;
4. Letter from Gold Coast City Council dated 19 December 2007, refusing the application;
5. Written submissions from the adjoining owners;
6. Verbal submissions from the owner at the hearing;
7. Verbal submissions from the applicant at the hearing;
8. Verbal submissions from the representative of the adjoining owner at the hearing;
9. Verbal and written submissions from Gold Coast City Council's representatives at the hearing;

10. The *Integrated Planning Act 1997*;
11. The *Integrated Planning Regulation 1998*;
12. The *Building Act 1975*;
13. The *Building Code of Australia* (BCA);
14. The Queensland Development Code (QDC), specifically MP 1.2;
15. The Gold Coast City Council's planning scheme; and
16. Original drawings forming the application for the original dwelling and the subsequent application for the swimming pool, supplied at the request of the Tribunal after the hearing by the Gold Coast City Council.

### **Findings of Fact**

The Tribunal makes the following findings of fact:-

- The retaining wall and fence is ancillary work to a Class 1 building, a detached dwelling;
- That the entire wall to the northern boundary exceeds the height to setback provisions prescribed by A2 (c) (i) of the QDC MP 1.2;
- That the height of the wall rises to approximately 5800mm at its highest point, approximately 8m east of the pool enclosure;
- The wall is constructed to approximately 500mm off the northern alignment, including at its highest point;
- The northern face of the wall facing the adjoining owners is poorly finished, with joints not properly filled or ironed;
- The adjoining owners have painted the wall a leaf green colour in an attempt to improve their outlook and reduce the impact of the wall on their property;
- The height of the wall around the pool is approximately 2000mm above the pavement/tile surround of the swimming pool;
- The natural topography slopes to the north east;
- The area of the subject site between the retaining wall/fence to the northern alignment is unpaved and practically inaccessible from the subject site for maintenance and cleaning;
- That there are no development approvals in place for this structure;
- That the certification for the residence and the pool were executed by different certifiers and the residence certification specifically excluded Building Regulation assessable retaining walls, and the swimming pool approval indicates a retaining wall/fence 1800mm high, not the 5800mm existing.

There are no further concurrence agency requirements.

## Reason for the Decision

Total Building Consult Pty Ltd refused the development application based on a refusal by Gold Coast City Council as a concurrence agency. Gold Coast City Council's refusal was on the premise that the retaining wall/fence was in conflict with the intent of the Council's planning scheme, specifically its visual impact on the neighbourhood. At the hearing, Council representatives raised the provisions of Part 7, Division 2, Chapter 11, Section 3.0 Development provisions, specifically PC6 and AS6.1, and AS6.2 which state:

LOCAL AMENITY, NOISE & EMISSIONS	
<p>PC6 All work associated with any development must not create a negative impact upon the amenity of surrounding properties</p>	<p>AS6.1 The cut and/or fill is retained, and the retaining wall is set back from any boundary at least one quarter of its height, with a minimum setback of 300mm, and:</p> <ul style="list-style-type: none"> <li>a) the site is located within a residential domain or adjacent to a residential domain and the retaining wall is stepped 1.5 metres for every 1.5 metres in height, and the terraces are landscaped or;</li> <li>b) (this section not included as irrelevant)</li> </ul> <p>AS6.2 The cut and/or fill is not retained, and the toe of any batter is no closer than 300mm from a boundary, and;</p> <ul style="list-style-type: none"> <li>a) the site is located within a residential domain or adjacent to a site in a residential domain, and batters along the boundaries are no steeper than one in four and landscaped; or</li> <li>b) (this section not included as irrelevant)</li> </ul>

The tribunal is of the opinion that this section is not applicable, as in Clause 2 Application, sub-clause 2.1 states:-

*This code applies to development indicated as **code** or **impact** assessable in the Table of Development in the domain or Local Area Plan (LAP) within which the development is proposed.*

Reference to Part 5 Division 2 Chapter 4, Domains – Detached Dwellings, under Clause 3 – Table of Developments, it indicates that a *Detached Dwelling* is *Self assessable* **not** Code or Impact assessable.

The Tribunal also referenced Clause 5 – Detached Dwelling Domain Place Code, specifically Clause 5.3, Development requirements, which the Gold Coast City Council also referenced in its refusal. This table lists, inter alia, Building Setbacks, which are similar to the provisions of the QDC MP 1.2, but unlike the QDC, refer only to “Building” and therefore specifically excludes “Structure”, both terms having specific definitions under the *Building Act 1975*, which are:-

**“building”** means a fixed structure that is wholly or partially enclosed by walls and is roofed, and includes a floating building and any part of a building.

**“structure”** includes a wall or fence and anything fixed to or projecting from a building, wall, fence or other structure.

The Tribunal is of the opinion that this provision of the Gold Coast City Council’s planning scheme therefore does not apply.

MP 1.2 of the QDC does have provisions for side alignment setbacks for a **structure**, and provides **Performance Criteria** and an **Acceptable Solution**, but allows the local government to vary the application of siting requirements to take account of alternative solutions and specific site conditions that may necessitate an alternative solution or a modification of an acceptable solution.

MP 1.2 of the QDC, under acceptable solution A2, subsection (a) requires the side and rear boundary clearance for a part of a building or structure to be:-

- (i) Where the *height* of that part is 4.5m or less – 1.5m; and
- (ii) Where the *height* of that part is greater than 4.5m but not more than 7.5m 2m;

There is provision in MP 1.2 for those set backs to be reduced where the site road frontage is less than 14.501m, which is not applicable in this instance as the road frontage is over 31m.

Section A2 (c) of the QDC MP 1.2 provides for exemptions for structures from A2 (a) where:-

- (i) A screen or fence is not more than 2m high; or
- (ii) A rainwater tank, including any supporting structure such as a stand, is not more than 2.4m high.
- (iii) A pergola or other *structure* which is;
  - A. Not enclosed by walls or roofed; and
  - B. Not more than 2.4m in height at the boundary; and
  - C. Primarily ornamental or for horticultural purposes.

In assessing this structure against this part of the Code, it is clear that a retaining wall/fence in excess of 2000mm, should have a minimum set back varying from 1500mm from the boundary where under 4500mm and 2000mm from the boundary where its height exceeds 4500mm but is less than 7500mm.

From the drawings submitted to the certifier for the swimming pool application, there is a dimension indicated of 3215mm between the swimming pool edge and the northern alignment, such that it would have been possible to have complied with the requirements of the QDC MP 1.2 section A2, and provided a 1500mm alignment setback, and to have achieved an adequate visual barrier to provide visual privacy to the swimming pool area and remain below the 4500mm height limit above *natural ground*.

The Tribunal found that due to site topography, a wall of 1500mm high above the swimming pool pavement/tile surround will provide more than adequate visual privacy between the adjoining properties.

The Tribunal considered the impact of a reduced alignment setback compared to the requirements of the QDC MP 1.2 of the retaining wall/fence on the visual amenity of the low density residential area, and is of the opinion that the reduction will have little impact, principally because of the site topography, with the adjoining site being lower than the subject site.

The Tribunal is of the opinion that the reduced height of a significant section of the wall, with the inclusion of translucent glazed panels within that part of the wall and the removal of a large section of the wall where it was at its highest point above natural ground level, together with an aesthetically acceptable finish, will considerably enhance the visual outlook of neighbouring properties.

The Tribunal **does not** believe there are reasonable grounds to vary the requirements of the QDC MP 1.2, to accommodate the full extent of the existing works, the subject of this appeal, as the impact on the visual amenity and property generally to the adjoining owners is extreme and unacceptable.

---

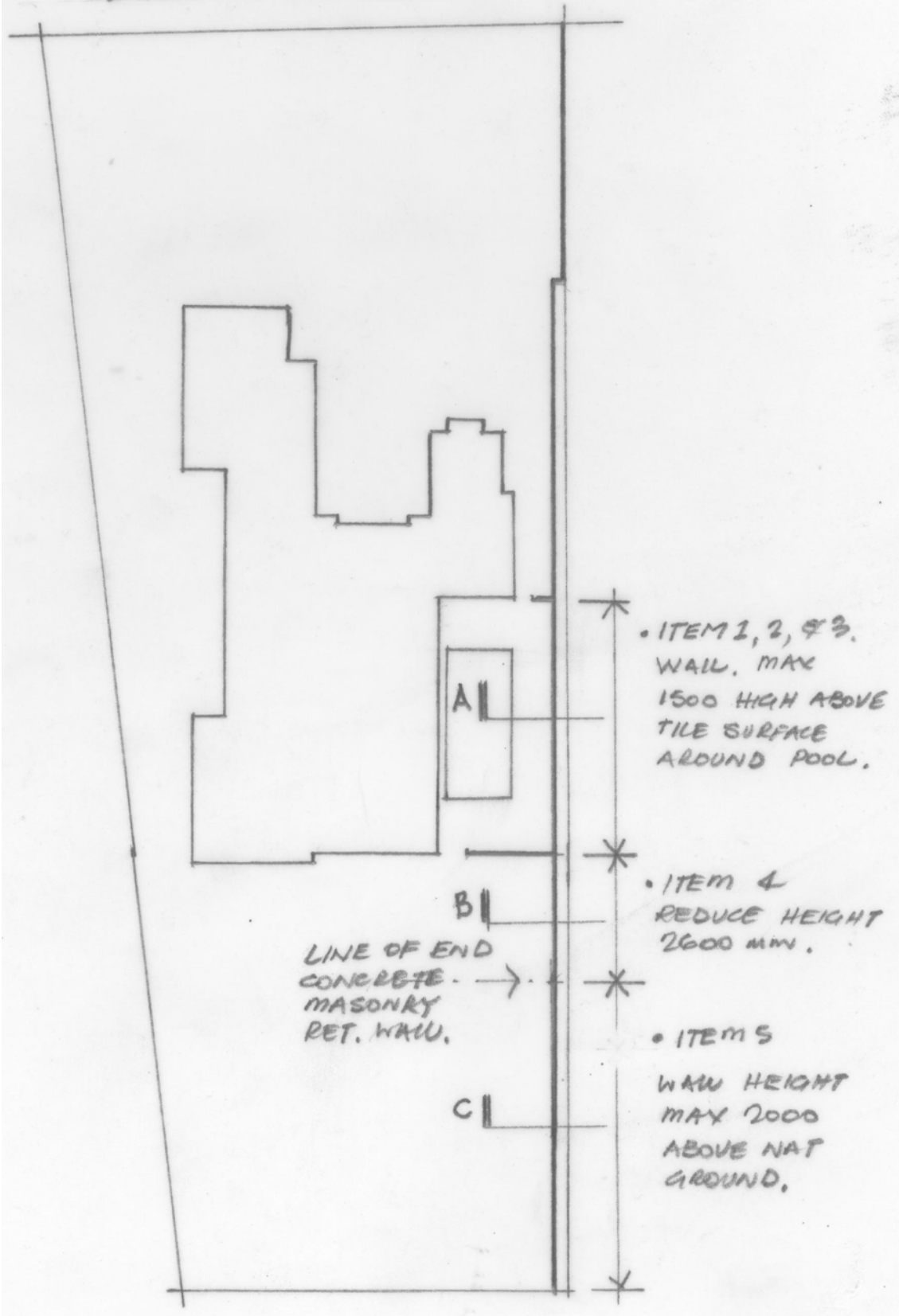
**Dennis Leadbetter**

Dip. Arch. QUT; Grad. Dip. Proj. Man QUT; METM UQ.

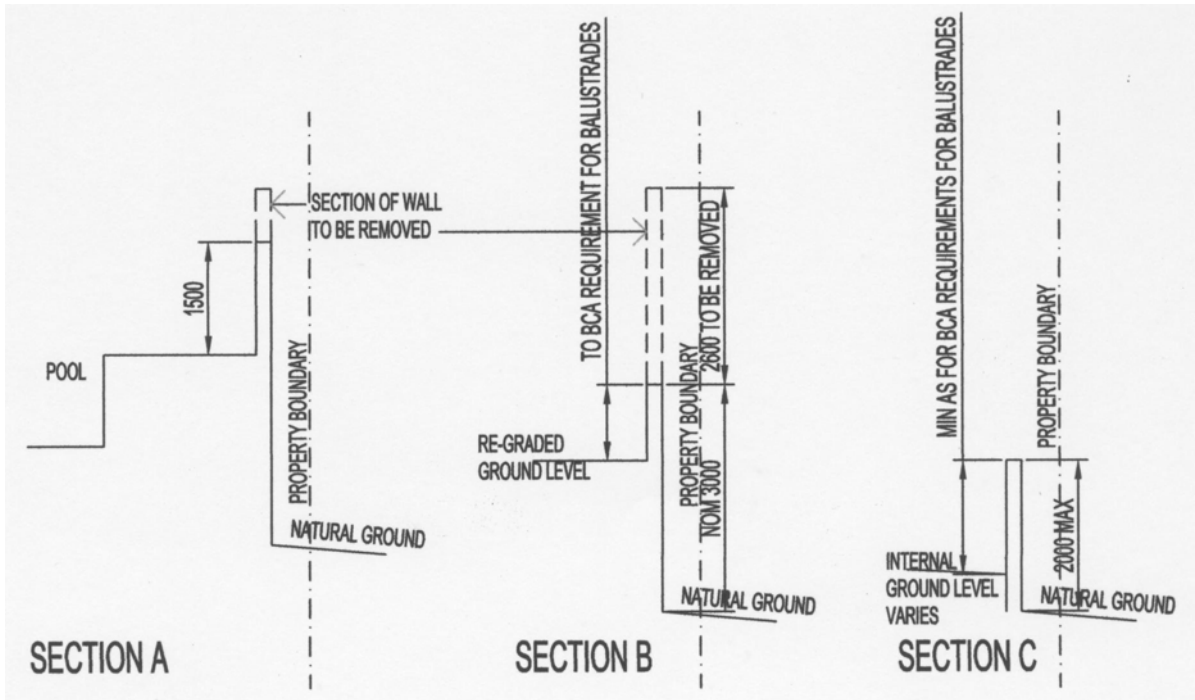
**Building and Development Tribunal Chairperson**

**Date: 22 April 2008**

MIDGERA STREET







## **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 Infrastructure and Planning  
PO Box 15009  
CITY EAST QLD 4002  
**Telephone (07) 3237 0403 Facsimile (07) 32371248**