



## Building and Development Dispute Resolution Committees—Decision

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### *Sustainable Planning Act 2009*

<b>Appeal number:</b>	<b>04-10</b>
<b>Applicants:</b>	Michelle Truscott, Karen Allfrey and Daphne Cuthbert
<b>Assessment manager:</b>	Geoffrey Mitchell on behalf of GMA Certification Group Pty Ltd
<b>Concurrence agency:</b>	Gold Coast City Council (Council)
<b>Site address:</b>	137 Wunburra Circle, Pacific Pines and described as Lot 400 on SP 206391—the subject site

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### **Appeal**

Appeal under section 527 of the *Sustainable Planning Act 2009* (SPA) against the decision of GMA Certification Group Pty Ltd as the assessment manager to refuse a development application for construction of a retaining wall. This decision was based on a deemed refusal from Council.

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<b>Date of hearing:</b>	Wednesday 10 February 2010 at 10.00 am
<b>Place of hearing:</b>	The subject site
<b>Committee:</b>	Dennis Leadbetter - Chairperson Greg Rust - Member
<b>Present:</b>	Karen Allfrey - Owner Geoff Mitchell - Assessment manager Tanya Smith - Assessment manager

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### **Decision:**

The Committee, in accordance with section 564 (2)(e) of the SPA, **sets aside** the decision of GMA Certification Group dated 14 December 2009, based on a concurrence agency deemed refusal and replaces it with the following decision:-

The assessment manager, in accordance with section 564 (1), is **directed** to decide the development application for building works as if there were no concurrence agency requirements with the following conditions:

1. The retaining wall along the south west alignment adjacent to the dwelling shall have a maximum height of 2.0 metres above the ground level of the property adjoining to the south west alignment.
2. No part of the retaining wall structure shall encroach into any adjoining property or into the easement to rear of the property.

3. The retaining wall shall return at the rear of the dwelling and shall be stepped and the rear of the property terraced to minimize the height of the retaining wall.
4. The Committee acknowledges that the requirements of the Building Code of Australia (BCA) P2.5.2 - Barriers does not apply to this retaining wall, on the basis that although it is a structure it is not a building, but would strongly recommend the inclusion of a suitable fence or barrier, particularly where the height of the wall exceeds 1 metre above the adjoining ground level, to prevent falls.
5. The retaining wall shall be constructed in accordance with the engineer's design and the engineer shall provide certification on completion.

## **Background**

The applicant lodged a development application with GMA Certification Group as the assessment manager for approval of a development permit for building works, for the construction of a retaining wall on the subject site.

The assessment manager lodged a concurrence agency application with Council as the combined height of the wall and barrier would be greater than 2 metres, as provided for in the Queensland Development Code (QDC) MP1.2.

Council refused the application on the grounds that:

- *The application was determined by Council to be "Incorrectly Lodged" as:*
  - *The property is subject to a Plan of Development (POD) and associated subdivision conditions. The POD and related conditions are "tied" to the subject land and relaxation of such conditions is not possible using the siting variation application form as lodged.*
  - *A siting variation of building relaxation is not required if the proposed building work/s complies with the conditions of the POD. A generally in accordance application (and related enquiries) may be made with Council's Planning Assessment area for minor variations to the POD.*

Council's letter is titled *Referral (Concurrence) Agency Response – Incorrectly lodged building application no 2915767*.

As the response from Council did not approve the application either wholly or with conditions, it was deemed to be refused by the assessment manager. The assessment manager issued a decision notice to the applicant refusing the development permit for building works on 6 January 2010.

The appeal was made on the basis of a refusal by Council

## **Material Considered**

1. *Form 10 – Application for appeal/declaration* and grounds of appeal contained therein received by the Registrar on 8 January 2010.
2. Drawings submitted with the appeal.
3. Verbal submissions from those attending the appeal hearing.
4. The written submission from Council dated 9 February 2010.
5. SPA.
6. *The Integrated Planning Act 1997*
7. *The Integrated Planning Regulation 1998*.
8. *The Building Act 1975*

9. The BCA
10. The Plan of Development and the accompanying conditions of approval dated 5 January 2006.
11. QDC Part MP 1.2.
12. Additional drawings (copy of the site plan for the dwelling building development approval) submitted by the assessment manager on 1 March 2010 as requested by the Committee.

### **Findings of Fact**

The Committee made the following findings of fact:

1. A recently constructed dwelling is on the site.
2. The site has an area of 922 square metres and is of basic rectangular shape.
3. The site has a fall across the frontage of approximately 1.3 metres but is level in the north south direction for approximately  $\frac{1}{4}$  of the site depth and then falls with a substantial gradient to the rear of approximately 8 metres.
4. The site has a 3 metre wide sewerage easement along the rear boundary.
5. The site adjoining the south west side boundary has an existing dwelling and the ground surface to that property adjacent to the rear of the dwelling on the subject property is approximately 2 metres below the filled surface level to the area supporting the rear of the dwelling to the subject site.
6. There is a cut to the north east side of the subject site, located approximately 4 metres from the south eastern face of the dwelling approximately 2 metres high, and this is not retained. The soil is of a shale nature that has shown signs of erosion in recent rains.
7. In the recent rains the fill to the south western side of the dwelling has eroded revealing a portion of the footing to the south eastern corner of the dwelling. The founding level of that footing is unknown.
8. The batter to the fill is well in excess of self supporting batter.

### **Reason for the Decision**

Council provided a written submission to the Committee, as they had advised the Registry that they did not wish to attend the hearing, nor did they complete a notice of election. The submission indicated that Council considers that the application was *incorrectly lodged* on the basis that there is an *earlier development approval* (being the Plan of Development (POD) for the subdivision of the estate). Council also asserts that the approval contained conditions related to construction of retaining walls (Condition 6), and therefore, in Council's opinion, the correct course of action was to apply for a change to those POD conditions. Council also supports its determination by submitting an earlier Building and Development Tribunal decision related to a nearby property (Appeal 03-08-026).

The Committee has considered the content of the POD and also the previous appeal decision. The prior appeal related to a vacant site, for which there were no existing or concurrent development approvals for the erection of a dwelling on the site in place, and on which a considerable volume of additional fill had been deposited. Appeal no. 03-08-026 was, in effect, about an application to legalise and retain a considerable amount of fill that had been placed, without approval, on the site prior to an application being lodged to build a residence. In this Committee's opinion the placing of the fill in appeal no. 03-08-026 would have required an operational works approval from Council and may not have been within the jurisdiction of that previous Tribunal to determine. The effect of the application in appeal no. 03-08-026 was to seek approval of unlawful fill placed on the site to create a new building platform on which a house may then be constructed. At the appeal the owner of that site indicated he had not deposited the fill on the site, nor had he agreed to its deposit and agreed to remove all such fill, thus returning the site to its original topography in conformance with the POD's conditions of approval for the subdivision, thus eliminating the need for an operational works approval from Council.

The current appeal relates to a development application to retain fill and to stabilize the foundations of a building lawfully approved and constructed on the site.

For present purposes the application is for *building work* as defined in the IPA s1.3.5

*Building work* means-

- (a) building, repairing, altering, underpinning (whether by vertical or lateral support), moving or demolishing a building or other structure; or
- (b) work regulated under the building assessment provisions, other than IDAS; or
- (c) excavating or filling-
  - (i) for, or incidental to, the activities mentioned in paragraph (a); or
  - (ii) that may adversely affect the stability of a building or other structure, whether on the land on which the building or structure is situated or on adjoining land; or
- (d) supporting (whether vertically or laterally) land for activities mentioned in paragraph (a).

The Committee is of the opinion that, for present purposes, the filling being retained is incidental to and necessarily associated with the house approved on the site and the retaining wall may be characterized as supporting that fill. Accordingly no operational works approval is required and a decision on the appeal falls within the jurisdiction of the Committee.

The Committee is of the opinion that the POD conditions relate to the subdivision of the land and possibly to any subsequent proposal that requires an operational works or other approval from Council, but is not relevant to filling that is incidental to and necessarily associated with the building of a residence on the land. In the Committee's opinion the intention of the Act is to facilitate the ordinary and sensible development of the land once it is subdivided. For example, it would be reasonable to expect, because of the nature of the site's topography and that occurring in other areas of this estate, that a normal residential building may be stepped as it extended over the sloping ground to minimise overall height, and that retaining walls may form part of that dwelling. Depending on building design, such a wall could reasonably exceed the heights specified in the POD in particular cases. This is not to say that all retaining walls of all heights would be considered incidental to and necessarily associated with a dwelling on the site. Each case must be considered on its individual merits.

As the retaining wall is to be over 1 metre high, under the provisions of the BCA, it requires a balustrade, and as such will mean the retaining wall and balustrade will exceed the maximum 2 metres in height allowed under the QDC, requiring a concurrence agency response.

The Committee notes Council's comments in their correspondence of 14 December 2009, in which they state that "*It is important to note that the Application was **NOT REFUSED** by Gold Coast City Council.*" The Committee is of the opinion that, as a concurrence agency, Council has the powers as set out under IPA s3.3.18 including power to tell the assessment manager it has no concurrence requirements, to impose conditions or to refuse the application. In these circumstances and notwithstanding Council's statement that the application was not refused, the Committee is of the opinion that Council's response must be taken as a refusal.

**Dennis Leadbetter**

Dip Arch QUT, Grad Dip Proj Man QUT, METM UQ

**Building and Development Dispute Resolution Committee Chair**

**Date: 19 April 2010**

## **Appeal Rights**

Section 479 of the *Sustainable Planning Act 2009* provides that a party to a proceeding decided by a Tribunal may appeal to the Planning and Environment Court against the Committee's decision, but only on the grounds:

- (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 Committees  
Building Codes Queensland  
Department of Infrastructure and Planning  
PO Box 15009  
CITY EAST QLD 4002  
**Telephone (07) 3237 0403 Facsimile (07) 3237 1248**