



**APPEAL**  
*Integrated Planning Act 1997*

## BUILDING AND DEVELOPMENT TRIBUNAL - DECISION

**Assessment Manager:** The Certification Professionals

**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 The Certification Professionals to refuse a development application for building works, namely a proposed dwelling and retaining walls on ‘the subject site’. 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:** 11.15 am Friday 11 April 2008 at  
the offices of Gold Coast City Council, Nerang

**Tribunal:** John Panaretos – Chairperson  
Peter Nelson – General Referee

**Present:** Applicant / Owner  
Rodney Davie – Gold Coast City Council Representative  
Sarah Kay – 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 The Certification Professionals to refuse a development application for a detached dwelling and retaining walls **and replaces it with the following decision:-**

**The Certification Professionals is directed to approve the development application subject to the following conditions:-**

1. The **detached dwelling** road boundary clearance to *withheld* is varied to 5.092m, as indicated on the revised Site Plan Job No. 205SOUT Rev No. G dated 21 November 2007, drawn by B Bonnett and the reduced setback is to be taken as being measured from the relevant boundary alignment to the outermost projection; and

2. The **rear retaining wall** is in accordance with the aforementioned revised Site Plan; and
3. The **side retaining wall** is disaggregated such that its maximum rise in any one step is 1.5 metres, separated by a planted bed a minimum of 0.5 metres wide.

## **Background**

The subject site is located in a housing estate which was the subject of an appeal decision by the Planning and Environment Court (P & E Court). The Court issued a Preliminary Approval for Material Change of Use (P & E Court Southport No. 48 of 2003) and Development Permit subject to conditions, including Condition 4(e) imposing a limit on height of retaining walls of 1.5m. Further, Condition 15 of that approval imposed the Kingsmore West Planning Code, as amended by the approval. A relevant Implementation Criterion from that code is as follows:

*Building type/style reflects the natural topographic features of the allotment or development site, and cut and fill is kept to a minimum.*

An Implementation Criterion specifically relating to slope/visually-sensitive lots is somewhat more prescriptive:

*Cut and fill on these allotments should not exceed 1.5m in any one location and should not exceed 3m across the entire lot.*

However, Council offered no evidence as to the applicability of this statement to the subject lot.

The site remains in the Emerging Community Domain. Hence, the relevant Place Code applies, to the extent it does not conflict with the Kingsmore West Planning Code. PC4 AS4.1.2 of the Emerging Community Domain Place Code requires a 6m setback to the street alignment.

Due to the wedge shape of the allotment combined with a steep slope down to the rear, the applicant proposed to site the dwelling at an angle to the front boundary. Consequently, a portion of the front western corner of the building encroaches into the required 6m front setback by 908mm.

The applicant's original plan proposed boulder retaining walls up to 2.5m to the rear and south-eastern side boundaries and up to 3.0m to the western side boundary. In response to an information request, the applicant submitted a modified plan which was not received by Council, replacing the rear retaining wall with two stepped walls of 1.5m and 1.05m maximum. The height of the western wall was notated at a maximum of 2.55m. All retaining walls were now intended to be constructed of concrete sleepers.

Council contends that:

- the height of retaining walls is limited to 1.5m (the 1.2m cited in the Council letter is an error) by the Land Development Guidelines;
- higher retaining walls are contrary to the intent of the Detached Dwelling Domain Place Code.

## **Material Considered**

- 'Form 10 – Notice of Appeal' lodged with the Building and Development Tribunals on 1 April 2008;

- Gold Coast City Council’s Request for Further Information 29 October 2007;
- Gold Coast City Council’s Concurrence Agency Response dated 25 February 2008;
- The Certification Professionals’ Decision Notice dated 25 March 2008;
- The applicant’s grounds for appeal against Gold Coast City Council’s reasons for refusal submitted with the application to the Tribunal and photos of nearby houses under construction;
- Original and revised architectural drawings prepared by B Bonnett, the revised site plan identified as Dwg No. 205 SOUT Revision G dated 21 November 2007.
- “The Observatory Planning Code” drafted by Stockland Development Pty Ltd;
- Extracts of the Preliminary Approval and Development Permit for “The Observatory” development issued by the Planning and Environment Court in April 2003 and handed to the tribunal at the hearing;
- ‘Form 18 – Notice of Election’ provided by Gold Coast City Council, dated 8 April 2008;
- Letter from Gold Coast City Council signed by Rod Davie, Senior Planner MCU Citywide, summarising Council’s arguments against the proposal;
- Verbal submissions made by the applicant at the hearing;
- Verbal submissions made by Gold Coast city Council representatives at the hearing;
- Subsequent telephone discussion with Council’s Rod Davie to secure a copy of Court Order No 48 of 2003 (Preliminary Approval and Development Permit) pertinent to the housing estate;
- Copy of Court Order No 48 of 2003 (Preliminary Approval and Development Permit) pertinent to the housing estate
- Relevant sections of the Gold Coast City Council Planning Scheme;
- The *Integrated Planning Act 1997*;
- The *Building Act 1975*;
- The *Building Regulation 2006*; and
- MP 1.2 the Queensland Development Code (QDC).

### **Findings of Fact**

The subject site is in the Emerging Community Domain but subject to a Court Order which establishes an additional code for new development over the site (the Kingsmore West Planning Code).

The Emerging Community Place Code applies to the extent that it does not conflict with the Kingsmore West Planning Code. Hence, a 6m setback to the street alignment applies pursuant to AS 4.1.2.

The application for the siting concession was required to allow the dwelling to be built within 6.0m of the street alignment of ‘the subject site’. The front setback encroachment relates to a short portion of the eave (approximately 4m) and wall of the western front corner of the building.

In response to Council's Request for Further Information issued on 29 October 2007, the appellant lodged a modified plan which was not received on the Council file, providing for:

- Two retaining walls at rear to a maximum height of 1.5m and 1.05m respectively with a separation of 1.5m;
- The western side retaining wall tapering up to 2.55m high.

Council proposes a maximum unstepped height of retaining walls consistent with its Land Development Guidelines of 1.5m.

## **Reasons for the Decision**

### **Front Setback**

As required by the relevant code, the building presents as a single storey facade to the street. In the irregular geometry of the street the setback encroachment will be almost imperceptible.

The site constraints, including its steep topography and additional code requirements such as 600mm wide eaves, have resulted in a wide building presenting a long street façade and northern edge. This is an 'efficient' response to the site challenges, as required by Performance Criterion PC 4 of the Emerging Community Domain Code.

Finally, Council confirmed at the hearing that it has no objection to the variation.

### **Retaining Wall Heights**

Council has cited its Land Development Guidelines as appropriate to the design and construction of the retaining walls to achieve the intent of the relevant code. Although the Land Development Guidelines Policy does not appear to apply to the subject site, the rear retaining walls as presented on the modified plan are consistent with Council's Land Development Guidelines Policy.

The western side retaining wall is in conflict with the intent of relevant Implementation Criterion of the Kingsmore West Planning Code quoted above.

Finally, the parties agreed at the hearing that the wall could be readily modified to achieve the maximum rise of 1.5m for each wall, separated by a step.

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**John Panaretos**  
**Building and Development Tribunal Chairperson**  
**Date: 22 April 2008**

## **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  
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