



Building and Development Dispute Resolution Committees—Decision

Sustainable Planning Act 2009

Appeal Number:	50 - 11
Applicant:	Ellen Enid King Koi
Assessment Manager:	Brisbane City Council (Council)
Concurrence Agency:	N/A
Site Address:	39 Eagle Street Alderley also described as 37 Eagle Street, Alderley and described as Lots 28 & 29 on RP 20309 – the subject site

Appeal

Appeal against the Enforcement Notice given under the *Building Act 1975* (BA) and taken to be an Enforcement Notice issued in accordance with section 590 of the *Sustainable Planning Act 2009* (SPA) which requires the Applicant to repair or rebuild the retaining walls on the adjoining boundary between 39 Eagle Street and 38 Braeside Street, Alderley and to apply for all relevant approvals from Council and/or private certifier.

Date of hearing:	10.00am – Tuesday 6th December 2011
Place of hearing:	Building Codes Queensland, Meeting Room 5B, Level 5/63 George Street, Street, Brisbane
Committee:	Ms Georgina Rogers – Chair Mr Ian Adams– General Referee
Present:	Ms Carolyn Xavier - as trustee for the Applicant Mr Robert Harding - on behalf of the Applicant Ms Nicole Wattz - Council

Decision:

The Building and Development Dispute Resolution Committee (Committee), in accordance with section 564 of the SPA **confirms** the Enforcement Notice appealed against which requires the Applicant to repair or rebuild the retaining walls on the adjoining boundary between 39 Eagle Street and 38 Braeside Street, Alderley and to apply for all relevant approvals from Council and/or private certifier and directs that the Enforcement Notice remain in force subject to the conditions

contained in this decision.

The Committee **directs** the Assessment Manager to follow through with the Enforcement Notice and associated penalty actions to all parties, subject to the following conditions:

1. The Applicant in conjunction with the adjoining owners is required to remove the fallen and damaged retaining walls and associated debris. The Applicant is to make the area safe on the subject site and for all affected adjoining neighbours.
2. The Applicant is to grant access across their site to allow the adjoining neighbours to undertake necessary works for the safe and effective removal of the fallen and damaged retaining walls and any associated debris which have collapsed on the neighbouring properties. In addition the access granted is to enable the safe and effective reconstruction of new boundary retaining walls on the common boundary title alignments between this site and the affected adjoining neighbours.
3. The Applicant is to grant access over their site to allow for essential plant and equipment which is required for the removal and reconstruction of the retaining walls on the boundary title alignments. The access should not restrict the safe operation of the works and in turn should not unduly impact on the Applicant's property. Where it may be required that some existing fill on the Applicant's site is to be removed for the safe operation of the plant and equipment while completing these works, this fill is to be reinstated in accordance with the design, specifications and certification undertaken by a registered Professional Engineer of Queensland (RPEQ), and Council and/or private certifiers requirements and approvals.
4. The Applicant in conjunction with the adjoining owners is to undertake all necessary works to the retaining walls which are located to the east of the subject site on the rear boundary title alignment and associated retaining walls which have been affected to the rear of the site on the northern boundary title alignment.
5. The Applicant is to grant all necessary owners consent for all of the relevant applications for works associated with the removal and rectification of the collapsed retaining walls.
6. Within 20 days from this decision, the Applicant in conjunction with the adjoining owners is to prepare and submit plans to the Council and/or private certifier for works required for the removal and reconstruction of the fallen and damaged retaining walls. Plans to be prepared by a RPEQ and to address overland flow of water.
7. The Council and/or private certifier as the Assessment Manager/s is to work with the Applicant to ensure that the application process is undertaken correctly and expediently and issue the required approvals within 20 business days of receiving these applications.
8. The Applicant is to ensure the existing fill on the subject site is retained in a safe manner and to engineering design and specified requirements. Any approvals in relation to the extent and nature of the fill are to be sought from the Council and the approval process should in no way delay the rectification of the retaining walls.

Background

A Show Cause notice dated 6 April 2011 was issued by Council in regard to undertaking the required works to the fallen and damaged retaining walls.

An Enforcement Notice dated 2 June 2011 was issued by Council in regard to the required works

and to obtain the necessary approvals.

The Applicant has appealed against the Enforcement Notice issued by the Council in regard to undertaking action to repair or rebuild the retaining wall between 39 Eagle Street and 38 Braeside Terrace, and appealed against obtaining the necessary approvals.

An Enforcement Notice was also issued by Council to the adjoining property owner of 38 Braeside Terrace, Alderley on the basis the retaining wall was benefitting both properties. The owner of that lot has not disputed the Enforcement Notice.

The Applicant in their appeal states that "the Council has no jurisdiction to order me to enter upon another person's property to carry out work, etc." In this case as the retaining wall is located on the adjoining boundary of 39 Eagle Street and 38 Braeside Terrace, Alderley it is evident that mutual access across these properties to enable the repair or rebuilding of the retaining wall is essential.

The Committee is free to inform itself as it considers appropriate, and undertook a site inspection on 13 December 2011 to view the retaining wall on the adjoining boundary alignment from both affected properties and took verbal submissions from the owner of 38 Braeside Terrace, Alderley during the site inspection.

Material Considered

The material considered in arriving at this decision comprises:

1. Survey Plan of 38 Braeside Terrace prepared by Bruce Hallett Surveys, dated 11 November, 2003.
2. Enforcement Notice (C1022962) under section 248 of the BA, issued to Mr Jordan Blinco, dated 26 December, 2010.
3. Site Photos taken by Brisbane City Council Compliance Officers, dated 26 December, 2010.
4. Geotechnical Report prepared by Auswide Geotechnical, dated 31 January, 2011.
5. Facsimile from Harding Lawyers to Tucker & Cowen Solicitors, dated 24 February, 2011.
6. Letter from Tucker & Cowen Solicitors to Harding Lawyers, dated 25 February, 2011.
7. Affidavit of David James Bailey, sworn on the 28 March, 2011 filed in the Magistrates Court of Queensland (M2445/11).
8. Show Cause Notice (C1022962) under section 248 of the Building Act 1975, issued to Mr Jordan Blinco, dated 6 April, 2011.
9. Letter from Brisbane City Council to Tucker & Cowen Solicitors, dated 8 April, 2011
10. Letter from Jordan Blinco to Brisbane City Council's Compliance and Regulatory Services, dated 13 April, 2011.
11. Engineering Assessment of the failed retaining wall prepared by Bennatt Ground Technologies, dated 13 April, 2011.
12. Letter from Tucker & Cowen Solicitors to Jordan Blinco, dated 13 May, 2011.
13. Enforcement Notice (C1022962) under section 248 of the BA, issued to Mrs Ellen Enid Koi c/- Mr Robert Harding of Harding Lawyers, dated 2 June 2011.

14. Enforcement Notice (C1022962) under section 248 of the Building Act 1975, issued to Mr Jordan Blinco, dated 6 June, 2011.
15. 'Form 10 – Appeal Notice', grounds for appeal and correspondence accompanying the appeal lodged with the Registrar on 22 June 2011.
16. Preliminary Building Estimate for repairs to the retaining wall, prepared by Sergon Building Consultants, dated 2 August, 2011.
17. Geotechnical Engineering Report prepared by Coffey Geotechnics, dated 3 August, 2011.
18. Remediation Design Advice, prepared by Coffey Geotechnics, dated 28 September, 2011.
19. Fill removal estimate prepared by Jurassic Earthmoving Pty Ltd, dated 28 September, 2011.
20. Landscape/Retaining Wall 3D View of 39 Eagle Street prepared by Arqus Design, dated 19 October, 2011.
21. Letter from Tucker & Cowen Solicitors to Harding Lawyers, dated 15 November, 2011.
22. Email from Harding Lawyers to Tucker & Cowen Solicitors, dated 22 November, 2011.
23. Draft letter to HBM Lawyers from Robert Harding, dated 30 November, 2011.
24. Letter from Tucker & Cowen Solicitors to Harding Lawyers, dated 3 January, 2012.
25. Email from Mr Kevin Blinco to Committee, dated 3 January 2012.
26. Email from Tucker & Cowen Solicitors to Kevin and Jordan Blinco, dated 6 January 2012.
27. Email from Mr Kevin Blinco to Committee, dated 12 January 2012.
28. Email from Mr Kevin Blinco to Committee, dated 23 January 2012.
29. 1978 Town Plan for the City of Brisbane.
30. 1987 Town Plan for the City of Brisbane.
31. Brisbane City Plan 2000.
32. Aerial photography flown 1946, 2007 and 2009.
33. Verbal submissions from the applicant at the hearing.
34. Verbal submission from the Council representative at the hearing.
35. Verbal submission from the adjoining landowner - Kevin and Jordan Blinco on 13 December 2011.
36. *City of Brisbane Act 1924 (CoB).*
37. *Local Government (Planning and Environment) Act 1990 (LGP&E).*
38. *Integrated Planning Act (1997) (IPA)*
39. *Sustainable Planning Act 2009. (SPA).*
40. *Building Act 1975.*
41. Building Code of Australia.

Findings of Fact

The Committee makes the following findings of fact:

- The subject site fronts Eagle Street on the western front title alignment and to the north on the site the adjoining neighbouring site falls steeply away from Eagle Street being the west to the east.
- Along the northern alignment there is a concrete block retaining wall on the boundary which is significantly damaged, but temporarily holding in place at the time of the site visit.
- The adjoining property to the north has not been filled and indicates the existing and natural fall of the land.
- To the rear of the subject site on the eastern title alignment which forms the boundary with the adjoining property being 38 Braeside Street, Alderley there was constructed two separate retaining walls. These walls have failed significantly and collapsed against the rear wall of the dwelling and against the pool, located on 38 Braeside Street, Alderley. This debris remains in place.
- Detailed reports have been included by engineers which describes the construction of these walls and nature of the damage.
- The site visit by the Committee to view the extent of the damage to and by the retaining walls, provided compelling evidence that the condition of the retaining walls are dangerous and in such a damaged and weakened state that they need to be demolished and rebuilt urgently as they will continue to fail causing significant damage to both the dwelling on the lower site being 38 Braeside Street and loss of fill and erosion to the subject site. With the failure of these retaining walls, it could further impact upon the existing sites to the north as additional retaining walls collapse.
- The Council through the issuing of the Enforcement Notices has recognised and acknowledged the danger caused by the failure of these retaining walls and needs to take the appropriate action to assist in the rectification of the danger through expedient processing of applications or issuing of penalties should this not be undertaken.
- There is no evidence of either designs or approvals, having been sought or granted for the construction of these retaining walls, nor for the subsequent fill which was located on the subject site and retained by the retaining walls.
- Due to the significant height of the retaining walls, purportedly up to 5m, and the requirement to retain significant fill on the subject site which is relatively as steep, it is required that the removal and reconstruction of the retaining walls be undertaken in accordance with the design, specification and certification of a RPEQ.
- The integrity of the retaining walls will be impacted by overland flow and stormwater and the design with any necessary easements for the proper dispersement of this water is to be in accordance with Council policy.
- Access is required across the subject and adjoining sites to enable the removal and reconstruction of the retaining walls. Both parties are to agree and ensure this is respectfully allowed and undertaken to ensure that the work is completed professionally and expediently.
- The fallen and damaged retaining wall has been fenced off on the subject site by the

Applicant who currently lives away from the site due to age and care needs and the site and dwelling are vacant.

- The owners of the adjoining property at 38 Braeside Street, Alderley are unable to use the rear of their site, rear rooms of their dwelling and swimming pool as the retaining walls have collapsed against these areas. These areas have been fenced off and in addition it has meant that the owners are unable to use a substantial part of their dwelling due to this damage and debris.
- The damage occurred during wet seasonal rains at Christmas 2010 and after the initial collapse and damage, has continued to collapse at a slower rate over the intervening period. With the current seasonal rains, it is expected that this could cause further collapse and damage if not rectified urgently.
- Material provided to the Committee has identified that a low concrete block retaining wall was constructed on the boundary alignment in the mid-1900s. At a later stage another concrete block wall was built on top of the soil, slightly behind the first wall and the subject site was then filled to the height of the combined retaining walls.
- Access to demolish and reconstruct the retaining walls would significantly be by access over the subject site as the dwelling at 38 Braeside Street, Alderley has only recently been constructed and there is not sufficient width either side of the building to allow for suitably large plant and equipment to manoeuvre through. However, the subject site which has been filled to the height of the retaining walls prior to their collapse, may not be suitable for large equipment to operate on and therefore may require the removal and reinstatement of the fill, subject to relevant Council approvals.
- The owners of the adjoining property at 38 Braeside Street, Alderley have had significant damage and loss of use on their property due to the collapse of the retaining walls. In addition it has had a huge emotional impact on the owners. They have indicated their willingness to cooperate with the removal and reconstruction of the damaged retaining walls on an urgent basis.
- The insurance companies of the Applicant and owners of the adjoining property at 38 Braeside Street currently are with the Magistrates Court for determination for insurance purposes. This decision by the Committee is separate to any Magistrates Court decision as it relates to the appeal against the Enforcement Notice only.

Reasons for the Decision

The Committee determined on the evidence given that there were sufficient and substantial evidence for the Enforcement Notice to be confirmed and enacted upon.

The evidence provided by the Applicant and their representative, engineered reports, site visit and discussions with neighbours who are being directly affected by the fallen and damaged retaining walls, clearly highlighted the need for the retaining walls and associated damage to be urgently rectified.

The retaining walls in the current state are dangerous to the persons and properties involved. While the areas have been fenced for the safety of people, there has been little, if any provisions put in place to ensure that the retaining walls do not continue to collapse. There are areas of the retaining walls where there is continued movement and collapse which requires remediation to alleviate further damage to adjoining property and persons.

The Council by issuing the Enforcement Notices have recognised and acknowledge that there is substantial danger to people and properties involved and with this, need to continue to act upon the Enforcement Notices to ensure that these dangers are alleviated. The Council can enact penalties should work not be undertaken to rectify the damage.

The Council is to cooperate and assist with the applications required by the Applicant and adjoining neighbours to ensure that the work can be carried out as a priority and in a professional manner.

In assessing the criteria for this appeal the Committee found that there was substantial evidence to support the Enforcement Notice as it had been issued based on the dangerous nature of the fallen and damaged retaining walls. The Enforcement Notice had been issued responsibly but had not been suitably enacted upon to protect the persons and properties involved and this should no longer be neglected but followed through with as the danger still exists and has the potential to become worse. In issuing the decision, the Committee has determined that the safety of persons and property is priority and every endeavour is to be made to protect them.

Building and Development Committee Chair
Georgina Rogers
Date: 15 February 2012

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 Local Government and Planning
PO Box 15009
CITY EAST QLD 4002
Telephone (07) 3237 0403 Facsimile (07) 3237 1248