



Development Tribunal – Decision Notice

Planning Act 2016, section 255

Appeal Number:	19-039
Appellant:	Julie Catherine Jensen and Christopher John Jensen
Respondent (Enforcement Authority):	Brisbane City Council
Site Address:	138 Enoggera Terrace, Paddington in the State of Queensland and described as Lot 1 on RP71331 – the subject site

Appeal

An appeal under section 229 and Item 6 of Table 1 of Schedule 1 of the *Planning Act 2016* (PA) against the decision of the Council to give an Enforcement Notice under section 248 of the *Building Act 1975* (BA) dated 31 August 2019, requiring the repair or demolition of a retaining wall that is located along the western boundary of the subject site that the Council considered was in a dilapidated condition.

Date and time of hearing:	10am, 29 October 2019
Place of hearing:	Subject site
Tribunal:	Samantha Hall – Chair Neil de Bruyn – Member
Present:	Appellant Chris Jensen – Appellant Les Simonsen – Lynskey Structural Consultants Pty Ltd Brisbane City Council Matthew Wightson – Compliance and Regulatory Services, Council Neil Dwyer – Built Environment Officer, Council (Delegate)

Decision:

The Development Tribunal (Tribunal), in accordance with section 254(2)(d) of the *Planning Act 2016* (PA) **sets aside** the decision of the Council to give the Appellant the Enforcement Notice dated 31 August 2019 relating to a retaining wall and **orders** the Council to **remake** the decision whether or not to give the Appellant any Enforcement Notice in relation to the wall and if so on what terms, within two months of receiving this decision notice.

Background:

1. This is an appeal about a retaining wall (retaining wall) located along the western boundary of the subject site abutting a Brisbane City Council (Council) footpath that connects Enoggera Terrace and Latrobe Terrace and is located within the Ithaca War Memorial Park (Park).
2. It is undisputed between the parties that the retaining wall is located on both the subject site and the Park, as demonstrated by a survey plan provided by the Council under cover of an email dated 1 November 2019.

The Show Cause Notice

3. The Council issued a Show Cause Notice to the Appellant dated 18 September 2018 (Show Cause Notice).
4. The grounds of the Show Cause Notice identified that the Council reasonably believed “that the retaining wall [did] not comply with the BA in that it ... [was] in a dilapidated condition”.
5. The Show Cause Notice referred to an inspection of the retaining wall carried out on 4 July 2018 by Ms Moreen Ma of the Council during which the Council identified:
 - (a) the retaining wall and fence was constructed with masonry blocks, measuring approximately 2.2m high and 24m long, with approximately 2.3m high pillars;
 - (b) the wall appeared to be retaining approximately 1m high of fill within the subject site with an approximately 1.2m high fence constructed of a combination of solid masonry blocks and breeze blocks;
 - (c) the retaining wall appeared to have rotated from the vertical and had a lean towards the footpath;
 - (d) the southern end of the wall had one pillar fractured in the mid-span; and
 - (e) the wall appeared to have no drainage system present.
6. The Show Cause Notice invited the Appellant to make representations to the Council on or before 5pm on 19 October 2018, as to why the Council should not issue an enforcement notice about the retaining wall.
7. The Appellant’s solicitor, Saal & Associates Lawyers, made representations to the Council on behalf of the Appellant by letter dated 31 October 2018 (Appellant’s representations).
8. The Appellant’s representations identified the following:
 - (a) the Appellant obtained an independent engineering report from Les Simonsen of Lynskey Structural Consultants Pty Ltd dated 26 October 2018 with respect to the retaining wall (engineering report);
 - (b) the Appellant accepted that the retaining wall was in a state of disrepair;
 - (c) the Appellant contended a legal principle that the entity who constructed a retaining wall retained the obligation to maintain, repair or replace it as necessary;
 - (d) the Appellant had not constructed the retaining wall and the Council had not provided any evidence that the previous owner of the subject site had constructed the retaining wall;

- (e) the engineering report concluded that the retaining wall was located on the Council's property and accordingly contended that the Council must have constructed the retaining wall;
 - (f) there was a fig tree located in the Park that affected and impacted upon the structural integrity of the retaining wall; and
 - (g) based on the above matters, the Appellant was not liable for nor required to rectify or replace the retaining wall and accordingly the Council should not issue an enforcement notice.
9. The engineering report concluded that while there was no specific evidence of the founding conditions on the site or the nature of the foundations of the retaining wall, the prime cause of the wall movement was rotation of the footing and that could have been caused by any of the following:
- (a) *"Poor quality underlying soil conditions and bearing capacities;*
 - (b) *An inadequately sized footing;*
 - (c) *Poor quality footing construction;*
 - (d) *Heaving caused by tree root growth."*
10. The engineering report referred to the following with respect to the footings for the retaining wall:
- (a) Excavation had been conducted down to the footing level, which revealed that there was no footing on the eastern side of the wall, however, a narrow strip of concrete was uncovered;
 - (b) This indicated that the footing was most likely on the non-retained or lower side of the wall, being that side located on the Council side of the property boundary;
 - (c) It was unusual for a retaining wall footing to be constructed outside the property boundary of an owner of the retaining wall and even less common where the adjoining owner was a local government;
 - (d) For these reasons, because the footing was on the Council's land, it concluded the retaining wall was the property of the Council;
 - (e) Further, the fig tree roots from the tree located in the Park had extended throughout the subject site and could be contributing to heaving along the east of the wall and subsequent rotation of the retaining wall to the west.

The Enforcement Notice

11. The Council's Enforcement Notice dated 31 July 2019 (the Enforcement Notice) the subject of this appeal, again referred to the inspection carried out by Ms Ma on 4 July 2018 that was referred to in the Show Cause Notice and provided further facts and circumstances which can be summarised as follows:
- (a) On 18 September 2018, the Show Cause Notice was issued to the Appellant seeking representations as to why an enforcement notice should not be issued;
 - (b) On 31 October 2018, the Appellant's representations were made;
 - (c) On 8 December 2018 and 6 June 2019, a Council officer carried out an external inspection of the subject site to determine compliance with the provisions of

Building Act 1975 (BA), which revealed the matters set out in paragraph 5 of the Show Cause Notice (and summarised in paragraph 4 of this decision);

- (d) The subject site directly adjoined the Park which was listed on the State Heritage Register;
- (e) On 23 June 2019, a search of the Council's historic building card records located records relating to an approval dated 10 October 1947 for a "concrete block wall retaining wall and fence" on the subject site. Those records identified a builder other than the Council as constructing the retaining wall and fence;
- (f) The Council considered the Appellant's representations and still considered it appropriate to issue an enforcement notice.

The appeal

- 12. The Appellant filed a Notice of Appeal (Form 10) with the Tribunal's Registrar on 27 August 2019.
- 13. The Appellant's Form 10 identified the Appellant's grounds of appeal which can be summarised as follows:
 - (a) The fact identified in the Enforcement Notice that the Appellant owned the retaining wall was an error;
 - (b) The Council did not attribute any liability to itself for the structural damage and impact upon the retaining wall, including heaving and rotation, that was caused by the fig tree located on the Council's property in circumstances where the fig tree had caused and continued to cause structural damage and impact upon the retaining wall;
 - (c) The Council failed to consider, or properly consider, the engineering report, including:
 - (i) the location of the footings for the retaining wall being on the western, Park side, which indicated that the retaining wall was constructed by, or on behalf of, the Council;
 - (ii) the extent of the fig tree root growth caused heaving and rotation to the retaining wall; and
 - (iii) the retaining wall was approximately 40 years old.
- 14. The appeal was heard by the Tribunal on 29 October 2019 from 10.00am.
- 15. On 29 October 2019, the Tribunal made the following orders that were communicated by the Tribunal's Registry to the parties by email (Orders):
 - 1. *The Council is to provide the following further information to the Registrar by email on or before 4pm on Friday 1 November 2019:*
 - (a) *A copy of the as-built survey plan showing the wall and the boundary between the subject site and the park;*
 - (b) *the information (drawings, photos, etc.) obtained and compiled by Council through its own excavations and investigations on the park side of the retaining wall;*
 - (c) *a copy of the building records search result(s);*
 - (d) *full details of the evidence upon which Asset Services concluded that the retaining wall is not a Council asset.*

2. *The Appellant is to provide the following further information to the Registrar by email on or before 4pm on Friday 1 November 2019:*
 - (a) *a copy of the plan that Les Simonsen was referring to, showing a typical section through a retaining wall design;*
 - (b) *a copy of the builder's estimate for a tiered retaining wall structure and fence to replace the existing retaining wall and fence;*
 - (c) *a copy of the Appellant's RTI search results.*

3. *The Council is to provide written submissions to the Registrar by email on or before 4pm on Wednesday 13 November 2019, which address the following:*
 - (a) *provides confirmation that relevant Council Officers from the Council's Asset Services branch and an arborist from the Council's Environment branch have conducted a site inspection of 138 Enoggera Terrace, Paddington (the subject site) and the adjoining Ithaca War Memorial and Alexander Jolly Park (park), in particular to examine:*
 - (i) *the retaining wall and fence located approximately on the common boundary between the subject site and the park from each of the sides of the park and the subject site; and*
 - (ii) *the extent of the tree root system from the large tree that is growing in the park which extends into the subject site;*

 - (b) *following the site inspection in paragraph (a), identify the Council's position and provide a detailed explanation and give evidence to support that position, with respect to:*
 - (i) *whether the Council or the Appellant owns the retaining wall and the fence;*
 - (ii) *the Council's obligations and responsibilities (if any) for damage caused to the retaining wall and the fence by the roots of the tree that is growing in the Council's park; and*
 - (iii) *whether the Council or the Appellant has the responsibility for the repair or the demolition and replacement of the retaining wall and the fence.*

16. By email dated 1 November 2019, Mr Neil Dwyer, Built Environment Officer of the Council provided the Council's further information pursuant to Order 1 of the Orders (Council's further information).

17. By email dated 1 November 2019, Mr Brett Saal, Principal of Saal & Associates Lawyers provided the Appellant's further information pursuant to Order 2(a) and (c) of the Orders (Appellant's further information). Mr Saal requested an extension of time for the Appellant to comply with Order 2(b) of the Orders.

18. The Tribunal agreed to the extension and on 11 November 2019, Mr Saal provided the Appellant's further information pursuant to Order 2(b) of the Orders (estimate).

19. By email dated 13 November 2019, Mr Glenn Davidson, Principal Officer Built Environment of the Council provided written submissions pursuant to order 3(a) of the Orders, which confirmed that a site inspection had been conducted by the Council's arborist and requested additional time to provide the Council's submissions pursuant to Order 3(b) of the Orders.

20. By email dated 15 November 2019, the Tribunal granted an extension to the Council to provide its submissions pursuant to Order 3(b) of the Orders on or before 4pm on Wednesday 11 December 2019.

21. By email dated 11 December 2019, Mr Davidson provided the Council's submissions pursuant to Order 3(b) of the Orders (Council's Submissions).
22. By email dated 10 January 2020, the Tribunals' Registrar on behalf of the Tribunal, invited the Appellant to make submissions in response to the Council's Submissions on or before 4pm on Friday 24 January 2020.
23. By email dated 23 January 2020, Mr Saal requested an extension of time for providing the Appellant's submissions of 1 week to on or before 4pm on Friday 31 January 2020.
24. By email dated 24 January 2020, the Tribunals' Registrar advised Mr Saal that the Tribunal had agreed to grant the extension sought.
25. By email dated 31 January 2020, Mr Saal provided the Appellant's submissions in response to the Council's Submissions pursuant to the Tribunal's email 10 January 2020 (Appellant's Submissions).
26. By email dated 2 March 2020, the Tribunal's Registrar advised the parties that upon receipt of the Appellant's submissions, the Tribunal proceeded to the preparation of its decision. However, in so doing the Tribunal identified some matters that it believed could be relevant to the decision but had not been addressed in the evidence or the submissions provided by the parties. Accordingly, the Tribunal made the following orders (Further Orders) that the parties make written submissions of a combined length of no more than 6 pages with respect to the following four matters (Further Submissions):
 - (a) provide confirmation as to whether a sketch plan prepared by the Council accurately identified the location of the retaining wall straddling the property boundary for the entire length of the retaining wall;
 - (b) who is the owner of the retaining wall having regard to the common law doctrine of fixtures;
 - (c) the impact if any, of their conclusion in respect of paragraph (b) on the application of section 248 of the Building Act 1975 and in particular the phrase "the owner of a building, structure or building work" in that section;
 - (d) the legal principles that apply for determining the responsibility of the respective owners of two adjacent parcels of land for maintaining and repairing a retaining wall straddling a boundary between the two parcels
27. The Council's Further Submissions were due by 5pm on 16 March 2020 and the Appellant's Further Submissions were due by 5pm on 30 March 2020.
28. By email dated 16 March 2020 received at 4.42pm, Mr Davidson provided the Council's Further Submissions.
29. By email dated 26 March 2020, Mr Saal requested an extension of time for providing the Appellant's Further Submissions of 1 week to on or before 5pm on 6 April 2020.
30. By email dated 26 March 2020, the Tribunals' Registrar advised Mr Saal that the Tribunal had agreed to grant the extension sought.
31. By email dated 6 April 2020 received at 4.45pm, Mr Saal provided the Appellant's Further Submissions.

Jurisdiction:

32. Schedule 1 of the PA states the matters that may be appealed to the Tribunal.¹
33. Section 1(1) of Schedule 1 of the PA provides that Table 1 states the matters that may be appealed to a tribunal. However, pursuant to section 1(2) of Schedule 1 of the PA, Table 1 only applies to a tribunal if the matter involves one of a list of matters set out in sub-section (2).
34. Section 1(2)(h) of Schedule 1 of the PA, relevantly refers to a decision to give an enforcement notice in relation to a matter under paragraphs (a) to (g). Paragraph (g) refers to a matter under the PA, to the extent the matter relates to the BA, other than a matter under the BA that may or must be decided by the Queensland Building and Construction Commission.
35. Section 248(5) of the BA, relevantly provides that an enforcement notice given under that section is taken to be an enforcement notice given under section 168 of the PA.
36. Accordingly, an enforcement notice given under section 248 of the BA, would come within section 1(2)(g) of Schedule 1 of the PA and consequently, also section 1(2)(h) of Schedule 1 of the PA.
37. So, Table 1 of Schedule 1 of the PA applies to the hearing of this appeal.
38. Under item 6 of table 1 of Schedule 1 of the PA, an appeal may be made against the decision to give an enforcement notice. The appeal is to be made by the person given the enforcement notice, who in this case was the Appellant and the Respondent to the appeal is the enforcement authority, who in this case is the Council.
39. Accordingly, the Tribunal is satisfied that it has the jurisdiction to hear this appeal.

Decision Framework:

40. The Enforcement Notice the subject of this appeal was issued by the Council on or about 31 July 2019. At that time, the PA was in force, as was the BA.
41. The Appellant filed a Form 10 – Appeal Notice on 27 August 2019.
42. The appeal is a PA appeal, commenced after 3 July 2017 under section 229 of the PA. As such, the appeal is to be heard and determined under the PA.
43. This is an appeal by the Appellant, the recipient of the Enforcement Notice and accordingly, the Council, being the enforcement authority that gave the Enforcement Notice, must establish that the appeal should be dismissed.²
44. The Tribunal is required to hear and decide the appeal by way of a reconsideration of the evidence that was before the Council which decided to give the Enforcement Notice the subject of this appeal.³
45. The Tribunal may (but need not) consider other evidence presented by a party with leave of the Tribunal⁴.

¹ Section 229(1)(a) of the PA.

² Section 253(3) of the PA.

³ Section 253(4) of the PA.

⁴ Section 253(5)(a) of the PA.

46. The PA provides the Tribunal with broad powers to inform itself in the way it considers appropriate when conducting a tribunal proceedings and may seek the views of any person⁵.
47. The Tribunal may consider other information that the Registrar asks a person to give to the Tribunal.⁶
48. Following the hearing of the appeal, by email dated 29 October 2019, the Tribunal made the Orders, asking the Council and the Appellant to provide further information. Both the Council and the Appellant provided the information sought by the Orders.
49. By email dated 10 January 2020, the Tribunals' Registrar, on behalf of the Tribunal, invited the Appellant to make submissions in response to the Council's Submissions to ensure that the Appellant was afforded natural justice in responding to the Council's Submissions. The Appellant's Submissions were provided to the Tribunals' Registrar by email dated 31 January 2020.
50. By email dated 2 March 2020, the Tribunal, via the Tribunals' Registrar, made the Further Orders, inviting the parties to make the Further Submissions. Both the Council and the Appellant provided the Further Submissions sought by the Further Orders.
51. The Tribunal is required to decide the appeal in one of the following ways set out in section 254(2) of the PA:
 - (a) *confirming the decision; or*
 - (b) *changing the decision; or*
 - (c) *replacing the decision with another decision; or*
 - (d) *setting the decision aside and ordering the person who made the decision to remake the decision by a stated time; or*
 - (e) *for a deemed refusal of an application:*
 - (i) *ordering the entity responsible for deciding the application to decide the application by a stated time and, if the entity does not comply with the order, deciding the application; or*
 - (ii) *deciding the application.*

Material Considered:

52. The material considered in arriving at this decision comprises:
 - (a) 'Form 10 – Appeal Notice', grounds for appeal and correspondence accompanying the appeal lodged with the Development Tribunals Registrar on 27 August 2019.
 - (b) An email dated 11 October 2019 from Mr Brett Saal, Principal of Saal & Associates Lawyers to the Development Tribunals' Registrar with attached expert engineering report from Lynskey Structural Consultants dated 26 October 2019.
 - (c) An email dated 1 November 2019 from Mr Saal to the Development Tribunals' Registrar with attached:

⁵ Section 249 of the PA.

⁶ Section 253 and section 246 of the PA.

- (i) copy of plan showing a typical section through a retaining wall design;
 - (ii) copy of the Appellant's right to information search results.
- (d) An email dated 1 November 2019 from Mr Neil Dwyer, Built Environment Officer of the Council to the Development Tribunals' Registrar with attached:
- (i) survey plan showing the boundary between the subject site and the Park;
 - (ii) a Geotechnical Observations Report prepared by the City Projects Office of the Council;
 - (iii) a Technical Note prepared by Daniel Sullivan, a Structural Engineer of the Council dated 14 March 2019;
 - (iv) a drawing titled "Approximate Test Pit Location for Boundary Wall" dated May 2019;
 - (v) a drawing titled "Asset Services Retaining Wall Stability 138 Enoggera Terrace Paddington Geotechnical Investigation Borehole Locations" dated May 2019;
 - (vi) the building card for the subject site showing that a block retaining wall was approved on 10 October 1947.
- (e) An email dated 11 November 2019 from Mr Saal to the Development Tribunals' Registrar with attached:
- (i) Copy of an estimate dated 11 November 2019 to remove the retaining wall and reinstate a fence and landscaping prepared by A.H. Done Builders.
- (f) An email dated 13 November 2019 from Mr Glenn Davidson, Principal Officer Built Environment of the Council to the Development Tribunals' Registrar providing confirmation pursuant to order 3(a) of the Orders that a site inspection had been conducted by the Council's arborist.
- (g) An email dated 11 December 2019 from Mr Davidson to the Development Tribunals' Registrar with attachments.
- (h) An email dated 10 January 2020 from MR Saal to the Development Tribunals' Registrar with attached:
- (i) Appellant's Submissions dated 31 January 2020;
 - (ii) report of Les Simonsen of Lynskey Structural Consultants dated 22 January 2020;
 - (iii) report of Craig Bauer of North Brisbane Trees dated 31 January 2020 (Arborist Report).
- (i) An email dated 16 March 2020 from Mr Davidson to the Development Tribunals' Registrar with the Council's Further Submissions attached.
- (j) An email dated 6 April 2020 from Mr Saal to the Development Tribunals' Registrar with the Appellant's Further Submissions attached.
- (k) *Planning Act 2016 (PA).*
- (l) *Planning Regulation 2017 (PR).*
- (m) *Building Act 1975 (BA).*

(n) *Property Law Act 1974 (PLA).*

Findings of Fact:

The Tribunal makes the following findings of fact:

The issues in dispute in the appeal

53. The Appellant's grounds of appeal are as follows:

1. *The fact relied upon by the Brisbane City Council's ("BCC") to issue an Enforcement Notice dated 31 August 2019, Reference CA124093 (the "Notice") to the Appellants is in error. That fact being that the Appellants own the retaining wall located on the common western boundary of the BCC's and Appellants' properties (the "Retaining Wall").*
2. *The BCC has given no consideration, and has attributed no liability to itself, for the structural damage and impact upon the Retaining Wall, including heaving and rotation, that has been caused by the fig tree located on its property in circumstances where the fig tree has caused and continues to cause structural damage and impact upon the Retaining Wall.*
3. *The BCC has failed to consider, or properly consider, the Structural Engineering Report obtained by the Appellants from Lynskey Structural Engineering Pty Ltd dated 26 October 2018, including:*
 - 3.1 *The location of the footings for the Retaining Wall are on the western, BCC, side, which indicates that the Retaining Wall was constructed by, or on behalf of, the BCC;*
 - 3.2 *The extent of the BCC fig tree root growth has caused heaving and rotation to the Retaining Wall;*
 - 3.3 *The current Retaining Wall is approximately 40 years old.*

54. The tribunal finds that the key question in this appeal is that of which party owns the retaining wall and, depending upon the answer to that question, whether the Enforcement Notice was lawfully given to the Appellant.

55. The grounds of appeal and the evidence given at the hearing and in the subsequent submissions by both parties also gave consideration to the impact of the roots of the large fig tree located within the Park, and whether they caused, or contributed to, the dilapidation of the retaining wall.

Ownership of the retaining wall

56. In respect of the question of ownership of the retaining wall, it is the Council that bears the onus to establish that the appeal should be dismissed.

Who built the retaining wall?

57. The Council's further information and the Council's Submissions addressed the question of ownership of the retaining wall from the perspective of who originally built the retaining wall, stating the following to support the contention that the Council had not built the retaining wall:

- (a) the style of the retaining wall, with the lower structure being of blockwork construction with decorative breeze blocks above, is not one that the Council would have used;
- (b) the absence of steel reinforcing in the structure was contrary to standard practice for a retaining wall built by the Council;
- (c) the encroachment of the retaining wall across the common boundary of the subject site and the Council's park indicates that the wall was not built by the Council, as the Council would have ensured that the retaining wall was correctly aligned and located within the Park lot only;
- (d) the retaining wall was not built as a retaining wall, but rather as a fence with a simple strip footing;
- (e) the purpose of the retaining wall was to retain earth located on the subject site and, as a retaining wall, it would have been constructed entirely for the benefit of the owner of the subject site, who must therefore be the owner of the wall;
- (f) the Queensland Heritage Register, in respect of the Ithaca War Memorial and Park, makes no mention of the retaining wall;
- (g) the retaining wall does not extend beyond the subject site itself to the adjacent property at 46 Latrobe Terrace; and
- (h) there are no similar walls on any of the other boundaries of the Park.

58. The Appellant's submissions followed a similar course, contending that:

- (a) it was common ground that the Appellant did not construct the retaining wall;
- (b) neither party, including the Council, was able to confirm who did construct the retaining wall;
- (c) the Council has an obligation to maintain building records and, in this case, the consequences of the absence of any record regarding who constructed the retaining wall should be the responsibility of the Council, and not the Appellant;
- (d) the retaining wall could well have been constructed by the entity that undertook the construction of the extensive works within the Park;
- (e) the reference by the Council, in the Enforcement Notice, to a building approval having been given in 1947 for a builder other than the Council to build a retaining wall on the subject site, does not confirm that the wall referred to was consistent with the retaining wall the subject of this appeal;
- (f) there is no evidence that the retaining wall benefits only the Appellant, given the relatively small volume of earth retained within the subject site by the retaining wall, and given that the retention of this earth also benefits the public pathway within the Park;
- (g) the cost of constructing such a substantial wall and fence to retain such a relatively small volume of earth within the subject site, indicates that an owner of the subject site would not have constructed the retaining wall;
- (h) there is no apparent benefit to the subject site or its owners arising from the retaining wall, which does not support any structures, works or improvements within the subject site, or create any level or usable ground;

- (i) the lack of any reference to the retaining wall in the Queensland Heritage Register is insufficient to support a conclusion that the retaining wall is owned by the Appellant;
- (j) the Council's statement that the retaining wall is not a Council asset because it does not extend beyond the subject site over the adjacent lot towards Latrobe Terrace was refuted, on the ground that this would not have been required given that the lower property had a rock retaining wall and timber fence that may well have been in existence prior to the construction of the retaining wall.

59. Following receipt of the Council's further information, the Council's Submissions and the Appellant's Submissions, the Tribunal proceeded to the preparation of its decision and in so doing was interested to understand whether the question of ownership of the retaining wall should have been answered not from understanding who built the retaining wall but instead from determining whose land the retaining wall had been built on, including a consideration of the common law doctrine of fixtures and the construction of section 248 of the BA.

60. As a consequence, the Tribunals' Registrar, on behalf of the Tribunal, made the Further Orders, inviting the parties to make the Further Submissions.

On whose land is the retaining wall constructed?

61. In response to the Further Orders, the Council's Further Submissions and the Appellant's Further Submissions both agreed that the:

- (a) plan titled "Sketch Plan of wall on the south western boundary of Lot 1 on RP71331 Locality of Paddington" prepared by the City Projects Office and circulated by the Council by email dated 1 November 2019, accurately indicated that the retaining wall straddles the property boundary for the entire length of the retaining wall and hence straddles both the subject site and the Park; and
- (b) retaining wall is a structure and is a fixture that forms part of the land on which it is attached (see *Holland v Hodgson (1872) LR 7 CP 328*).

62. Before addressing the remaining Further Submissions of the parties, the Tribunal notes that the Council's Further Submissions raised a contention that the retaining wall was in its view, an encroachment upon the Park within the meaning of the PLA.

63. As identified above, each party provided a number of reasons as to why the retaining wall wasn't constructed by them. The Tribunal however is not satisfied that any of these reasons provided clear evidence that either the Council or the Appellant (including a predecessor of the Appellant) constructed the retaining wall. In any event, the Tribunal's jurisdiction for this appeal is to consider the giving of the Enforcement Notice and not to exercise the powers of a Court under the PLA. For these reasons, the Tribunal has not made any decision with respect to the Council's contention about the retaining wall being an encroachment upon the Park.

64. The Council's power to give the Enforcement Notice is derived from section 248(1)(c) of the BA, which provides that a local government may give an enforcement notice to "*the owner of a building, structure or building work if the local government reasonably believes the building, structure or building work ... is in a dilapidated condition*".

65. Schedule 2 (Dictionary) of the BA relevantly defines "owner" of a building or structure to mean:

- (h) *“if the building or structure is on land granted in trust or reserved and set apart and placed under the control of trustees under the Land Act 1994—the trustees of the land; or*
- (i) *if paragraphs (a) to (h) do not apply—the person for the time being entitled to receive the rent for the building or structure or would be entitled to receive the rent for the building or structure if the building or structure were let to a tenant at a rent.”*

66. In this appeal, the parties agreed that the retaining wall straddled the property boundary between the subject site and the Park and that as a fixture, it is owned by the person who owns the land upon which it has been constructed.

67. This is supported by general property law, in particular that with respect to party walls, which are similar structures to the retaining wall in this appeal. The Tribunal considers that the following passage from “The Law of Real Property” by Megarry and Wade, 8th Ed. (London Weet & Maxwell 2012) at page 1, 354 (para 30-043) is relevant:

“As a general rule ownership of a party wall follows the ownership of the land upon which it is built. There is therefore a presumption that, where a wall between adjacent properties is constructed so that the median line follows the boundary, ownership of the wall is split longitudinally between the two landowners.” [citations omitted]

68. The parties’ Further Submissions both considered the decision in *Gold Coast City Council v Lear & Anor* [2016] QDC 215 (Lear case) and the Tribunal found the following summary provided in the Appellant’s Further Submissions particularly useful:

“(d) The decision in Gold Coast City Council v Lear & Anor was an appeal from an earlier decision from the Magistrates Court and dealt with an Enforcement Notice given pursuant to section 248 of the Building Act.

(e) Gold Coast City Council v Lear & Anor:

(i) Related to a timber sleeper retaining wall that straddled the boundary and was partly on land owned by each owner.

(ii) Was given to each owner in identical terms.

(iii) Did not identify which part of the retaining wall that was relevant to, and to be rectified by, each owner.

(iv) Created a trespass upon an owner who attempted to rectify the retaining wall by way of accessing the other owner’s land to do so.

(v) Submissions were made by the respondents with respect to Coco v R (1994) 179 CLR 427 in relation to the tort of trespass and that any legislative power of an authority, i.e. the GCC pursuant to section 248 of the Building Act, to require an owner to engage in what otherwise would be tortious conduct must be expressed in unmistakable and unambiguous language.

(f) The decision in Gold Coast City Council v Lear & Anor found, inter alia, at paragraph 13, that:

“The Enforcement Notice directed the respondents to unlawfully carry out work on the land of their neighbour Ms Nicholas and it was therefore, as the magistrate correctly found, defective.”

69. The Council’s Further Submissions only address the decision in the *Lear* case by trying to distinguish it from this appeal by contending that as this appeal involves unallocated State

land, the principles expounded cannot apply. However, the Tribunal considers that this is not a valid reason for distinguishing the case because by virtue of section 2(1) of the BA, section 248 of the BA binds all persons including the State and accordingly, applies to State land equally as it applies to freehold land.

70. Accordingly, for the purposes of issuing an enforcement notice pursuant to section 248(1)(c) of the BA, where a retaining wall straddling a boundary is in a dilapidated condition, the Tribunal finds that the Council should have:
- (a) issued the Enforcement Notice to both the owner of the subject site and to the owner of the Park; and
 - (b) identified the specific work that was to be undertaken by:
 - (i) the owner of the subject site on that part of the retaining wall located on the subject site; and
 - (ii) the owner of the Park on that part of the retaining wall located on the Park.
71. The subject site is freehold land that the Tribunal understands is registered in the names of the Appellant. Accordingly, the Appellant would be the person entitled to receive the rent for that part of the retaining wall that is constructed on the subject site, should it be let to a tenant at a rent (e.g. for the display of a sign or the like).
72. Definitive evidence of the owner of the Park has not been provided to the Tribunal. The Council's Further Submissions suggest that the Park is unallocated State land, however, it is the Tribunal's understanding that the Park has also been identified in other evidence as road reserve. In any event, both scenarios mean that the Park is owned by the State of Queensland. Identifying the nature of the State's ownership is relevant for the purposes of the definition of "owner" in the BA. If the Park is indeed road reserve, then it is likely held by the Council in trust and therefore the Council, as the trustee of the Park, would be the owner for the purposes of that definition in the BA.
73. As the retaining wall is constructed on both the subject site and the Park, the Tribunal finds that it is owned by both the Appellant and the owner of the Park, whether that be the Council or the State. Accordingly, the giving of the Enforcement Notice to the Appellant only, was unlawful and the Enforcement Notice should be set aside.

Potential impact of the fig tree roots

74. In relation to the issue of whether, or not, the root system of the large fig tree within the Park had caused, or contributed to, the dilapidation of the retaining wall, the Council's Submissions contended that:
- "Council's obligations and responsibilities for property damage caused by Council tree roots are set out in the Civil Liability Act 2003. If a person suffers property damage or loss because of negligence, they may make an insurance claim against Council or if they believe the damage or loss is because of negligence, make a civil claim for damages.*
- Council cannot say with certainty the roots haven't had a detrimental effect on the structure. However, Council does submit that the tree roots would not have had any affect (sic) or impact on the structure's integrity if it was designed and constructed as a retaining wall to the appropriate standard. It is worth noting there was no indication of the tree roots damaging the asphalt pathway."*
75. In regard to this issue, the Appellant's Submissions identified that should the Tribunal find that the Appellant owns the retaining wall, the Appellant intends to make a civil claim against the Council for the damage that the tree is causing.

76. In relation to the question of the impact of the tree roots, and having considered the evidence provided by both parties on this issue in the appeal, the Tribunal finds that it is beyond the scope of the Tribunal's jurisdiction to decide an issue of negligence, and make any determination as to appropriate compensation for any negligence that may have occurred on the part of the Council in its management of the tree's roots. Further, while some evidence was provided by both the parties about this issue, the Tribunal considers that both parties would need to provide further evidence, including expert opinion, once a cause of action was properly articulated.
77. By way of comment, and based on the Arborist Report provided by the Appellant, the Tribunal considers that there is some merit in the Appellant's contention that the roots of the fig tree located in the Park, have at least contributed to the dilapidation of the retaining wall the subject of this appeal.

Reasons for the Decision:

Ownership of the retaining wall

Who built the retaining wall?

78. Both the Council and the Appellant's evidence addressed the question of ownership of the retaining wall from the perspective of who originally built the retaining wall.
79. Further, both parties contended that they had not built the retaining wall, each for a number of reasons but neither of them was able to provide conclusive evidence as to who constructed the retaining wall.
80. Following the Tribunal's consideration of this evidence, the Tribunal sought further evidence from the parties to explore the question of ownership of the retaining wall not from the perspective of who built it but instead from determining whose land the retaining wall had been built on.

On whose land is the retaining wall constructed?

81. Both the Council and the Appellant agreed that:
- (a) the retaining wall straddles the property boundary for the entire length of the retaining wall and hence straddles both the subject site and the Park; and
 - (b) the retaining wall is a structure and a fixture that forms part of the land on which it is attached.
82. Section 248(1)(c) of the BA, provides the power for the Council to give the Enforcement Notice to "the owner" of the retaining wall.
83. The definition of "owner" in the BA, includes:
- (a) the trustee of land, where the relevant structure is located on land granted in trust; and
 - (b) the person entitled to receive the rent for the structure if the structure were let to a tenant at a rent.
84. The Tribunal is satisfied that general property law and case law supports a finding that ownership of the retaining wall rests with the person who owns the land upon which the retaining wall is located.

85. The Tribunal finds that ownership of the retaining wall is split between the owner of the subject site and the owner of the Park, with each person owning that part of the retaining wall located on their land.
86. The Enforcement Notice should therefore have:
- (a) been issued to both the owner of the subject site and to the owner of the Park; and
 - (b) identified the specific work to be undertaken by each owner upon that part of the retaining wall located on their land.
87. The Appellant is the owner of that part of the retaining wall that is constructed on the subject site, being the person entitled to receive the rent for that part of the retaining wall that is constructed on the subject site, should it be let to a tenant at a rent.
88. The owner of the Park is the owner of that part of the retaining wall that is constructed on the Park. Definitive evidence of the owner of the Park has not been provided to the Tribunal. The evidence suggests that the Park is either owned by the State of Queensland as unallocated State land or as road reserve. If it is road reserve, then it is likely held by the Council in trust and therefore the Council, as the trustee of the Park, would be the owner for the purposes of the definition in the BA.
89. The Tribunal therefore finds that as the retaining wall is constructed on both the subject site and the Park, the retaining wall is owned by both the Appellant and the owner of the Park, whether that be the Council or the State and the Enforcement Notice should have been addressed to both owners.
90. The giving of the Enforcement Notice to only the Appellant, was unlawful and the Enforcement Notice is set aside.

Potential impact of the fig tree

91. Having considered the evidence provided by both parties, the Tribunal finds that it is beyond the scope of the Tribunal's jurisdiction to decide an issue of negligence, and make any determination as to appropriate compensation for any negligence that may have occurred on the part of the Council in its management of the roots of the tree located in the Park.

Demolition and replacement of the subject wall

92. As a final comment, the Tribunal has been presented with evidence that the retaining wall does not include adequate reinforcing and footings and this evidence is not in dispute between the parties.
93. As a result of concerns about the stability of the retaining wall and the safety of pedestrians using the adjoining public path located within the Park, the Council erected temporary fencing between the retaining wall and the path. It is not in dispute between the parties that the retaining wall is at risk of imminent collapse, the only contention being with respect to how soon that will occur.

94. Given this undisputed risk, the Tribunal suggests that the retaining wall needs to be demolished and lawfully replaced, preferably wholly within either the subject site or the Park. It is undisputed between the parties that the retaining wall is inadequately designed and built and does not meet industry acceptable standards for a retaining wall, given the lack of sufficient reinforcing and footings. As such, from the evidence given in this appeal, the Tribunal does not consider that the retaining wall is capable of repair in a manner that will effectively and safely overcome these shortcomings.

Samantha Hall
Development Tribunal Chair

Date: 11 May 2020

Appeal Rights:

Schedule 1, Table 2 (1) of the *Planning Act 2016* provides that an appeal may be made against a decision of a Tribunal to the Planning and Environment Court, other than a decision under section 252, on the ground of -

- (a) an error or mistake in law on the part of the Tribunal; or
- (b) jurisdictional error.

The appeal must be started within 20 business days after the day notice of the Tribunal decision is given to the party.

The following link outlines the steps required to lodge an appeal with the Court.

<http://www.courts.qld.gov.au/courts/planning-and-environment-court/going-to-planning-and-environment-court/starting-proceedings-in-the-court>

Enquiries:

All correspondence should be addressed to:

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