



## Development Tribunal – Decision Notice

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### **Planning Act 2016**

<b>Appeal Number:</b>	<b>21- 057</b>
<b>Appellant:</b>	Lorraine Fay Hennessy
<b>Respondent: (Enforcement Authority)</b>	Sunshine Coast Regional Council
<b>Site Address:</b>	11B Queen Street Moffat Beach and described as Lot 29 on RP 127302 - the subject site

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### **Appeal**

Appeal under section 229 and schedule 1, sections 1(1) and 1(2) and table 1, item 6, of the *Planning Act 2016* (“the PA”) against the enforcement authority’s decision to give an enforcement notice under the *Building Act (Qld) 1975* (“the BA”) and section 168 of the PA, alleging the Appellant was the owner of a dilapidated retaining wall.

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<b>Date and time of hearing:</b>	10.00 am 20 April 2022
<b>Date and Time of Inspection:</b>	10.00 am 20 April 2022
<b>Place of hearing:</b>	11B Queen Street Moffat Beach
<b>Tribunal:</b>	Mark Chapple – Chair Michael Pickering – Member
<b>Present:</b>	Michael Cossa – representing the Appellant Sandro Cossa – representing the Appellant Peter Chamberlain – representing the Respondent Greg Roberts - representing the Respondent
<b>Material Provided after Hearing</b>	After the hearing, the appellant provided photographs and buildings design drawings as directed by the Tribunal. The Appellant also provided a submission which the Respondent was invited to respond to and the Respondent advised it did not wish to make any submission.

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## **Decision:**

The Development Tribunal ('the tribunal'), in accordance with section 254(2)(c) of the *PA* replaces the decision of the enforcement authority to give the enforcement notice with a decision to not give the enforcement notice and to set the enforcement notice aside.

## **Background**

1. The Appellant is the owner of the subject site.
2. The Respondent is the Enforcement Authority for the Local Government Area where the subject site is located.
3. The subject site adjoins Lot 30 on RP 127307 which is number 11 Queen Street, which is on the eastern side of the subject site.
4. The land around the subject site and 11 Queen Street slopes to the east and the land 11 Queen Street is generally lower than the land at the subject site.
5. Between the eastern side of the house at the subject site and the western side of the house at 11 Queen Street there is a retaining wall "the retaining wall".
6. By way of a Customer Request to the Respondent date stamped 17 February 2020 the owner of 11 Queen Street raised concerns about the retaining wall with the Respondent.
7. The Respondent gave a Show Cause Notice to the Appellant dated 4 March 2020 on the premise that the Appellant was the owner of the retaining wall and that the wall was in a dilapidated condition.
8. The Respondent gave a Show Cause Notice to the Appellant and PB and AM Morton the owners of 11 Queen Street dated 14 April 2020 on the premise that the retaining wall was dilapidated and that both the owners of the subject site and 11 Queen Street gained proportionate benefit from the retaining wall.
9. The Respondent gave an enforcement notice to the Appellant of 11 October 2021 alleging that the Appellant was the owner of the retaining wall which was dilapidated.
10. The Enforcement Notice required the Appellant to either replace or repair the wall or remove the wall and otherwise stabilize the embankment.
11. The Enforcement Notice recites that "On 19 July 2021, the Respondent withdrew the enforcement notice against the owner of Lot 30 as Council investigations identified that the retaining wall was owned by and is the responsibility of the owner/s of Lot 29". The Tribunal has not been supplied with any enforcement notice given to the owners of 11 Queen Street.

## **Material Considered**

The material considered in arriving at this decision comprises:

1. 'Form 10 – Appeal Notice', grounds for appeal material lodged with the Tribunals Registrar on 14 October 2021.
2. Enforcement Notice from the Sunshine Coast Regional Council to the Appellant, 11 October 2021.
3. Email Peter Chamberlain to Sandro Cossa 11 October 2021 including earlier series of email correspondence.
4. Site Investigation and Foundation Recommendation Cardno Davies 30 June 1992.
5. Email Sandro Cossa to Peter Chamberlain 10 October 2021 including earlier series of email correspondence.

6. Undated correspondence from Sandro and Michael Cossa.
7. Undated correspondence between persons Michael and Brett with ground level profiles.
8. Email from Michael Cossa (from account Jacinta Cossa) to Phil and Anne of 4 August 2021.
9. Email Peter Chamberlain to Phillip Morton 7 July 2021 including earlier series of correspondence.
10. Email Peter Chamberlain to Phillip Morton and others 14 March 2021 including earlier series of email correspondence.
11. Email Phillip Morton to Carole Popple and others 1 March 2021 including earlier series of email correspondence.
12. Drawing JTC Consulting Engineers 20084 (4 Sheets).
13. Tax Invoice JTC Engineers 1 March 2021.
14. Email Phillip Morton to Sandro Cossa 7 March 2021.
15. Email Phillip Morton to Peter Chamberlain 11 January 2021.
16. Report JTC Consulting Engineers to Phillip Morton 14 December 2020.
17. Email Peter Chamberlain to Phillip Morton and others 22 October 2020 including earlier series of email correspondence.
18. Email Peter Chamberlain to Phillip Morton and other 22 October 2020 including earlier series of email correspondence.
19. Geotechnical Soils Report 4 September 2020.
20. Email Phillip Morton to Sandro Cossa 4 October 2020.
21. Email Peter Chamberlain to Phillip Morton and Sandro Cossa 12 August 2020 including earlier series of email correspondence.
22. Email Peter Chamberlain to Phillip Morton and Sandro Cossa 2 July 2020 including earlier series of email correspondence.
23. Unity Water Detailed Sewer Water Plan
24. Caloundra City Council Constructed Plan of House Connection.
25. Unity Water Detail Infrastructure Map.
26. Letter Unity Water 9 June 2020.
27. Email Carol Popple to Sandro Cossa 21 May 2020.
28. Email Peter Chamberlain to Sandro Cossa 14 April 2020.
29. Show Cause Notice Sunshine Coast Regional Council to LF Hennessy and to PB and AM Morton 14 April 2020.
30. Email Peter Chamberlain to Phillip Morton and Sandro Cossa 17 April 2020 pages 1 and 2 of 4.
31. Email Sandro Cossa to Peter Chamberlain and Carol Popple 9 April 2020.

32. Response to Show Cause Notice from LF Hennessy (undated).
33. Show Cause Notice from Sunshine Coast Regional Council to LF Hennessy 4 March 2020.
34. Photograph – height difference Lot 28 – Lot 29.
35. Photograph – lot 30 pool.
36. Aerial view photographs depicting 11B Queen Street and 11 Queen Street x 3.
37. Email Sandro Cossa and Michael Cossa to Development Tribunals 21 April 2022.
38. Email Peter Chamberlain to Development Tribunals 26 April 2022.
39. Sketches x 2 prepared on behalf of the Appellant
40. Design Drawings for house at 29 Queen Street
41. Customer Request Form from Phillip Morton to Sunshine Coast Regional Council date stamped 17 February 2020 with photographs.
42. Encroachment Notice from Saunders Havill Group Licenced Surveyors to LF Hennessy 27 January 2016.
43. Plan of Identification Survey Saunders Havill Group
44. Sketch Plan of Wall Saunders Havill Group.
45. Report Roy B Hoskins and Assoc Structural and Civil Engineers to Phillip Morton 11 January 2016.
46. Photographs of the western side of the house at 11 Queen Street x 4.

Any attachments to emails do not form part of the material considered unless the attachments are individually listed above.

### **Tribunal's Jurisdiction**

Schedule 1 of the PA states the matters that may be appealed to the Tribunal.

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).

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.

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.

The matter is not one which must be decided by the Queensland Building and Construction Commission.

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.

So, Table 1 of Schedule 1 of the PA applies to the hearing of this appeal.

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.

Accordingly, the Tribunal is satisfied that it has the jurisdiction to hear this appeal.

### **Decision Framework:**

- For this appeal, the onus rests with the Respondent as Enforcement Authority to establish that the appeal should be dismissed (section 253(3) of PA).
- The tribunal is required to hear and decide the appeal by way of a reconsideration of the evidence that was before the person who made the decision appealed against (section 253(4) of PA); however, the tribunal may nevertheless (but need not) consider other evidence presented by a party with leave of the Tribunal or any information provided under section 246 of PA.
- The tribunal is required to decide the appeal in one of the ways mentioned in section 254(2) of the PA and the tribunal's decision takes the place of the decision appealed against (section 254(4)).

### **Findings of Fact**

The Tribunal finds that:

1. A retaining wall existed on or near the common boundary of the subject site before the construction of houses on either the subject site or 11 Queen Street. The Tribunal notes that one of the photographs in item 36 of the Material Considered depicts a wall on or near at least part of the common boundary. The Tribunal also had regard to the appearance of the age of the wall.
2. The house at 11 Queen Street was built prior to the house on the subject site. The Tribunal notes that one of the photographs in (item 36 of the Material Considered) depicts a house at 11 Queen Street next to vacant land at the subject site.
3. The house at 11 Queen Street has been built to take advantage of the ground level allowed by the existence of the retaining wall.
4. The retaining wall is located partially on land at the subject site and at 11 Queen Street. The Saunders Havill Group Plan of Identification Survey (Item 43 of the Material Considered) and the Saunders Havill Group Sketch Plan of Wall Location (Item 44 of the Material Considered) show the parts of the wall found to be on the subject site and 11 Queen Street according to their measurements.
5. The retaining wall is in a dilapidated condition. The Tribunal had regard to its own observations of the wall and the comments in the report of Roy B Hoskins and Assoc. in item 45 of the Material Considered and the report from JTC Consulting Engineers in (item 16 of the Material Considered). The Tribunal notes that it was not argued at the hearing that the wall was not dilapidated.

## Reasons for Decision

The BA section 248 (3) provides that before a person is given an enforcement notice they must be given a show cause notice meeting the requirements of BA section 247 (1) (a) to (f) with the period provided in BA section 247 (2).

The Respondent gave the Appellant a Show Cause Notices dated 4 March 2020 address to the Appellant alone and gave a Show Cause Notice addressed to the Appellant and the owner of 11 Queen Street dated 14 April 2020. The Enforcement Notice (item 2 of the Material Considered) is premised on the Show Cause Notice of 14 April 2020.

The Show Cause Notice of 14 April 2020 satisfies the requirements of BA Section 247 (1) (a) to (e). The Show Cause Notices required that written representations were to be given by 5.00pm Friday 30 April 2020 which is less than the 20 business days required by BA section 247 (2). The Tribunal notes that 30 April 2020 was a Thursday, not Friday as stated in the Show Cause Notice of 14 April 2020.

The Tribunal notes that a Show Cause Notice dated 4 March 2020 was given to the Appellant however as the Show Cause Notice of 14 April 2020 is the later in time and the one upon which the Enforcement Notice is premised the Tribunal finds that it is the Show Cause Notice of 14 April 2020 the notice which is relevant for determining compliance with BA Section 247 (2). In the circumstances the Tribunal finds that the Enforcement Notice was not issued in compliance with BA section 248 (3) as a Show Cause Notice complying with BA section 247 was not given.

BA section 248 (1) provides that a local authority may give an enforcement notice to “*the owner of a building, structure or building work if the local authority reasonably believes the building structure of building work*” is of the type described in BA section 248 (1) (a) to (f). Relevantly one of the types is that described to subsection (c) “*is in dilapidated condition.*”

The Tribunal finds that the retaining wall is a structure within the meaning of the BA.

BA section 249 provides the types of things an enforcement notice may require a person to do.

Throughout the history of the matter including prior the lodgement of the appeal the parties have given considerable consideration and argued over which land benefits from the retaining wall with a view to determining who had the responsibility to maintain and repair it.

One of the arguments put the Respondent was that a house could have been built on the natural ground levels at 11 Queen Street without a retaining wall.

The Appellant’s arguments included the benefit the land at 11 Queen Street had in the form of level yard area and improved drainage because of the retaining wall.

The Dictionary in Schedule 2 of the BA provides a definition of the word owner for the purpose of the BA. Subparagraphs (a) to (h) provide who is owner in particular circumstances and sub paragraph (i) provides:

*“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”*

While noting that a party wall performs a different function to a retaining wall 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 helpful: “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]

The Tribunal notes the decision of his honour Judge Everson in *Gold Coast City Council v Lear & Anor* [2016] QDC 215. The case involved a timber sleeper retaining wall that straddled the boundary of two properties. The Council issued identical Enforcement Notices to the owners of the land on each side of the wall which would have required them to trespass on the land of the other to comply with the notice. The enforcement notices were found not to be valid.

The Tribunal finds that it is not the party who owns the land which benefits from the retaining to whom the Enforcement Notice should be given but the owner of the wall. The Tribunal has made findings about the house at 11 Queen Street benefiting from the ground levels created by the retaining wall, but it is relevant only to the extent that it goes to establish ownership.

The Tribunal is satisfied that general property 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. While it may be difficult to imagine any commercial demand for a lease of the retaining wall one example is that if tenants were found wanting to lease the retaining wall for signage each the owners would be able to let that part of the wall on their side of the boundary.

The Tribunal finds that ownership of the retaining wall is split between the owner of the subject site and the owner of the 11 Queen Street, with each person owning that part of the retaining wall located on their land.

The Enforcement Notice was given only to the Appellant and not the owner of 11 Queen Street and as result was not given to the owner as required by the BA section 248 (1).

The Tribunal finds that the Appeal should be allowed as:

1. the Enforcement Notice was not issued in compliance with BA section 248 (3) as a Show Cause Notice complying with BA section 247 was not given.
2. The Enforcement Notice was not given to the “owner” as required by BA section 248 (1).



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**Mark Chapple**

**Development Tribunal Chair**  
**Date: 8 June 2022**

## **Appeal Rights**

Schedule 1, Table 2, item 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:

The Registrar of Development Tribunals  
Department of Energy and Public Works  
GPO Box 2457  
Brisbane QLD 4001

**Telephone (07) 1800 804 833**

**Email: [registrar@epw.qld.gov.au](mailto:registrar@epw.qld.gov.au)**