WEIR
Legal & Consulting

CITY OF MELVILLE
REVIEW OF COMPLAINTS
BUILDING AND PLANNING

Bronwyn Weir

Director, Weir Legal & Consulting

FINAL REPORT

DATE: 17 September 2021

Contents

Introduction and Summary of Findings

This review was commissioned by the Council following a resolution that the City arrange for an independent review of complaints related to building and planning issues. The objective was to review the City's customer interactions and make recommendations for improvements. [redacted] and his wife [redacted] and [redacted] and his partner [redacted] were chosen as complaints. When referring to [redacted] in the report we note that he acts on behalf of himself and [redacted] Each of the couples had made several complaints about planning and building matters over recent years.

Process and Scope of Review

The scope of the issues for review was determined having regard to initial submissions made to me by [redacted] and [redacted] in December 2020 and January 2021. The City disputed the scope of matters presented by [redacted] and it was agreed that from the initial submissions I would prepare detailed summaries. Within these I proposed questions for review. Once agreed, [redacted] and [redacted] were given an opportunity to submit further material which they did by early March 2021.

Further refinements to the summaries and questions were made. The City were then given 4 weeks to provide its submissions on the summaries. The City made several requests for further time and all of the City's submissions were received by 30 June 2021. [redacted] and [redacted] provided their replies to the City's submissions by the end of July 2021.

As part of the review the reviewer met with representatives from the City, [redacted] and [redacted] Detailed notes of all meetings were taken and shared. I also met with representatives from Building and Energy. A confidential summary of the notes of that discussion was also provided to the parties.

A draft report was shared to provide an opportunity for comments. Those comments have been considered with various edits made to the draft report.

Overarching comments in relation to the [redacted] complaints

The [redacted] complaints related to a [redacted] development approved under the Canning Bridge Activity Centre Plan (**CBACP**) on the property neighbouring [redacted] family home. [redacted] and [redacted] are adamant that the development does not comply with the CBACP and should not have been approved. They have also made numerous complaints about construction management and traffic management issues as the development has been built. The complaints reflect concerns for public safety, damage to their home and health impacts from uncontrolled dust and debris emanating from the development site.

Whilst I have not agreed with all of [redacted] complaints, I consider [redacted] and [redacted] have acted reasonably and that the impacts they have experienced are real and concerning. In some cases, the complaints they have made are valid but the position of the City reflects the limitations of the Building Act, at least in the way it has been interpreted by SAT and Building and Energy.

There is no doubt that from a planning perspective the development has and will have a significant impact on neighbouring properties. However, this impact appears to be an inherent, and to a large extent an inevitable, consequence of the approval of the CBACP. It is difficult for [redacted] and [redacted] to accept this. They consider the overarching objectives of the CBACP were to maintain a sense of community and mitigate impacts and that this has not occurred.

Developments approved under the CBACP are not subject to a right of review to SAT. The fact that there is no right of review for objectors creates a significant responsibility on the City to ensure that the processes it follows to consider and approve development applications are transparent and fair. Further, the merits of decisions to approve applications must be sound. This means that the standard of applications must be high and it must be demonstrable to those impacted that the application documents show clearly that all requirements of the CBACP have been met.

There will always be conjecture about whether a development meets the CBACP. This is because in some respects the requirements of the CBACP are outcomes based making them less prescriptive and open to interpretation and judgement. If the City does not conduct itself to the highest standard in assessing compliance against the CBACP, in the absence of review rights, the community may lose confidence in the decisions of the City.

In relation to the specific complaint about the assessment of the development application and whether the development complies with the CBACP, I have found there were errors in the application documents and that some issues should have been resolved more fully before the approval was issued. Except for the issue concerning the mezzanines, I do not believe the inadequacies in the application material were material to the decision that was made to approve the development application.

On the question of whether the mezzanines should have been treated as a storey, I have preferred the interpretation that they were a storey. However, in doing so, I have said that that alternative interpretation taken by the City has merit and that the City acted reasonably in taking that position given the ambiguity and given it obtained external legal advice (which I have not seen). I also note that notwithstanding that there are arguably 5 storeys in the development, it meets maximum height restrictions. Therefore, in all likelihood, if the City had not allowed the mezzanines (or required a varied mezzanine design), the overall impact of the development on [redacted] may not have been significantly different.

In relation to complaints about construction management and traffic management, the City's management of these issues has not been adequate. The only version of the Construction Management Plan I have reviewed does not meet the requirements of the planning approval and as a result there is no evidence of a clear and responsible plan for the management of the impacts of construction. There has been some traffic management by the builder, however, I accept the evidence of [redacted] that there have been frequent instances where traffic management has not been undertaken, presenting an unacceptable risk to the community. [redacted] and [redacted] have been refused a copy of the Traffic Management Plan or any updated Construction Management Plans. The failure to make these sorts of documents available to residents impacted by a development like this is unreasonable.

I have recommended the City urgently develop Construction and Traffic Management Guidelines and related materials for publication on its website. In doing so I note that several local councils around Australia have good examples of these documents. The City should also resource a construction and traffic management enforcement team to respond promptly and effectively to construction and traffic management issues. In my view, this is a responsibility of the City that is inextricably linked to the proper implementation of planning policies such as the CBACP.

In relation to issues which go to adverse impacts on adjoining properties and the role of the City when assessing applications for building approval, I have found that the City acted in accordance with the prevailing interpretations on these issues found in the SAT case of *Miller and the City of Melville* and on guidance from Building and Energy. I have noted that these interpretations of the rights of adjoining owners and the role of local government under the Building Act appear to be at odds with the vision for the scheme when the Bill was introduced into the Parliament of Western Australia in 2011. The orderly implementation of planning policies that seek to encourage mid to high density development is not helped by a scheme which does not afford protection to the rights of property owners adjoining multi-unit developments. The confidence of the public in the building control system is also not helped by interpretations of the scheme which amount to an abrogation of the role of local government to private building industry participants. It is concerning that the City sees its role in overseeing and ensuring compliance with building standards as limited to administration and reliance on certificates from others. However, I understand that this is the prevailing view of local government in Western Australia and therefore any shift to this culture will need to be driven by state government, if there is any mind to do so.

Overarching comments in relation to the properties at [redacted] and [redacted]

The complaints I have considered relating to [redacted] are in 3 groups. Two of these concern his family home in [redacted], the third relates to a former rental property he once owned in [redacted]. It has always been apparent that the issues within the scope of my review are a subset of the complaints that [redacted] has raised with the City.

The amount of material supplied to me by [redacted] for my review has been astonishing. He has drafted written submissions in excess of 140 pages, there are numerous slide packs comprising over 150 pages of commentary, photographs and document extracts. In addition to these submissions, [redacted] has provided me with approximately 3000 pages of documents and almost 10 hours of audio or video recordings. At one point I advised [redacted] that I intended to exclude from my review material that I considered out of scope. In doing so I identified the material excluded in a marked folder. I took a very conservative approach to what I excluded. This amounted to over 600 pages of material and 5 hours of audio or video recordings. In addition to his material. I have also had more than 10 hours of Zoom meetings with [redacted]

[redacted] has informed me that 'I have so much material that can evidence my position on many things; you have seen a small fraction.'

The City advised in its submissions that if it conducts a search of its electronic records of documents for '[redacted] there are over 8,500 documents, many of which are several pages. If there is an average of 10 pages per document, this amounts to 85,000 pages of material relating to [redacted] complaints. [redacted] advises that based on his own records he has had over 3000 emails exchanges with the City and Counsellors. Obviously, the material in [redacted] and the City's records concerns all of his complaints and communications, many of which are not within the scope of my review. However, it gives an indication of the enormity of time and effort that both [redacted] and the City have spent on [redacted] complaints, FOI applications and requests. It also reflects a deep and troublesome relationship that is exceptional. I have observed that on both sides of the relationship positions have been taken that have been unreasonable and without merit. The City has made mistakes and acted unreasonably or been ineffective on some matters. There are also many instances where the City has taken a reasonable position open to it which [redacted] has refused to accept, leading to [redacted] reagitating issues over and over again. He has often recast his complaint to focus on the conduct of individuals claiming they are incompetent, corrupt, misleading, wilful, dishonest and deceitful. [redacted] also complains that he has been unfairly described as an unreasonable complainant, bullied, intimidated and had his character impinged. These sorts of allegations compound to create what can only be described as a toxic relationship.

[redacted] will say that this is not an equal relationship. He says that the City as a public authority must be beyond reproach, transparent, ethical and reasonable at all times. They must act in the public interest and protect the community. He is right. However, this does not mean that [redacted] should be held to a lower standard of reasonableness and should be able persistently refuse to accept decisions the City has properly made. It does not mean that [redacted] is entitled to relentlessly demand that the City respond to his issues absorbing more time than is warranted relative to the City's obligations to other ratepayers and to matters which have a greater public interest than those advanced by [redacted]. [redacted] appears to have little regard for the disproportionate impact his complaints and demands have on the City's resources.

I can see that the City has made attempts to 'draw a line in the sand' by taking a position on certain issues and saying it will not take any further action or engage further on an issue. [redacted] refuses to accept that the City is entitled to do this. He is mistaken.

[redacted] appears to believe that the City has a duty to take enforcement action including prosecution in relation to any breach of a building permit or demolition permit or any offence under the Building Act. As a general proposition, the exercise of any enforcement powers or functions by local councils or any other regulators remains at the discretion of the decision maker. It is not the case that the City has a duty to take enforcement action in response to every breach it becomes aware of. The City has a discretion not only on whether to prosecute but also when to issue orders or take other actions in response to breaches of legislation for which they have enforcement responsibility. The City's Enforcement and Compliance Policy is consistent with good practice, although I have recommended it be reviewed in relation to escalation of enforcement responses and communication with complainants about legal proceedings.

Several of the matters I have considered have been the subject of reviews by other bodies such as SAT, the WA Ombudsman's office, Building and Energy, the Building Services Board and the Public Service Commission. The City has also obtained external legal advice on a number of issues. In some cases [redacted] has been satisfied with some or all aspects of decisions of these bodies and he is keen for me to accept those decisions in my review. In many cases, he has not agreed with these decisions. He says that the decision maker did not have all relevant information, did not take enough time to hear from him or review his material, did not have the technical knowledge required to understand the issues or that he was not given a chance to comment on material submitted by others. [redacted] also claims that City officers have misled or misrepresented facts to these other bodies. [redacted] has provided me with considerable material relating to types of these allegations despite the fact that I determined that such allegations would not form part of my review.

Considerable time was taken to set a clear process for this review through a consultative process. This was intended to ensure my independence, transparency and fairness to all involved. That process has been followed. I have carefully considered the decisions of other bodies in my review. I note that in some cases two bodies have considered the same issues and come to different conclusions. I have most certainly given [redacted] a fair opportunity to be heard and present his case in detail. He has also had an opportunity to respond to the material provided by the City and review records of my meetings with them. I have expertise in building and planning regulation matters and the powers and functions of local governments generally. I have reviewed all of the material [redacted] has provided to me to the best of my ability. In making my findings I have looked at the intricacies of the issues and also considered them more holistically. Whilst both [redacted] and to a lesser extent, the City have referred to matters outside the scope of my review, I have treated this as background noise but am aware that the broader context impacts on the issues I am considering.

I do not find that as a result of the matters I have reviewed the actions of the City in relation to [redacted] can necessarily be inferred as reflecting a broader public safety or community issue. In fact, in the earlier stages of the interactions I have considered, the City acted entirely appropriately. It would appear that where mistakes have been made or where the City has been reluctant to act more effectively on alleged breaches by [redacted] neighbours, this has been a position taken after many months of interactions with [redacted] This is not intended as an excuse but it is a potential explanation for some of the findings I have made against the City.

I have concluded in this report that the City has acted unreasonably or made mistakes. In some cases this was already conceded by the City. The City has delayed taking appropriate responses for long periods and at times, it has been difficult to work out what responses they have taken as they sometimes have not advised [redacted] of the outcomes of his complaints. I have found the City has not always acted in accordance with findings and sensible advice from Building and Energy. This is particularly so regarding the issuing of retrospective building approvals in relation to the screen fence at [redacted] and in relation to [redacted] These mistakes and actions are unacceptable and the City needs to reflect on its mistakes and my findings, learn from them and continually improve.

Notwithstanding the City's conduct, the nature of the complaints does not warrant the time and resources that [redacted] has demanded of the City. The complaints that are the subject of this review largely relate to issues impacting [redacted] and his family. They predominantly relate to boundary structures and disputes [redacted] has with his neighbours where he believes the City must exercise its powers to advance his legal rights against his neighbours. They are not matters of public interest or safety and as noted above, because of the unique relationship between [redacted] and the City, I am not able to conclude that any unreasonable conduct of the City that I have found to have occurred is evidence of broader dysfunction.

[redacted] has referred me to examples of cases where the City has prosecuted or issued orders where fences or walls have been constructed higher than approved in planning or building permits. [redacted] asserts that this shows the City to be inconsistent in its enforcement decisions. That may be the case but on the material I have I cannot draw that conclusion.

In relation to the complaints about [redacted] the underlying and compounding factor has been the relationship between the two neighbours and their dispute about their boundary fence. [redacted] demands of the City entangled it in his civil dispute where it made errors and tried to extract itself by not keeping [redacted] well informed and by making the least serious enforcement responses it could to resolve alleged ongoing breaches by the neighbours. However, I find that [redacted] plays a role in his dissatisfaction by reason of his own actions and his at times unreasonable expectations of the City.

As the relationship between [redacted] and the City continued to deteriorate over the [redacted] complaints, the issues concerning [redacted] and the temporary fence on [redacted] arose. The already fractured relationship was bound to set the tone for the interactions between the City and [redacted] on these other matters and, no doubt on several others that are not the subject of my review.

A way forward

I have been asked to set out my recommendations for the City to assist it to improve its process and decision making going forward. My recommendations are as follows:

1. The City should review its policy on the initial notification of development applications where the CBACP applies and consider revising it to ensure that those notified are told they if they wish to make a submission, their submission will be considered and they will be informed of relevant process that they can participate in. (see question 1A)

2. The City should provide an explanation to [redacted] and [redacted] of:

    a. why the impact of visitor parking and overflow parking from residents from the [redacted] development did not need to be considered in the Traffic Impact Report; and

    b. how the City took into account the stated objective of the CBACP 'To ensure that adequate vehicle parking and access is provided for multi-storey development, ensure that off-street parking is linked to pedestrian routes and to ensure car parking and servicing activities to not dominate the street (page 37 of the CBACP). (see questions 4A and 5A)

3. The City should not include conditions like condition 14 of the [redacted] permit in their planning approvals and instead state more clearly that the approval provides for the use of site sheds and other structures on site to enable construction but that an application for a permit for materials on the verge may be made. (see question 13A)

4. The City should prepare an information sheet for the public about permits for materials on the verge including:

   a. their purposes and when they are issued;

   b. that the City is inclined to issue them to enable construction to occur on sites where there are large developments; and

   c. setting out the kinds of conditions that are imposed to mitigate impacts on safety and the community.

   The information sheet should also state clearly that adjoining neighbours are not consulted as part of the application process. (see question 13A)

5. As a matter of priority, the City should develop Construction Management Plan and Traffic Management Guidelines and related documents in consultation with a range of stakeholders including community representatives. (see question 14 A and 15A)

6. The City should resource a construction management compliance team that can respond promptly to complaints and work with the community and industry to address breaches of construction management plans and traffic management plans. (see question 14 A and 15A)

7. The City should review the enforcement mechanisms available to it to respond to non-compliance with approved construction management plans and traffic management plans. This may include the development of dedicated local laws with provision for the issuing of infringements, notices, orders or offences that may be prosecuted. (see question 14 A and 15A)

8. The City should complete its review of all ramps within its municipality that may be non-compliant due to the previous misinterpretation of the relevant Australian Standard by the City without delay. The City will also need to provide for any future maintenance plan, for example to ensure signage and footpath markings are maintained over the longer term. (see question 20A)

9. The City should advise [redacted] of the outcome of his complaints regarding the following allegations concerning [redacted]

   a. the unauthorised spa and lack of safety barrier around the spa (see question 15B);

   b. the stone deck around the pool constructed without a building permit (see question 16B);

   c. the non-complying ground levels and fence heights required under planning approvals issued by the City. (see question 12B).

10. The City should take steps to require the outer side of the screen fence at [redacted] to be finished to the extent necessary having regard to the proposed construction of a fence

by [redacted] on [redacted] (which may remove the need for some or all of the [redacted] screen fence to be finished on the outer side facing [redacted]). This may require the City to insist on [redacted] and [redacted] availing themselves of the processes under the Dividing Fences Act or other legal processes to reach agreement on the way that the screen is to be finished. (see question 14B)

11. If Building and Energy amend its information sheet on works affecting adjoining property, the City should immediately change its practices and require BA20 consent or court order in any circumstances where building work 'may affect adjoining property'. This should include situations where:

    a. a half of a duplex is proposed to be demolished (see question 5C); and

    b. excavations for basement construction are proposed close to boundaries (see question 22A).

    The City should err on the side of requiring BA20 consent so as to encourage transparency and cooperation between adjoining owners.

12. Consistent with the advice of Building and Energy, the City should require owners that wish to demolish half of a duplex dwelling to apply for a building permit to demolish as well as a building permit in relation to the make good works.(see question 5C).

13. The City should amend its Complaince and Enforcement Policy to include:

    a. commentary on its approach to escalating enforcement action. This might include a policy for escalating the enforcement response where:

        i. the conduct of an alleged offender is repetitive or ongoing and is giving rise to an unacceptable risk to health or public safety; and

        ii. the alleged offender has been educated, requested to comply, issued warnings or notices to comply and has failed to do so without reasonable excuse;

    b. a policy on its communication with complainants when enforcement action is taken and where there are appeals or proceedings relating to those actions. The intention is to provide complainants with an opportunity to attend or initiate their own actions if they choose to do so and to leave it up the relevant court or Tribunal to manage the actions of complainants. (see questions 2B, 3B and 4B).

14. Where a person applies to the City for a BAC for retrospective approval of building work, and where it has been alleged or it is suspected that the subject work may be non-compliant, the City should undertake a substantive review of the application material and conduct its own inspection of the work to confirm the documentation is consistent with as built conditions and the work appears to be compliant with applicable building standards. Where the City does not have the resources, it should engage an independent consultant to undertake the checks of the application material and/or conduct the inspection.

15. Where there is a failure to comply with a building permit or demolition permit or applicable building standards during construction and the owner is required to provide a

new design or a CDC or CBC (new material), the City should undertake a substantive review of the new material and conduct its own inspections to confirm the non-compliance is remedied. Where the City does not have the resources, it should engage an independent consultant to undertake the checks of the new material and/or conduct the inspection.

Abbreviations and Acronyms

The following acronyms and abbreviations are used in this report:

BA20	An approved 'Notice and request for consent to encroach or adversely affect' form to ensure compliance with s77 of the Building Act.
BAC	Building Approval Certificate
Building Act	*Building Act 2011 (WA)*
Building and Energy	Department of Mines, Industry Regulation and Safety (Building and Energy)
CBACP	Canning Bridge Activity Centre Plan
CBC	Certificate of Building Compliance
CDC	Certificate of Design Compliance
CMP	Construction Management Plan
City	City of Melville
Councillors	Elected Councillors of the City of Melville
Dividing Fences Act	*Dividing Fences Act 1961* (WA)
FOI	Freedom of Information
[redacted]	[redacted]
JDAP	Joint Development Assessment Panel
NCC	National Construction Code
RAR	City of Melville Responsible Authority Report

SAT	State Administrative Tribunal
TMP	Traffic Management Plan
Traffic Impact Report	Traffic Impact and Parking Assessment Report

Summary of findings – [redacted] Complaints

Question 1A: Whether the City acted reasonably and appropriately in notifying and corresponding with [redacted] about the proposed development, during the period from when the development application was lodged in late 2016 to the JDAP meeting on [redacted]?
I find in its initial interactions with [redacted] the City acted in accordance with the policies that applied. The informal letter dated 17 January 2017 was consistent with the City policy which did not require information to be given about the JDAP process given the nature of the application. However, it is not reasonable for the City to have a policy that does not require people to be told about a process that they may participate in. In relation to the queries raised by [redacted] after the 17 January letter, the City responded both in person and in writing, including responding to [redacted] letter to the [redacted] dated 24 February on 17 March 2017. These responses were reasonable, timely and appropriate.

Question 2A: Was the City's characterisation of the 'mezzanines' in the development as mezzanines rather than storeys reasonable? **Question 3A:** Whether the City's consideration of and communication with [redacted] about its interpretation of the CBACP in relation to this issue was appropriate and reasonable?
On balance I have concluded that under the CBACP the mezzanines at the development are a storey. I therefore conclude that the City's characterisation of the areas in the intermediate space on the ground level of the development as mezzanines rather than storeys was incorrect. Notwithstanding that I have preferred the interpretation that the mezzanines were storeys, I find the City's communication with [redacted] and [redacted] in relation to this issue has been appropriate and reasonable. The City's refusal to accept [redacted] complaint based on its legal advice was a reasonable position for it to take.

Question 4A: Whether the Traffic Impact Report was correct and adequate and, following on from that, if the City acted appropriately in not referring to the errors in the RAR?

I do not believe the errors in the Traffic Impact Report were material to its conclusions. This does not mean that the City should not have required the errors to be fixed when they were pointed out by [redacted]

Question 5A: Whether the City acted appropriately in its response to the concerns raised by [redacted] about the alleged errors in the Traffic Impact Report?

The City's response to [redacted] on these issues was not reasonable. Until this review the City provide no response to [redacted] and [redacted] on their specific claims or any explanation of why the report was accepted with errors in it.

Question 6A: Whether the content of the RAR was adequate and appropriate having regard to the issues raised about residential density, bicycle parking and waste management?

Question 7A: Whether the City's actions were appropriate and reasonable with respect to compliance with the following requirements of the planning approval:

(a) 30 bicycle parking bays;

(b) tree protection to be provided around street tress prior to commencement of the works; and

(c) waste management.

I conclude that content of the RAR was adequate. However, the following matters in the application materials were inadequate:

(a) errors in the Traffic Impact Report;

(b) the drawings should also have included levels, cut and fill and retaining wall information (see question 8A and 9A).

I do not believe these matters were material to the outcome of the application. However, ensuring the quality of applications is of a high standard goes to the adequacy of the process, transparency and good decision making. It also helps interested persons to understand the impact the development will have on them which is a legitimate part of the planning approval process.

Question 8A: Whether the initial plans included adequate information about the change to ground levels and retaining walls?

Question 9A: Whether the City acted appropriately and reasonably in its communication with [redacted] and [redacted] about the approval of retaining walls, fence heights and ground levels?

I accept that [redacted] and [redacted] were not able to tell clearly from the plans submitted with the development application what boundary fence and retaining structures were proposed and that they were not fully informed about these issues until after the development commenced.

I believe this information should have been required to be included in the application.

I conclude that the City acted appropriately and reasonably in its communication with [redacted] and [redacted] about the approval of retaining walls, fence heights and ground levels once these issues arose after the building permit has been issued in 2020.

Question 10A: Whether the City approved a change to allow the rear basement wall to be along the boundary for the majority of its length and if so, whether the process followed to approve the change to the basement wall location was in accordance with policy and procedure and was appropriate?

I find the City approved a change to allow the rear basement wall to be along the boundary for the majority of its length (which is uncontested) .

I find no evidence that the change resulted in a change in levels and accept the City's explanation that the change did not require consultation or notification to neighbouring property owners. I therefore find the City acted appropriately in relation to this matter.

Question 11A: Whether the CMP met the conditions of the planning approval and should have been recommended for approval by the City ?

It was not reasonable for the City to approve the CMP as it did not meet the conditions of the planning approval.

It is inappropriate for the City to approve the CBACP which allows for significant amount of multi storey construction in a residential area, without being willing to actively manage the impacts of construction on the community. It is unacceptable for the City to say that they don't have the resources or that it is the responsibility of WorkSafe or the builder to manage these issues.

Question 12A: Whether the CMP ought to have been updated and if so, was it updated?
The City should have required the CMP to be updated and its failure to do so is unreasonable.
Question 13A: Whether the City acted appropriately and reasonably in issuing permits or otherwise allowing facilities or structures to be placed on the verge?
I find the City did not act reasonably in relation to the issuing of permits for materials on the verge in that it mismanaged the expectations of [redacted] and [redacted] about the potential for the builder to apply for and be granted a permit to store materials and buildings on the verge.
Question 14A: Whether the City acted appropriately and reasonably in relation to the implementation and enforcement of the CMP, including in communicating with the builder and [redacted]? **Question 15A:** Whether the City responded promptly and appropriately to the various complaints raised by [redacted] including whether its investigation of the complaints and interactions with the builder were timely, reasonable and appropriate?
Whilst the City has responded to some complaints from [redacted] its actions have not prevented repeated construction and traffic management issues from occurring. I therefore conclude the City has been ineffective in its enforcement of these issues. Unfortunately this is not surprising given the absence of a CMP that properly articulated the agreed and approved ways in which construction was to be managed. Given [redacted] has not been provided with the approved TMP, I cannot express a view on whether that document is adequate in its content or has been complied with. However, I find that there has been inadequate traffic management which should have resulted in more effective enforcement action by the City.

Question 16A: Whether the City acted reasonably and appropriately in determining that the exit ramp was compliant before December 2019 (noting that the City later conceded it was not compliant)? **Question 17A:** Whether the City acted reasonably and appropriately in corresponding with [redacted] and [redacted] about the matter?

It was not reasonable that it took the City almost 3 years to seek independent advice and concede that the ramp design drawings did not comply with the relevant standard.

It was not reasonable for the City to rely on the builder's engineer in the circumstances where an important safety concern was raised and where, if the City were incorrect (which it was) this would have ramifications for the safety of other developments in the municipality.

Question 18A: Whether the City should have issued the building permit for the work on [redacted] given the certification by the private building surveyor and the non-compliant ramp design?

Condition 18 of the planning approval was not met and therefore building permit should not have been issued by the City approving the ramp design given the design did not comply with the relevant Australian Standard.

Question 19A: Whether the exit ramp is now compliant, noting the most recent correspondence between a City planning officer and the builder?

The City insists that the exit ramp is now compliant and says officers have inspected.

Question 20A: What actions the City has taken to investigate the alleged non-compliant ramps at other addresses put forward by [redacted]

The City advises, in summary:

(a) it gathered information about sites where the ramps had been approved;

(b) it inspected all sites and assessed the ramps against its revised interpretation of the relevant Standard;

(c) where construction had not commenced, it required amended plans; and

(d) where construction had commenced it has liaised with and continues to liaise with owners to arrange mitigation measures such as mirrors, signs, flashing warning lights, footpath markings, and demarcation of pedestrian path or cross over.

It appears the City did not appreciate the importance of this question in making their initial submissions to this review. It is not an excuse to say 'that they were approved and constructed in accordance with approved plans.' This does not make them safe and compliant. Any such approvals were in error and bring great risk legal to Council if there is an injury or fatality due to the unsafe condition of these ramps.

Whilst I am relieved to hear that actions have been taken by the City to mitigate safety and legal risks, I note the additional submissions from [redacted] and [redacted] which suggest the actions have been inadequate to date.

Question 21A: Whether the City acted reasonably and appropriately in issuing the approval for the building work without requiring BA20 consents to be obtained?

Question 22A: Whether the City acted reasonably and appropriately in:

(a) issuing the amended approval for the building work?

(b) not requiring BA20 consents to be obtained before amending the building permit?

(c) not meeting with [redacted] to explain the proposed stabilisation work?

Question 23A: Whether the City's actions against and communications with the builder about the initial excavation, amended building permit and subsequent stabilisation works were reasonable and appropriate?

Question 24A: Whether the City acted reasonably and appropriately in its response to complaints about the excavation made by [redacted] between early January 2020 and 11 June 2020?

Whilst the City could have been more proactive in its oversight of the revised basement wall design and inspection of the work, it had no duty to do so. The position of the City is consistent with the comments made in the Miller case about the role of councils and on that basis, I must conclude that the City acted reasonably in relation to the revised design and construction of the basement wall.

In relation to the issue of a BA20. The City acted in accordance with the advice from Building and Energy that unless the building work, once completed, will adversely affect adjoining property, a BA20 consent is not required. Having received a report from an engineer that there would be no adverse effect on [redacted] and [redacted] property, the City acted reasonably in issuing the building permit without requiring a BA20.

In relation to the refusal to provide [redacted] with access to the revised engineering drawings the City acted in accordance with the Building Act.

The City's refusal to meet with [redacted] and [redacted] to talk to them about the revised design and give them some assurance is unfortunate but understandable. It would have been difficult for the

officers to discuss the matter without providing them with the revised design details which the builder had refused to give them access to.

Summary of findings – [redacted] Complaints

Question 1B: Whether the City responded appropriately and reasonably to the initial complaints about the limestone wall leading up to and including its decision to issue the building order on [redacted]?

The City acted appropriately in responding to the initial complaints of [redacted] about the limestone wall.

The initial delay was not ideal. However, there was no evidence that the wall was in danger of collapse. Having regard to the risk and the intervening end of year holiday period, the timeframe of 6 months was in my view reasonable.

Question 2B: Whether the actions of the City relating to the SAT proceeding and its consent to the orders made by SAT on [redacted] were appropriate and reasonable?

Question 3B: The extent to which the City informed [redacted] about the proceeding or sought comments from [redacted] and his wife [redacted] prior to agreeing on consent orders?

Question 4B: If the City did not involve [redacted] or [redacted] the basis on which that's approach was taken and whether it was reasonable in the circumstances?

I consider the actions of the City during the SAT hearing to be appropriate and reasonable. The City's [redacted] advised the Tribunal of the issue of the encroachment. He told it of [redacted] strong objection to the repair of the wall and refusal to give access to his property for repair of the wall.

It is uncontested that [redacted] was not told about the hearing, did not attend and consequently there was no communication with him or [redacted] during the hearing before the orders were made. Notwithstanding this, the City's approach was appropriate. I am satisfied that the Tribunal was informed of [redacted] position and nevertheless took the view that the issues of encroachment were for a different proceeding.

Whilst I consider the City's actions at the SAT hearing to be appropriate, I believe that with hindsight and the benefit of knowing how this matter has unfolded (which could never have been predicted at the time of the SAT hearing) it would have been prudent for the City to inform [redacted] about the proceeding and give him an opportunity to attend, seek to intervene or take any other action he chose to respond to the submissions put to the Tribunal by the City and [redacted]

Question 5B: Whether the actions of the City in response to the complaints about trespass, safety, lack of consent or building approvals for the repair work were appropriate and reasonable?

I find that the City should have inspected the limestone wall repair works given the concerns raised by [redacted] about safety. However, as it transpired there was no injury to any person, wall collapse or other event causing damage that [redacted] had feared would occur when he emailed the City on 23 May 2013. Therefore, the failure to inspect was of no consequence.

I do not consider City had an obligation to act on the alleged trespass and its decision not to do so was supported by legal advice later received.

Question 6B: Whether the actions of the City in agreeing to issue a building order for demolition of the wall based on encroachment was appropriate and reasonable?

I have concluded that it was open to the City not to issue an order to demolish the wall. The fact that it did was a reasonable outcome from the perspective of [redacted] However, the time it took for the City to receive and respond to the ongoing complaints, seek advice and make this decision was excessive.

This delay was unsatisfactory for not only [redacted] but also [redacted] who since undertaking the repair works 12 months earlier must have believed that they had met the City's requirements.

Question 7B: Whether the actions of the City in relation to the SAT review of the second building order were appropriate and reasonable including its interactions with [redacted] and [redacted] (or the legal representatives) prior to and at the mediation hearing?

I find that generally the actions of the City in relation to the SAT proceeding were appropriate and reasonable including its interactions with [redacted] and [redacted] (or their legal representatives) prior to and at the mediation hearing.

Question 8B: Whether the City's decision to accept that the demolition of the limestone wall and footings complied with the conditions on the demolition permit was appropriate and reasonable?

I find the City's decision to accept that the demolition of the limestone wall and footings complied with the conditions on the demolition permit was appropriate and reasonable.

Although [redacted] was about 1 month late in complying with the SAT's orders, the delay was over the end of year holiday period and in my view, it was not a significant delay or worthy of any enforcement action by the City.

Question 9B: Whether the City's actions in response to complaints about the steel framed screen were appropriate and reasonable?

It was not reasonable for the City to deny that building approvals were required for the screen fence. It was not reasonable for that denial to continue over 15 months. The City only conceded its error after persistent complaints by [redacted] and I am satisfied the City would not have otherwise taken action to ensure the fence had the required approvals.

I conclude that the City acted reasonably in response to the complaint that was made by [redacted] about the structurally adequacy of the screen fence when he presented his first report from an engineer.

Consistent with the findings of Building and Energy that the decision to issue the CBC was not appropriate, it was not reasonable for the City to accept the report from [redacted] engineer

about the construction of the screen wall and the drawings which purported to show the as built conditions.
Question 10B: Whether the City's actions in response to complaints about the remnants of retaining wall were appropriate and reasonable?
Whilst I agree with [redacted] that the retaining structures were non-existent or inadequate resulting in gaps, soft spots and unretained soil, I do not agree that the demolition permit for the limestone wall required retaining walls to be constructed.
Question 11B: Whether the City's actions in response to complaints about non-compliant ground levels at [redacted] were appropriate and reasonable? **Question 12B:** Whether the City's decision to issue a retrospective planning approval for the 'front fence' was appropriate and reasonable?
I find the City's action to issue a retrospective approval to confirm the as built fence heights was unreasonably slow (taking 2 years) and that it has failed to inform [redacted] of its response to his complaints about this issue. I find the decision to issue the retrospective approval to regularise the as built fence conditions in June 2017 was a necessary enforcement response. The conditions were as built for several years so by issuing an approval it did not result in any works to change the fence heights or pool deck height. As much as breaches of height restrictions on a planning permit should not be readily tolerated, it would have been unreasonable for the City to require [redacted] to lower the level of this whole area and the associated fences when they had been in place for so long.
Question 13B: Whether the City's decision to issue a Building Approval Certificate for the steel framed screen fence and remnants of retaining wall was appropriate and reasonable?
Building and Energy have found that the [redacted] acted inappropriately in issuing the CBC for the timber deck and screen fence. It follows that the City's decision to issue the BAC was not appropriate or reasonable.
Question 14B: What action, if any, could or should the City now take in relation to the steel framed screen fence, remnants of retaining wall and levels relating to [redacted]
In relation to the screen fence and deck, the City has advised that the necessary approvals have now been issued. I have not seen these documents but find that the approval of the screen fence and renting structures was unlikely to have been reasonable based on the as-built condition.

The City should write to [redacted] explaining its response to his complaints and recent actions in relation to these matters.

As I am not privy to the issues relating to the wall [redacted] proposes to build on his land, I do not know whether the need for retaining and finishing of the screen wall remains. Subject to these issue, the City should also seek to enforce condition 2 of the 2017 planning approval. It would appear that [redacted] have not made an adequate effort to comply with condition 2. They may use the Dividing Fences Act to seek a resolution to this issue if they need to.

Question 15B: Whether the City's actions in response to complaints about the adequacy of the swimming pool barrier whilst the new steel framed screen was under construction were appropriate and reasonable?

I find the City was responsive to [redacted] complaints about the pool barrier. The City inspected frequently and it observed that the pool barrier was non-compliant several times. It chose to request these issues be addressed either verbally or with work orders and was satisfied with the response. The City chose not to escalate to infringement notices or prosecution. These decisions were open to the City initially. However, my view is that the pool barrier issues continued for too long.

I find that the exercise of discretion not to issue and infringements or escalate its enforcement response after allowing a reasonable time for [redacted] to comply was unreasonable. In making this finding I do not take the view that [redacted] should necessarily have been prosecuted. My view is that the City should have acted to ensure more secure temporary fencing, closing of gaps etc. If this was too difficult, the City should have required the pool to be temporarily decommissioned until a complying barrier was in in place.

Question 16B: Whether the City's actions in response to complaints about the unauthorised installation of the spa were appropriate and reasonable?

I conclude the City acted unreasonably in response to complaints about the unfenced spa. It was not appropriate to allow the spa to remain without a complying pool barrier on the basis that it had no water in it when the City visited. The City's acknowledgement that action should have been taken and its action to require retrospective approval is welcomed. However, the delay in resolving this issue was not reasonable.

Question 17B: Whether the City's actions in response to complaints about replacement of the timber deck with a stone deck were appropriate and reasonable and what the current status of that response is?

Question 18B: Whether the City's actions in relation to complaints about noise and light spill between 7pm and 7am were reasonable and appropriate?

Question 19B: Whether the City's prosecution of [redacted] in relation to the Noise abatement notices and Infringement Notice issued between [redacted] and [redacted] was reasonable and appropriate? Including:

(a) the number and scope of charges laid in the prosecution?

(b) the decision to withdraw 8 charges and proceed on one charge about one incidence of excessive noise at 8pm on [redacted]

(c) information given to [redacted] about the prosecution.

In relation to the stone deck around the pool, on the basis of the City's advice that the paving has now been issued with a BAC, I find the enforcement action appropriate. However, it appears to have taken 3 years for this issue to be resolved which is not reasonable. It also appears that the City have not notified [redacted] of the outcome of his complaint. They should do so without delay.

The City's actions to issue an infringement and 23 noise abatement notices in response to the noise complaints was reasonable, so was its decision to prosecute given the egregious nature of the allegations.

In relation to the charges for breach of noise abatement notices, I cannot say the decision to proceed on only one charge was not warranted given I was not privy to discussions with the [redacted] lawyers and the potential defences that may have been proposed. However, I don't agree with the characterisation of the outcome as representative of the 9 charges laid. I am also critical of the fact that charges were not laid sooner to deter [redacted] from continuing with this alleged behaviour while works were taking place.

Question 20B: Whether the City's actions in response to the complaints investigated by Building and Energy were appropriate and reasonable?

Question 21B: What actions the City has taken in response to the findings by Building and Energy relevant to this review and what the current status of that response is?

I find the City has not acted reasonably in its actions relating to the approval of the screen fence either in [redacted] or more recently. The findings of Building and Energy in 2020 were evidently that the retaining structure under the screen fence was inadequate. Based on the photographs, the as built condition of the retaining wall does not reflect the drawings that were approved when issuing both the [redacted] retrospective planning approval and the [redacted] BAC.

I have found above that the City was not required to compel [redacted] to build retaining walls as part of the demolition permit issued in 2015. I maintain that view. However, in constructing their new boundary fence, even if it was entirely within her boundary [redacted] was required to build a structure that would properly retain the soil.

When the City conceded that an approval was required, it became squarely its responsibility to ensure the fence was appropriate. What has been built is not appropriate and the City should not have accepted a CBC from any building surveyor. I refer to the Miller case where SAT found that a council could refuse an application for a building permit if there are errors in the documents presented to it. The solution to this matter is not to change the City's policy to not issue CBCs for retrospective building approvals anymore. In circumstances such as these where the as-built structure is plainly inadequate, the City cannot avoid responsibility by accepting a CDC from a private building surveyor.

Given the above findings, I conclude the City has not acted appropriately in response to the investigation and findings of Building and Energy.

Question 22B: Whether the City's enforcement actions taken against [redacted] were appropriate and reasonable having regard to:

(a) how the issues giving rise to the action came to the attention of the City;

(b) the date the City became aware of the issue;

(c) the date it took each action;

(d) the outcome or current status of the enforcement action.

Question 23B: Whether when the City has declined to take action in relation to alleged non-compliances by [redacted] (not already discussed above) it has acted reasonably and responsibly?

This question has not been answered as insufficient information was provided and given the detail in this report, I consider it is no longer necessary.

Summary of findings – [redacted] Complaints

Whether the City acted appropriately and reasonably in its decision to issue the demolition permit, including:

Question 1C: Whether the City acted appropriately and reasonably in its decision to issue the Demolition Permit, including:

(a) Whether it should have been a building permit or demolition permit?

(b) Whether the City should have required evidence of a BA20 consent or court order prior to issuing the demolition permit?

(c) Whether the information provided by the applicant about the proposed 'make good' works was adequate to support the issuing of the demolition permit?

The City did not act appropriately and reasonably in its decision to issue the demolition permit, including that it:

(a) should have required a building permit and a demolition permit;

(b) should have required written consent from [redacted] or a court order prior to issuing the demolition and building permits; and

(c) should not have accepted the proposed 'make good' works as adequate to support the issuing of the demolition permit.

Question 2C: Whether the City acted appropriately and reasonably in its decision to issue the building order dated [redacted]?

Question 3C: Whether the City's building order addressed issues identified in the Inspection Report issued by the Building Commission on [redacted] and or the building remedy order dated [redacted]?

Question 4C: Whether the City acted appropriately and reasonably in its decision to issue the Building Approval Certificate including:

- whether that decision was consistent with the findings, recommendations and actions of Building and Energy, and if not, why?
- whether the City acted reasonably and appropriately in relation to the seeking of consent orders made on [redacted] by SAT, including in relation to communicating with [redacted] about the proposed consent orders and taking into account the issuing of the building remedy order on [redacted]?

In circumstances where a BAC was sought and the City was aware there was an outstanding building remedy order dealing issues that went to whether the make good work was complaint, it should not have accepted the CBC until the building remedy order was resolved. In doing so it undermined Building and Energy.

Given I have concluded that the City acted unreasonably in issuing the BAC and consenting to the withdrawal of the building order, it follows that my view is that City did not act reasonably by consenting to the orders made in the SAT matter.

Question 5C: What policies and processes (internal and published) do the City have in relation to issuing building or demolition permits or requiring evidence of consent when similar applications for demolition of duplex buildings are made prior to and since this matter?

The City has changed is procedures to require a building permit and a demolition permit where half of a duplex is to be demolished.

Summary of findings – [redacted] Complaints

Bearing in mind the outcome of the WA Ombudsman's investigation, the matters for the City's to respond to are set out below taken from [redacted] submissions as follows:

Question 1D: The City's 'building order' created unnecessary trouble;

Question 2D: The City was wrong to retrospectively provide arguments to the WA Ombudsman that they could make such orders under the Local Government Regulations on the basis that there was excavation work underway;

Question 3D: The City has shown no contrition or apologised for the trouble it caused.

Given the City, [redacted] and Building and Energy all agree that there was a potential hazard and Building and Energy say the temporary fence was warranted during construction, it follows that the City's request to address the hazard with the temporary fence was not unreasonable.

I do not think the City's [redacted] needed to refer to regulation 11 as a possible basis on which action could have been taken. There is no evidence that regulation 11 was the basis for the 14 April 2016 letter. Further, whilst at some point there must have been an excavation in order to construct the driveway and retaining wall, I accept that by the time the City's [redacted]

referred to regulation 11 as possibly applying, there was no longer an excavation next to the retaining wall.

[redacted] is at least as much to blame for the 'trouble' in relation to this matter. He persisted in finding ways to emphasis his dissatisfaction with what was in the scheme of things an unimportant matter.

I do not believe that the fact that the City's has not apologised to [redacted] in relation to this matter is unreasonable.

Part A – [redacted] Complaints

1. Summary of Issue 1 Complaints and Findings

1.1 [redacted] and [redacted] have owned the property at [redacted] for over 30 years.

1.2 Their complaints relate to the City's approval for a [redacted] development at [redacted] which is on the land adjoining the western boundary of [redacted]

1.3 A development approval was granted by the City in 2017 followed by a building permit on [redacted] At the time of writing this report, construction is ongoing.

1.4 The Development is in the residential H4 zone of the Canning Bridge Activity Centre Plan (**CBACP**).

1.5 [redacted] and [redacted] have made complaints to the City about a range of issues relating to the development. They say:

(a) when initially advised about the development by the City in January 2017 the information was factually incorrect and misleading;

(b) in preparing the Responsible Authority Report (**RAR**) (which is the written assessment of the application against the CBACP) the City ignored the goals of the State Planning Policy and the CBACP. They disregarded building codes and standards and accepted false information from the developer making their assessment erroneous and incomplete;

(c) the planning and building permit approved a non-compliant basement ramp based on false information;

(d) the City succumbed to the pressure from the builder in not requiring it to obtain a BA20 consent from [redacted] or other neighbours;

(e) there have been a number of changes to the development approved by the City that impact the neighbours without telling them;

(f) the Construction Management Plan (**CMP**) accepted by the City was inadequate and public safety and amenity has continually been compromised;

(g) the City has taken no action against the builder who has falsified their design compliance information and disregarded public safety; and

(h) they have been treated with disdain by the City officers who pay little attention to their comments.

1.6 For the purposes of my review, after considering the nature of [redacted] and [redacted] complaints and related documents, I categorised in the complaints into following issues which are considered below:

(a) Initial interactions regarding the planning application

(b) Responsible Authority Report matters

(c) Retaining walls

(d) Construction Management Plan

(e) Rear basement wall

(f) Basement ramp design

(g) Basement excavation

2. Initial interactions regarding the development application

Question 1A: Whether the City acted reasonably and appropriately in notifying and corresponding with [redacted] about the proposed development, during the period from when the development application was lodged in late 2016 to the JDAP meeting on [redacted]?

Facts and evidence relating to this question

2.1 On 23 December 2016 an application was submitted to the City for a development at [redacted] consisting of a [redacted] building including a 'mezzanine' level within the ground floor and containing [redacted]

2.2 On 17 January 2017, the City wrote to [redacted] about the application. The letter said:

> *"The City of Melville has received an application for development comprising [redacted], at the above address.*
>
> *The development complies with the provisions of the Canning Bridge Activity Centre Plan, and as such formal consultation is not required.*
>
> *The City has adopted an informal notification process and the purpose of this letter is to advise you of the application. Details of the proposal are available on the City's website.*
>
> *The purpose of this letter is to inform you only. Formal submissions in response cannot be taken into consider and are therefore not required."*

2.3 [redacted] and [redacted] viewed plans that a neighbour had obtained and interpreted that the proposed building was to have [redacted], one with a mezzanine, plus a roof top garden that had a roof on it. The total building height was 19m being 16m plus 3m for the lift shaft and roof top garden. They had understood the CBACP only allowed building with a maximum of [redacted] and believed that the mezzanine level was a storey making the building [redacted].

2.4 On 23 January 2017, [redacted] and [redacted] attended the City's offices and spoke with officers from the planning department about the development. The officers told [redacted] they could review the plans on the City's website but could not make submissions. As a result, [redacted] and [redacted] believed that there was no way for them to make submissions or objections to the proposed development even if they believed it did not comply with the CBACP.

2.5 On 30 January 2017, [redacted] attended the City's offices and spoke with officers again asking a number of questions. The planning officer advised:

(a) they had no recourse for the loss of solar power generating capacity due to overshadowing;

(b) mezzanines are allowed under the CBACP and are not a storey; and

(c) the building complies with all requirements of the CBACP and is likely to be approved.

2.6 On 3 February 2017, a Councillor told [redacted] they could make a presentation at the Joint Development Assessment Panel (**JDAP**) meeting that was considering the development for approval. This was the first time [redacted] were advised of this opportunity and they were shocked that in their two discussions with planning officers she had not advised them about the JDAP meeting.

2.7 On 3 February 2017, [redacted] attended the City's offices again and requested the definition of a 'mezzanine' as per the National Construction Code (**NCC**), a copy of the traffic management plan and the sewerage connection plan. They were advised that the traffic management plan and sewerage connection plans were not available and the mezzanine plans were being revised and would be available the following week.

2.8 On 20 February 2017, [redacted] asked the planning officer for advice on how to nominate to present at the JDAP. The officer subsequently forwarded a link containing the information. [redacted] also asked about whether the proposed development had a 'bulky storage area' and the definition of 'mezzanine' in Volume 1 of the NCC. [redacted] says the officer was unaware of the NCC definition.

2.9 Notes of the meetings referred to in paragraphs 2.4 to 2.8 above have been provided by [redacted] The City says they do not usually make notes of these sorts of discussions and do not have notes of these meetings.

2.10 On 24 February 2017, [redacted] wrote to the City's then CEO raising concerns including that the proposed development was actually [redacted] as it included a mezzanine which was a storey under the definitions in the NCC. They also noted the absence of a waste bulk storage area and that the bin storage provided for only 15 bins whereas with [redacted] there would need to be 60 bins. They requested that their objections be heard by the full Council and that the determination that the development fully complied with the CBACP be reversed.

2.11 No response was received from the [redacted]. However, on 17 March 2017, the City's [redacted] emailed [redacted] stating that all matters they had raised in their letter dated 24 February 2017 had been addressed in the City's RAR which was available on the WA Planning Commission website. It said that the applicant would be required to submit a waste management plan for approval. The letter also noted that the JDAP meeting was on [redacted] and that [redacted] was listed as a submitter. There was no specific response to [redacted] request to have the application referred to Council.

2.12 On [redacted] the JDAP met and considered the application for planning approval for the site. The agenda and the minutes of the meeting have been provided by [redacted]

2.13 The minutes record that four residents, including [redacted] and [redacted] gave presentations objecting to the development and that the JDAP determined to approve the application.

2.14 [redacted] and [redacted] say they were abandoned by the City and that there was a lack of empathy for the impact the development would have on them, their property and the community. They say they expected the CBACP to operate to maintain the amenity and say that assurances about this were made by the [redacted] A copy of a letter from the [redacted] to [redacted] dated September 2011 is provided by [redacted]

Discussion and findings

2.16 In response to the above summary, the City has said (in summary):

(a) Its letter dated 17 January 2017 informally advising of the development was in accordance with the City's policy.

(b) It notes the references to discussions between [redacted] and planning officers on 23 and 30 January and 3 and 20 February 2017 and says in essence that whilst they do not have notes, the advice they are said to have given was accurate.

(c) At the time, advice about the JDAP and other Council meetings was only given where formal advertising of a development application was required. As this was a case where only informal notification was required, information about the JDAP meeting was not provided.

(d) The City says that the revised plans submitted to the City on 8 February 2017 and later, on 20 March 2017, did depict provision for a bulk storage area in the basement carpark level.

(e) The letter to the [redacted] dated 24 February 2017 was responded to on 17 March 2017. It is the usual practice for City officers to respond on behalf of [redacted] 'It is not the usual practice of local government generally, and the City of Melville particularly, to enter into a response with comments received in respect of a DA, noting however, that a response was provided to [redacted] on this occasion, on 17 March 2017.'

(f) The CBACP was developed in partnership between the City of Melville, the City of Perth and the State Department of Planning. It went through extensive community consultation. [redacted] and [redacted] participated in that process.

(g) [redacted] and [redacted] concerns were taken into account by the JDAP via their deputation at the meeting.

(h) 'In dealing with a development approval such as this which represents a significant change in the local landscape, the decision maker has to assess any impacts against the prevailing planning policy framework and determine whether there are material impacts that are of sufficient weight to warrant the refusal of the development. The decision to recommend that the development approval be approved and the ultimate decision of the JDAP to do so indicates the development meets the prevailing planning policy framework and ought to be approved on that basis.'

(i) The decision is not intended to isolate or abandon [redacted] or any other interested third parties.

(j) It is important that in making the decision the focus remain on the extent to which the development aligns to the prevailing planning policy framework.

2.17 [redacted] and [redacted] are dissatisfied with the City's submissions on this issue. They maintain the development application did not comply with the CBACP or all aspects of the NCC and Australian Standards. They say there were not told why the decision could not go before the Council. They say the RAR did not address the issues they raised. They accept there may not have been a legal obligation to inform them about the JDAP process but say there was a moral obligation to do so.

2.18 In a late submission to this review the City provided further information as follows:

(a) Its practices have changed since 2017. Today the notification letter advises of the receipt of an application. If submissions are received, submitters are advised about applicable Council meeting dates and on how to make a deputation.

(b) Given there was no response from [redacted] in respect of the information notification and given there was no submission received from them, they would not have been advised in writing of the meeting dates associated with the JDAP meeting.

2.19 [redacted] and [redacted] made it known that they objected to the development and twice attended Council offices before being told by a Councillor that they were entitled to attend and present to the JDAP. If the City is saying it requires a written submission in order to tell objectors about their rights, this should be made clear in notification letters.

2.20 I find that in communicating with [redacted] between the time the development application was lodged and [redacted] (when the JDAP meeting occurred), the City acted in accordance with the policies that applied. The informal letter dated 17 January 2017 was consistent with the City's policy which did not require information to be given about the JDAP process given the nature of the application.

2.21 However, it is not reasonable for the City to have a policy that does not require people to be told about a process that they may participate in. If they are not told about the JDAP meetings, how can they know they may attend and speak at them. If the City did not allow people 'informally' objecting to a development application under the CBACP to attend JDAP meetings then I would not expect them to be told about these meetings. But given people like [redacted] can attend, they should be told that they have that opportunity.

2.22 The current policy does not seem much fairer than the 2017 policy. If a person will only be told about their right to participate if they make a submission, how will they know they know they can even make a submission in the first place.

2.23 In relation to the queries raised by [redacted] after the 17 January letter, the City responded both in person and in writing, including responding to [redacted] letter to the [redacted] dated 24 February on 17 March 2017. Noting my recommendation that the City review its policy on initial notifications, these responses were otherwise reasonable, timely and appropriate.

2.24 I note that in the early stages of this communication, [redacted] and [redacted] were referred to the website to review the application. The City has reviewed its records and advises that the application was available on the website at the time the letter was sent. It says that it routinely ensures documents are on the website prior to sending out notification letters.

3. Responsible Authority report Matters - Mezzanine

Question 2A: Was the City's characterisation of the 'mezzanines' in the development as mezzanines rather than storeys reasonable?

Question 3A: Whether the City's consideration of and communication with [redacted] about its interpretation of the CBACP in relation to this issue was appropriate and reasonable?

Facts and evidence relating to these questions

3.1 The ground floor of the development was to include 9 units with a space described on the drawings as a 'mezzanine' level. Each mezzanine level contained a bedroom, walk-in-robe and an ensuite. The ensuites are fully enclosed. The walk in robes have 1100mm walls to one side and the bedrooms have glass balustrades. The floor area of the mezzanine levels varies but would be more than 50% of the floor area in the space below. In each unit, the mezzanine spans over living, kitchen and/or bathroom areas below. In 2 of the 9 units, all of the edge of the mezzanine is open to the floor below. In the other 7 cases, the edge of the mezzanine comprises an open area but also the enclosed wall of the ensuite.

3.2 As noted above, [redacted] and [redacted] attended the City's offices and spoke about the mezzanines on 30 January, 3 February and 20 February 2017.

3.3 [redacted] and [redacted] argue that the mezzanine level is a storey and therefore that the development is [redacted] development which is not consistent with the CBACP.

3.4 The issue of the mezzanine was referred to in the RAR. On page 12 the position of the City is set out and is summarised as follows:

(a) the building including the mezzanine design is within the allowable building height under the CBACP;

(b) the definition of mezzanine in the NCC is only a guide;

(c) the definition in Part C of the NCC is provided for the purpose of calculating fire resistance levels and not overall heights and therefore not relevant to the CBACP;

(d) the City has legal advice which is that the mezzanines are acceptable having regard to the definitions in the CBACP; and

(e) the mezzanines are consistent with the goals of the CBACP, specifically G5 and the desired outcomes in Element 1.7 in relation to dwelling diversity.

3.5 At a special meeting of Council on [redacted] a report on the CBACP and a review of issues related to transitional areas was considered. In relation to mezzanines, the minutes refer to 'consideration of additional clarity to the definition of mezzanine (Council resolution 16 May 2017) (page 24).

3.6 [redacted] presented to the meeting on [redacted] In relation to the issue of the mezzanine, he asserts that the proposed development is effectively 6 storeys given the roof top and mezzanine level within the building. He insists that the definition of mezzanine in the NCC must apply making the development not in accordance with the CBACP.

3.7 In August 2019, an amendment to the CBACP was gazetted to provide a definition of 'mezzanine' which says it has a habitable space between two storeys that is:

(a) accessible only from the apartment spaces that are immediately below;

(b) limited in area to no more than one third the floor space of the area it is located within;

(c) design in a manner which ensures the mezzanine space is open to the floor area below; and

(d) of an overall height and design which ensures that the design space does not appear as a separate floor in the external elevations of the building.

3.8 In their submissions [redacted] and [redacted] also refer to a decision of the SAT *Health Resorts of Australia Pty Ltd and Western Australian Planning Commission* [2007] WASAT 60 as authority for determining that the mezzanines in the subject development are storeys.

Discussion and findings

3.10 The CBACP dated February 2016 provides (as relevant):

(a) in relation to heights for buildings in the H4 zone (page 27) 'notwithstanding the 4 storey height limit, no building shall exceed 16 metres above NGL';

(b) the term Height is defined as not including any lift plant, water tower or similar utility services not exceeding 3 metres in height or any architectural feature such as an open roof structure. It also says the term height in storeys does not include a basement (page 41); and

(c) the term 'storey' has the same meaning as 'storey' in the NCC and means a space within a building which is situated between one floor level and the floor level above next above, or if there is no floor above, the ceiling or roof above, but a storey is not a mezzanine (page 42).

3.11 Under the NCC (as relevant):

(a) a mezzanine is defined as 'an intermediate floor within a room';

(b) in the definition of 'storey' a storey does not include a mezzanine;

(c) in Part C of Volume One of the NCC for the purposes of calculating a rise in storey, a mezzanine is 'regarded as a storey' if the floor area of the mezzanine is more than 200m2 or one third of the aggregate floor area of the room;

(d) there are requirements for:

(i) fire resisting construction where a mezzanine exceeds one third of the floor area of the room below;

(ii) minimum widths and heights of egress paths from a mezzanine if it will hold a certain number of occupants; and

(iii) suitable barriers to prevent falls (i.e. balustrades).

3.12 The Guide to the NCC (which has no legislative force but is an aide to interpretation) says a room within a floor that is fully enclosed by a wall is a storey. The guide does not say whether an enclosed room within a mezzanine makes the rest of the mezzanine level a storey.

3.13 The development included intermediate floors within a storey which meets the definition of mezzanine under the NCC. There is no doubt that under the NCC, the mezzanine levels in this development would be regarded as a storey because of their size relative to the floor below and possibly because of the enclosed ensuites, although this latter feature makes no difference to the outcome.

3.14 The CBACP states that the word 'storey' has the same meaning as 'storey' in the NCC. Therefore, it is not correct for the City to say that the definition in the NCC is only a guide. However, as can be seen from above the definition of 'storey' in the NCC, is subject to and modified by other provisions in the NCC.

3.15 The question seems to be whether for the purposes of the CBACP the intention was to confine the meaning of storey narrowly to only the specific definition of 'storey' in the NCC or more broadly to the term 'storey' as used in the NCC as a whole.

3.16 The City's position supports the narrow interpretation. It argued that for planning purposes provided the overall height restrictions can be met, a mezzanine is not a storey presumably because it has no impact from a planning perspective. It says that the NCC's characterisation of mezzanines of a certain size as a storey is concerned with fire safety requirements which are not relevant to planning considerations. That is true. The NCC is aimed at addressing safety considerations, not planning considerations. However, a decision was made to use the definition from the NCC with no qualification or statement that the definition would be applied only having regard to planning considerations. The NCC does not make definitions with planning considerations in mind and if the CBACP wanted to ignore safety considerations when determining what a 'storey' is, it should not have used the NCC definition.

3.17 I accept that the height restrictions have been met and that had the mezzanines not been allowed, the building envelope of the development may not have looked any different. However, if the mezzanines were not allowed, the design would likely have had fewer units which does go to the impact of the development and this is most definitely a planning consideration. The CBACP has been amended to provide clarity to the issue and in doing so now prohibits the types of mezzanines that have been approved for the development. This is relevant. It suggests that the original intent

which has now been clarified, was not to have mezzanines of the size and design that has been approved in this development.

3.18 Whilst the amended provisions concerning mezzanines cannot apply retrospectively, what the amendment shows is that the Council, having regard to the arguments raised by [redacted] at the [redacted] meeting, decided to clarify that these types of mezzanines are not allowed under the CBACP. In this way, the amended provisions can be considered in trying to understand the intent behind the original version of the CBACP.

3.19 I cannot say what the SAT would have determined on this issue, had [redacted] had a right of review and decided to challenge the decision to approve the development. The two competing interpretations of the requirements of the CBACP have merit.

3.20 However, on balance I prefer the interpretation that the mezzanine is a storey. I therefore conclude that the City's characterisation of the bedroom and walk in robes areas in the intermediate space is as mezzanines rather than storeys was incorrect.

3.21 In making this conclusion, I have considered the SAT decision referred to by [redacted] In that case the areas described by the applicant as mezzanines were fully contained (i.e. the walls were not open to the space below) and their floor area extended partially over the space below and partially over a corridor and other adjoining single level units. I do not believe the design of the mezzanines in this development are on all fours with the mezzanines under consideration in that case. However, the case does confirm that where walls are not open to the space below, this is one factor against them being a mezzanine.

3.22 For completeness I note that in their submissions, [redacted] and [redacted] have also asserted that the roof top structures amount to a storey because they would be considered a storey under the NCC. I do not agree. The definition of storey in the NCC refers to the space between a floor and ceiling but not if the space only contains a lift shaft, stairway, meter room, bathroom shower, laundry, water closet car accommodation for no more than 3 vehicles or a combination of the above. Based on the description of the roof top structures at the subject development, they do not constitute a storey within the meaning of the NCC. Further, the 'substantial roof structure' would not create a storey if it does not have walls as it would not be a space within a building.

3.23 Notwithstanding that I have preferred the interpretation that the mezzanine was a storey, I find the City's communication with [redacted] in relation to this issue has been appropriate and reasonable. I note that City officers addressed the question of the definition of mezzanine in the RAR setting out reasoning for position. The City also obtained legal advice on this question. As noted in my legal analysis, there is merit in both interpretations of the CBACP on this issue and my opinion I should not be taken as suggesting that the City's legal advice is not sound. The City's refusal to accept [redacted] complaint based on their legal advice was a reasonable position for the officers to take.

4. Responsible Authority Report matters – Traffic Impact and Parking Assessment Report

Question 4A: Whether the Traffic Impact and Parking Assessment Report was correct and adequate and, following on from that, if the City acted appropriately in not referring to these errors in the RAR?

Question 5A: Whether the City acted appropriately in its response to the concerns raised by [redacted] about the alleged errors in the Traffic Impact and Parking Assessment Report?

Facts and evidence relating to these questions

4.1 The Traffic Impact and Parking Assessment Report (**Traffic Impact Report**) was attached to the agenda for the [redacted] JDAP Meeting.

4.2 It is alleged the Traffic Impact Report included matters that were incorrect or inadequate, as detailed in paragraph 3.4.2 of [redacted] submission and in the discussion and findings below.

4.3 The alleged errors in the Traffic Impact Report were referred to by [redacted] and [redacted] at the JDAP meeting and at the [redacted] Council meeting, [redacted] and [redacted] referred in detail to the alleged errors in the Report.

4.4 [redacted] and [redacted] were not told whether the errors in the Traffic Impact Report alleged by them were considered further by the City or rectified.

Discussion and findings

4.5 In its initial response to this matter the City says (in summary) that its in house [redacted] had no reason to doubt the conclusions in the report presented to the JDAP at the time. They say these reports are important information to attach to the RAR for the decision maker 'irrespective of whether they are accurate or not.'

4.6 In a follow up response, the City said:

(a) its in house engineers reviewed the Traffic Impact Report and no issues were raised regarding accuracy of adequacy of the report. It is acknowledged (now) that there were errors in the report, however, these no not outweigh the report's conclusions that the development satisfied the requirements in respect to traffic impacts and carparking;

(b) the City says that the CBACP negates the need to provide for visitor parking so whether there was sufficient street parking (which the City says there was) was not relevant to the approval of the development;

(c) [redacted] highlighted the alleged errors in his presentation to the JDAP and therefore the JDAP took them into account; and

(d) the report does refer specifically to cyclist facilities and notes that it is a bicycle friendly street.

4.7 In their submissions, [redacted] and [redacted] say that the City's assessment of the Traffic Impact Report was not provided in the RAR. They say near enough is **not** good enough and that the City should be extra diligent with traffic management issues as new developments are introduced in the area in order to ensure changes from the previous norm are implemented to the highest standards.

4.8 My review of the issues raised by [redacted] and [redacted] is set out below. I conclude the Traffic Impact Report presented to the JDAP was inaccurate in several respects.

	[redacted] **allegation**	**Review of report**
(a)	referenced there being 21 two bedroom and 9 one bedroom units when in fact there are 24 two bedroom and 6 one bedroom units (i.e. 51 bedrooms when there was to be 54);	Error
(b)	said there was adequate parking on [redacted] for visitors which [redacted] say is not the case including because it is only 6 m wide with parking allowed on one side. Further, the parking is taken up during business hours because it is regularly used by people who work in the area or attend the nearby shopping area. They therefore say there is no on street parking available for most of the time which was not addressed in the report;	The common use of the single side parking by people during business hours is not mentioned. However, the City says that the CBACP does not require consideration of visitor parking either on or off site.
(c)	did not address overflow parking from residents (i.e. residents with more than one vehicle);	Not addressed but presumably this is addressed by the allowance of 30 spaces for this development
(d)	did not refer to [redacted] as being a designated bicycle route;	Report says [redacted] has designated on-road cycle lanes to the west of the site (page 5).
(e)	did not consider the non-compliant traffic ramp and cross fall over the footpath;	Report incorrectly concludes ramp and crossovers are compliant. This error was not accepted by the City at the time of the JDAP. Discussed further below

(f)	was erroneous in concluding the complex was complaint with relevant standards and the conditions of the planning approval;	Allegation is correct at least in in relation to the ramp and cross over
(g)	incorrectly stated the distance to the rail station was 1.1km, 1.2km and 800m (p 7) when it is actually 1.4km;	City does not refute [redacted] measurements. Assume report was inaccurate
(h)	incorrectly stated the footpath width was 2m and 1.5 m when it is 1.8m and 1.2m;	City does not refute [redacted] measurements. Assume report was inaccurate
(i)	did not consider the objective of the CBACP 'to ensure adequate vehicle parking and access is provided for multi-storey development... and to ensure car parking and service activities do not dominate the street.	Unable to conclude the report is not correct. The City says the report's conclusions were correct.

4.9 I do not believe the errors in the report are material to its conclusions. This does not mean that the City should not identify errors in documents either reference the errors in the RAR or require them to be fixed as part of their diligent review of applications.

4.10 The City's response to this complaint was not reasonable. The errors were raised at the initial JDAP meeting and again in [redacted] Until this review the City provided no response to the specific claims made or explanation of why the report was accepted given the issues raised.

4.11 [redacted] and [redacted] continue to seek an explanation as to why the impacts of visitor parking are not required to be considered and ask which clauses of the CBACP negate this. My reading of the CBACP is that given it makes no specific reference to the need to provide for visitor parking, the visitor parking for the site has been accounted for in setting the parking ratios based on the number of units.

5. Responsible Authority Report matters – Other issues

Question 6A: Whether the content of the RAR was adequate and appropriate having regard to the issues raised about residential density, bicycle parking, street protection and waste management?

Question 7A: Whether the City's actions were appropriate and reasonable with respect to compliance with the following requirements of the planning approval:

(a) 30 bicycle parking bays;

(b) tree protection to be provided around street tress prior to commencement of the works; and

(c) waste management.

Facts and evidence relating to these questions

Residential Density

5.1 [redacted] and [redacted] make the following submissions in relation to residential density:

(a) State Planning Policy 4.2 Activity Centres for Perth and Peel, 31 August 2010 (SPP4.2) sets overall desired targets for Activity centres such as CBACP equivalent to a desired R75 **SPP 4.2, Table 3 and Note 5, pages 12 and 13**;

(b) CBACP has average density targets equivalent to R63 by 2031 and R185 by 2051, the outer H4 residential transition zone being much lower than the average. **CBACP, page 3 and SPP 4.2, Note 5 page 13**;

(c) A letter from the Minister for Planning, Hon John Day, 10 March 2016 in a reply to an Applecross resident stated the [redacted] H4 zoning was equivalent to R50;

(d) The [redacted] development at [redacted] is equivalent to R222, ten times the previous residential density and well in excess of the desired density envisaged under the SPP4.2 and the CBACP. **Residential Density = [redacted] x 10,000 / 1,353m2 = R222**.

5.2 [redacted] and [redacted] raised their issues regarding Residential Density generally at the [redacted] JDAP meeting and in more detail since, for example at the [redacted] special Council Meeting.

5.3 [redacted] and [redacted] say that residential density was not considered properly or at all in the RAR and that the development does not comply with the CBACP with regards to residential density. They also say the City has never responded to [redacted] about their issues regarding Residential Density or set out how it says the development meets the CBACP in relation to this issue.

5.4 Various matters were not addressed in the RAR and/or included in the planning approval as conditions that were then not complied with, being:

(a) Bicycle parking bays. Bays are not evident on the RAR plans. Early plans for the development included bays in the basement which were removed to make way for a bulky waste storage area;

(b) The installation of a tree protection zone for street tree(s) prior to the commencement of works. When work at the Site commenced in December 2019 a fence was not erected around a tree until 7 January 2020, following 2 emails and 6 phone calls from [redacted] and/or [redacted] During the time the tree was

unguarded a large branch was broken by a sheet piling machine and left dangling above the footpath (email dated 9 January 2020);

(c) A waste storage area for bins was to be located inside the building between units off the grand lobby of the building. This was referred to in the RAR as *"The bin storage area is located behind the street setback area and is accessible from the main lobby".*

Discussion and findings

5.5 In relation to the complaints about excessive residential density, the City says (in summary):

(a) It is not clear the basis used by [redacted] and [redacted] to calculate residential density targets;

(b) The H4 zone does not control the number of dwellings on a site or regulate residential density;

(c) Density is regulated indirectly through built form controls and the targets in SPP 4.2 are minimums;

(d) The scale of density was envisaged by the approved CBACP allowing up to four storey in H4 areas;

(e) Residential density is not an element that requires assessment. Instead, the impact of the proposed number of dwellings is assessed including in relation to the provision for car parking and traffic.

(f) How the resultant dwelling density on the site compares to overall dwelling density targets of the wider precinct is not a consideration for the development approval.

5.6 [redacted] and [redacted] maintain that a tenfold increase in density in the H4 zone was never communicated to the community during public consultation and exceed the density forecast for the whole area. They say every community member they speak to uses words like eyesore, blot on the landscape and 'gross' to describe the development.

5.7 I accept the City's position that it was not required or entitled to consider residential density forecasts when approving the development application. In the absence of the CBACP providing for minimum numbers of dwellings in the H4 zone, it could not reject the development based on the numbers of units.

5.8 I empathise with [redacted] and [redacted] position. They believe this Development does not reflect the overarching objectives of the CBACP and what residents understood would be the outcome of the CBACP. [redacted] and [redacted] reaction to this development is understandable. However, to a large extent, the impact of developments complying with the CBACP

was always going to result in significant and rapid change to the look and feel of the precinct which many existing residents would find confronting.

5.9 In relation to the bicycle parking bays and waste management, the City says that these issues were considered and that it included conditions on the planning approval to require that 30 bicycle bays be included and that a waste management plan be approved.

5.10 The issue seems to be whether the provision for bicycles and waste should have been more resolved before the approval was granted rather than as conditions on the approval. The plans under consideration by the JDAP showed 15 bins provided for [redacted] and a bulky waste area in the basement. They did not show provision for bicycle parking but there were storage cages for each carpark which were later marked as bicycle storage.

5.11 Having reviewed revised plans approved by the City on [redacted], I conclude that the matters raised by [redacted] and [redacted] were provided for in the application that was originally referred to the JDAP for approval.

5.12 I note [redacted] maintains that the waste management that has been allowed is not adequate. I am not able to make a finding on this based on the information available to me. However, it would appear that the conditions for bicycle storage and waste management have been met through modifications to the design and therefore, I cannot conclude that proper provision for these amenities has not been achieved within the final planning approval.

5.13 In relation to the tree protection zones, the planning permit conditions were in order. I will deal below with the City's response to the complaints about the tree protection.

5.14 I conclude that content of the RAR was adequate. However, the following matters in the application materials were inadequate:

(a) errors in the Traffic Impact Report;

(b) the drawings should also have included cut and fill and retaining wall information (see below).

5.15 I do not believe these matters were material to the outcome of the application. However, ensuring the quality of applications is of a high standard goes to the adequacy of the process, transparency and good decision making.

6. Retaining Walls

Question 8A: Whether the initial plans included adequate information about the change to ground levels and retaining walls?

Question 9A: Whether the City acted appropriately and reasonably in its communication with [redacted] and [redacted] about the approval of retaining walls, fence heights and ground levels?

Facts and evidence relating to these questions

6.1 The development at the site includes 0.7m cement block retaining walls along both sides and along the rear of the site. In some places a 1.8m high Colourbond fence is to be on top of the retaining wall and in other places, including an 8m long section at the front, the cement block retaining wall would be extended a further 1.8m to be the dividing fence. This will result in a fence that is 2.4m high and level with the eaves of the dwelling on [redacted]

6.2 [redacted] and [redacted] allege that the plans forming part of the RAR included two plans showing the existing and proposed ground and floor levels however did not include a cut and fill plan, cross-section, or reference to retaining walls.

6.3 On 24 June 2020, [redacted] was told by [redacted] at the City's offices that there was to be a retaining wall on the boundary between the site and [redacted] Prior to this [redacted] and [redacted] were not aware of the 0.6m increase to ground level or the retaining walls. (Notes of that meeting have been provided by [redacted]

6.4 On 6 August 2020, [redacted] had a meeting with the builder who informed them about the retaining wall and fence height. In September 2019 the builder had advised them that the fence would be a 1.8m Colourbond fence but had not explained that it would be on top of a retaining wall.

6.5 On 11 August 2020, [redacted] and [redacted] wrote to the City raising concerns about:

(a) the builder's approaches to neighbours pressuring them to sign BA20 forms to allow cranes to be used over their properties noting some of the neighbours are elderly and intimidated; and

(b) why they had not been informed about the change in level across the site and the need for retaining walls.

6.6 The 11 August 2020 email was followed by emails about a range of issues including works commencing before 7am and traffic management. On 30 August 2020, [redacted] wrote to [redacted] referring to 7 unanswered emails and asking for a reply.

6.7 The City's [redacted] responded via email on 4 September 2020, stated in summary (as it related to the levels and retaining walls):

(a) the retaining wall is to be a maximum height of 0.65m above natural ground level;

(b) a dividing fence is permitted under the City's By-Law to a maximum height of 1.8 metres; and

(c) 'The original development application was the subject of informal notification to you on the 17 January 2017. The details of the levels were included as part of the development applications that have been approved. These levels have not changed significantly since the initial approval.'"

Discussion and findings

6.8 The City's submissions in relation to this issue are that the plans showed finished levels at the ground floor and their relationship to the adjoining site and it should have been clear that retaining would be required. I take it from this they do not believe that the cut and fill plan and retaining wall details were not required in the application.

6.9 [redacted] and [redacted] say a cut and fill plan was required by the planning application form. They say the level shown at the top of the basement is not adequate and that there was no information about what was to occur between the boundary and the basement. They say it was the City's responsibility to ensure interested parties and the JDAP had this information to properly understand the development.

6.10 [redacted] and [redacted] have included a Form 1 Application for planning approval from the Western Australian Planning Commission. It says plans showing 'proposed cut and fill, and retaining walls' must be provided with an application.

6.11 In its follow up submission, the City says that the *Planning and Development (Local Planning Scheme) Regulations 2015*, Schedule 2, Part 8, Clause 63(1) outlines the requirements for accompanying material to a DA. They note clause 63(2) provides that a local council can waive such requirements. They go on to say that the considered the material they had was adequate to support the application.

6.12 Clause 63(1) provides (as relevant) for plans showing existing and proposed ground levels over the whole of the land and the existing and proposed buildings and structures to be erected on the site.

6.13 I accept that [redacted] and [redacted] were not able to tell clearly from the plans submitted with the development application what boundary fence and retaining structures were proposed and that they were not fully informed about these issues until after the development commenced.

6.14 I believe this information should have been required to be included in the application. This information should have been relevant to the application and would also have assisted [redacted] and [redacted] to understand how the development would impact them. I accept that had they and other objectors known that the ground floor level of the development was to be 600mm above the ground level of adjoining sites they would have strongly objected. Therefore, the failure to ensure the plans clearly showed all levels and their impact prevented objectors from being able to raise this issue.

6.15 Although the City refers to its ability to waive the requirements provided for in the regulations, I do not believe it did so in this case. The mere fact that it did not ask for this information does not mean it waived the requirement for it to be provided.

6.16 When [redacted] and [redacted] became aware of the proposed treatment of boundaries, they spoke to the builder and raised their complaint with the City. The City responded to their complaint providing information about the proposed boundary structures.

6.17 I conclude that the City acted appropriately and reasonably in its communication with [redacted] and [redacted] about the approval of retaining walls, fence heights and ground levels once these issues arose after the building permit had been issued in 2020. There is no evidence before me that there were changes to these design features after the planning approval was issued (other than those discussed below in relation to the boundary wall subsidence issues).

7. Rear basement wall

Question 10A: Whether the City approved a change to allow the basement wall to be along the boundary for the majority of its length and if so, the process followed to approve the change to the basement wall location was in accordance with policy and procedure and was appropriate?

Facts and evidence relating to this question

7.1 The 2017 plans for the development at the site showed the rear basement wall as being stepped and touching the rear boundary in three places (see page 21 of the agenda for the [redacted] JDAP Meeting).

7.2 The City approved a change to the plans to permit the basement wall to be, along the majority of its length, built along the rear boundary of the site.

7.3 [redacted] and [redacted] allege that the changes to the basement wall location were approved by the City without reference to a JDAP and contrary to policy and procedure for amending the design of the development.

Discussion and Findings

7.4 The City confirms that the basement was extended to allow for vehicle turning. It says there was a negligible impact to [redacted] as there were no changes to ground levels or to the boundary retaining proposed along the boundary with [redacted]

7.5 The City says the change was approved as a minor amendment without consultation or any informal notice to owners of neighbouring properties. It says even if consultation was required, it would not have included consultation with [redacted] given it did not affect them.

7.6 [redacted] and [redacted] have responded saying it is not possible to know whether there was a change to ground levels given the levels were not clearly noted on the original plans. They say regardless of any impact on them, the City is required to follow the change process correctly. They say the neighbours to the rear of the development, on the boundary where this change occurred, were not notified and not aware of the change.

7.7 The City has not referred me to any policy it has on its process for reviewing applications for amendments and when it will notify or consult with affected residents about these applications or decisions to amend.

7.8 I find the City approved a change to allow the basement wall to be along the boundary for the majority of its length (which is uncontested).

7.9 I find no evidence that the change resulted in a change in levels and accept the City's explanation that the change did not require consultation or notification to neighbouring property owners. I therefore find the City acted appropriately in relation to this matter.

7.10 I also note the change to the rear basement wall was shown on the revised plans approved by the City dated [redacted]

8. Construction Management Plan and Traffic Management Plan

Question 11A: Whether the CMP met the conditions of the planning approval and should have been approved by the City?

Question 12A: Whether the CMP ought to have been updated and if so, was it updated?

Question 13A: Whether the City acted appropriately and reasonably in issuing permits or otherwise allowing facilities or structures to be placed on the verge?

Question 14A: Whether the City acted appropriately and reasonably in relation to the implementation and enforcement of the CMP, including in communicating with the builder and [redacted]

Question 15A: Whether the City responded promptly and appropriately to the various complaints raised by [redacted] including whether its investigation of the complaints and interactions with the builder were timely, reasonable and appropriate?

Facts and evidence relating to these questions

8.1 Part 5 of [redacted] and [redacted] revised submissions outlines their allegations in relation to traffic and construction management including references to emails, photographs and other documents that have been provided by them to support their complaints.

8.2 Emails were sent, phone calls made and meetings with City officers occurred between June 2020 and December 2020 about poor traffic management, dust, oil spills, damaged footpaths, drains and trees, a broken asbestos fence and concrete slurry.

8.3 In submissions from [redacted] and [redacted] they included further emails from May 2021 with complaints to the City and WorkSafe about dust, including evidence that they have collected over 5kg of dust from their gutters and roof. They have had the dust tested showing it contains toxic chemicals. They also report damage to polycarbonate roofing from concrete and show emails from the builder emails saying they will replace the roofing and apologising for the damage. The builder insists there are dust management controls in place.

8.4 Condition 17 of the planning approval required street trees to be protected by the installation of a tree protection zone. [redacted] and [redacted] say tree protection was not provided until 4 weeks after construction commenced and only after 2 emails and 6 phone calls was the protection installed. They say that the tree was damaged when a 10cm branch was broken by a sheet piling machine and left dangling above the footpath. The City responded by giving the builder 28 days to install the tree protection on 28 December 2019. The City would not provide [redacted] with a copy of its notice to the builder.

8.5 Condition 13 of the planning approval requires a CMP to be submitted 30 days prior to the commencement of works and approved by the City.

8.6 [redacted] sought a copy of the CMP and Traffic Management Plan under FOI. The City initially refused to provide these documents but after discussions with Councillors, a redacted version of the CMP dated May 2018 but signed as approved 19 March 2019 and letter dated 3 April 2019 approving the TMP were released. [redacted] and [redacted] have never been provided with a copy of the TMP that was approved. The CMP refers to a project site evacuation plan which is not provided.

8.7 [redacted] and [redacted] allege that based on a redacted version of the CMP, the CMP did not meet all the requirements set out in condition 9 of the planning approval.

8.8 The CMP states that the construction period is 7am to 7pm and that the builder will update the document every 3 months when changed conditions warrant it. The document was only 12 months old when it was provided to [redacted]. [redacted] and [redacted] allege the CMP has never been updated.

8.9 Work at the site commenced without adequate facilities including a site office and first aid room. Following intervention by CFMEU, the builder applied for and was granted permits to place facilities on the verge.

8.10 Condition 14 of the planning approval also provides for temporary structures to be installed within the property boundaries and not obstruct vehicle sight lines. [redacted] and [redacted] say that the City's [redacted] had previously assured them that no buildings were allowed on the verge and no approval to use the verge would be given.

8.11 Approval for a permit to allow facilities to be placed on the verge was later given. [redacted] and [redacted] say that the issuing of the verge permit was contrary to the planning approval.

They say they were not consulted about the application to place facilities on the verge or told why the City had changed its mind to allow facilities on the verge.

8.12 The verge contained 2 demountable offices, a skip bin and is used for storage of materials. [redacted] and [redacted] allege the objects on the verge obstruct vehicle sight lines and trucks are also frequently parked next to the verge creating further obstruction.

8.13 There have been a range of issues at the site described as failures to comply with the CMP, including un-notified road closures, vehicles, materials and huts located on the verge that were within 2.5m of the roadway and impaired sight lines from driveways, a footpath being broken by machinery creating a trip hazard and broken tree branches. These are detailed in part 5 of [redacted] and [redacted] revised submissions.

8.14 [redacted] and [redacted] say their complaints were ignored or that the City would take the word of the builder that he was complying with the CMP or permit for facilities on the verge without inspecting for themselves to see that he was not.

8.15 In relation to traffic management, [redacted] and [redacted] allege that the builder frequently commenced building work and road closures earlier than 7am and that it was common for there to be no traffic controllers, signs or other measures in place. They say this caused significant risk to cyclists and road users.

8.16 There have also been incidents where [redacted] was damaged of affected by the works, being:

(a) on 16 October 2020, a 2m long metal plank for scaffolding was dropped from a height of approximately 5 metres and hit the side of the house, chipping the brickwork and landing on the side garden path;

(b) on 13 October 2020, a load suspended from a crane was swung over [redacted] and collided with the carport, causing minor damage. [redacted] and [redacted] had previously denied the builder access to the space above their property for an unloaded or loaded crane;

(c) in 14 December 2020, a small piece of wooden formwork, with two large nails protruding from it, hit the roof of the house and ended up in the gutter;

(d) 30 April 2021, there was damage to the polycarbonate patio roof from concrete overspray and on inspection [redacted] observed extensive concrete dust and saw dust in his gutters. When removing the dust they collected over 5Kg of concrete and saw dust.

Discussion and findings

8.17 The City has responded to the allegations about construction management and tree protection as follows (in summary):

(a) in relation to tree protection, it responded to the query regarding the lack of protection after the work commenced and the tree was protected before works commenced after the Christmas break;

(b) the CMP is not a statutory requirement but was required as a condition of the planning permit. It provides a vehicle for the builder to demonstrate proper management of the site and minimise adverse impacts;

(c) the City attempts, within its resources to ensure construction proceeds in a proper and orderly manner;

(d) onsite management is monitored by WorkSafe;

(e) where a significant infill development is taking place in accordance with an adopted Activity Centre Plan, there will be a period during which existing owners and occupiers will experience some level of disruption, particularly during the construction phase;

(f) there will always be impacts, these are temporary in nature and reduce as construction proceeds towards completion;

(g) the City allows the use of the verge during the construction phase in order that the development can actually be constructed. The provision of these facilities is a matter for the builder. The adequacy of these facilities is a matter for WorkSafe;

(h) in relation to condition 14 of the planning permit, to permit temporary structures within the boundary, the City says this was not intended to prevent temporary structures outside the boundary if it became necessary because there was no room, which was the case here;

(i) the builder operates the site generally in accordance with the CMP and is responsive to the City when they raise issues in response to complaints. The builder cannot be expected to have full control over the site for example, when a third party supplier arrives on site before 7am, there is little that can be done except prohibit off loading;

(j) with regard to the complaint about sight lines due to materials on the verge, the builder did not comply with the permit initially but this was resolved after a number of meetings with the site supervisor;

(k) with regard to complaints about traffic safety, damage to footpaths and trip hazards, complaints were resolved in a timely manner. City [redacted] attended to offer advice to the builder and meet with residents. The City's [redacted] was also involved in assessments and ensuring the verge was safe. The builder will have to reinstate the verges at the end of the works;

(l) the complaints from [redacted] were not ignored and the evidence from [redacted] shows this to be the case. Some of the complaints were matters for WorkSafe.

8.18 In my meeting with City officers on 16 August 2021, they advised that the behaviour of this builder is typical, however, the number of complaints from [redacted] is not. They say this builder is constructing similar buildings nearby and there has been very few complaints about construction management issues.

8.19 In the City's follow up submission it says that the CMP provided to [redacted] is the only version of the plan they have. They say the planning approval does not require the CMP to be revised or updated. They say the builder also submitted Health Safety Environmental Management Plan on 18 November 2020 which includes 'monitoring, including dust and other items.'

8.20 The City says that impacts of construction are not eradicated by the existence of an approved CMP. This statement reflects a lack of understanding of the purpose of a CMP and its importance as a compliance tool to hold developers and builders to account. The City says that it appreciates there are opportunities to improve in this area and there is a review currently underway.

Question 11A: Whether the CMP met the conditions of the planning approval and should have been approved by the City?

8.21 [redacted] and [redacted] say the approved CMP did not address the matters required under the planning permit. Only hours of operation were specifically stated but the following matters (set out in condition 9 of the planning approval) were not addressed:

(a) public safety and site security;

(b) noise and vibration controls;

(c) air and dust movement;

(d) stormwater, groundwater and sediment control;

(e) waste and material disposal;

(f) traffic management;

(g) parking arrangements for contractors and sub-contractors

(h) onsite delivery times and access arrangements;

(i) storage of materials on site (with no storage of materials on the verge permitted); and

(j) any other matters likely to impact on surrounding properties.

8.22 The CMP approved by the City does not meet the requirements of the planning approval and is wholly inadequate. It does not demonstrate that the builder

understands how to mitigate impacts of construction on the community and does not provide the City with an adequate basis on which to undertake enforcement action if traffic management issues arise.

8.23 It is inappropriate for the City to approve the CBACP which allows for significant amount of multi-storey construction in a low density residential area, without being willing to actively manage the impacts of construction on the community. It is unacceptable to say that they don't have the resources or that it is the responsibility of WorkSafe or the builder to manage these issues.

Question 12A: Whether the CMP ought to have been updated and if so, was it updated?

8.24 In its follow up response, the City confirmed that the CMP provided to [redacted] was the only CMP it had been provided. It said another document referring to dust management was provided more recently. The CMP should have been updated, for example, when the verge permits were issued or when the dust complaints began, noting that the CMP did not address management of dust.

8.25 Further, the CMP provides for construction between April 2019 and March 2020. The construction is ongoing and there is no evidence of a revised CMP to cover the period since March 2020.

8.26 It is a condition of the planning permit that a CMP containing certain information be approved. This did not occur and there has been no or inadequate attempts to have the CMP updated to reflect the requirements of the planning approval in response to [redacted] complaints. This City has acted unreasonably in relation to this issue.

Question 13A: Whether the City acted appropriately and reasonably in issuing permits or otherwise allowing facilities or structures to be placed on the verge?

8.27 [redacted] and [redacted] say the [redacted] told them permits would not be issued to allow for equipment and materials to be stored on the verge. The [redacted] advised in my meeting with City officers on 16 August 2021 that he may have given this advice as he did not believe the verge would be able to be used for materials or equipment given pedestrian access issues, its size and that it had trees on it. He says that it later became necessary for the builder to use the verge and footpath, so permits were applied for and granted.

8.28 In my meeting with the City on 16 August, it said that the assessment of permits to use the verge does not require consultation with neighbours. It says it does not have any information for residents about the process for approval of verge permits but that the application form contains information about the matters considered by the City.

8.29 I find the City did not act reasonably in relation to the issuing of permits for materials on the verge in that it mismanaged the expectations of [redacted] about the potential for the builder to apply for and be granted a permit to store materials and buildings on the verge.

8.30 Condition 14 of the planning approval gives a clear impression that the builder will be required to keep all materials inside the boundary. It is uncontested that the [redacted] validated [redacted] understanding that this would be the case. The City may not have intended for the planning approval condition to prevent any future application for a verge permit to be issued but that is how it reads.

8.31 The City should have known that once the construction got to a certain point, the builder would not be able to fit site sheds and material within the boundary given the nature of the development and the footprint of the building it had approved. The City should have been more transparent with [redacted] about the likelihood that the development would require use of the verge for construction and should have information on its website about verge permits so that the expectations of neighbouring owners are managed proactively.

8.32 I consider the information sheet to be an important document in a suite of actions that should be taken by the City to support the implementation of the CBACP and the management of the construction of large developments.

Question 14A: Whether the City acted appropriately and reasonably in relation to the implementation and enforcement of the CMP, including in communicating with the builder and [redacted]

Question 15A: Whether the City responded promptly and appropriately to the various complaints raised by [redacted] including whether its investigation of the complaints and interactions with the builder were timely, reasonable and appropriate?

8.33 The response from the City to [redacted] complaints demonstrates it has not acted proactively to ensure the proper management of the site having regard to the number and nature of complaints that have been made. I accept that at times, [redacted] and [redacted] have had to complain several times before the City would respond to its complaints.

8.34 In its further submissions the City said between 1 January 2021 to 18 August 2021 the City's rangers team has issued 36 compliance notices relating to on street parking on [redacted] Since 30 June it has received 2 customer requests and between 20 June 2021 and 19 August the rangers have patrolled [redacted] 67 times.

8.35 Whilst the City has responded to some complaints from [redacted] its actions have not prevented repeated construction and traffic management issues from occurring therefore, I conclude it has been ineffective in its enforcement of these issues. In the absence of a CMP that properly articulated the agreed and approved ways in which construction was to be managed, unfortunately this is not surprising.

8.36 [redacted] and [redacted] have provided photographic evidence to support many of the complaints made. They show the road being obstructed with no traffic management in place, I accept their claims that heavy vehicles have repeatedly arrived before 7am blocking the roadway when traffic management was not in place.

8.37 The public safety issues associated with traffic management have in my view not been taken seriously enough by the City.

8.38 Complaints about works commencing before 7am have been frequent. However, in my meeting with [redacted] and [redacted] on 17 August 2021, they advised that they have had dozens of written notifications about road closures and that in most cases when the road is being obstructed, traffic management does occur. They say it is not that there is no traffic management, but that the builder is not diligent about managing traffic at all times. They say this is particularly dangerous on early mornings when it is still dark and bicycle commuters are using the roads. They also recall times where cars have driven along the footpath to get around trucks because there has been no traffic management. I accept these accounts that have been given by [redacted] and [redacted]

8.39 Given [redacted] and [redacted] have not been provided with the approved TMP, I cannot express a view on whether that document is adequate in its content or has been complied with. However, it is clear that there has been inadequate traffic management which should have resulted in enforcement action by the City given the safety risks associated with these issues.

8.40 As to the issue of the provision of the CMP and TMP to [redacted] and [redacted] I am baffled as to why they were provided with the CMP under FOI but not the site plan referred to in it or the TMP. These documents are provided as part of the planning approval process and they should be available to any person seeking access to them. They are prepared for the purposes of managing the construction to mitigate impacts to the community and neighbours. They should be provided to the City for approval on the basis that they will be available to the public on request.

8.41 Many of the local councils around Australia have comprehensive Construction Management Plan and Traffic Management Plan Guidelines or fact sheets which are public documents. They act to inform the public about the objectives of these plans, how the council manages construction sites and what the builder and developers must include in the CMP and TMP submitted to the planning departments for approval. Some also have template plans for various aspects of construction management such as air and dust management, operating hours and noise and vibration controls. I am also aware of Councils producing Codes of Practice for Building and Construction in their municipality.

9. Basement ramp design

Question 16A: Whether the City acted reasonably and appropriately in determining that the exit ramp was compliant before December 2019 (noting that the City later conceded it was not compliant)?

Question 17A: Whether the City acted reasonably and appropriately in corresponding with [redacted] and [redacted] about the matter?

Question 18A: Whether the City should have issued the building permit for the work on [redacted] given the certification by the private building surveyor and the non-compliant ramp design?

Question 19A: Whether the exit ramp is now compliant, noting the most recent correspondence between a City planning officer and the builder?

Question 20A: What actions the City has taken to investigate the alleged non-compliant ramps at other addresses put forward by [redacted]

Facts and evidence relating to these questions

9.1 Condition 18 of the planning approval specified compliance with AS/NZS 2890.1:2004. This Australian Standard is not required under the NCC.

9.2 [redacted] and [redacted] were concerned that the gradient of the basement ramp for the development did not comply with the Australian Standard. [redacted] and [redacted] raised their concerns at the JDAP meeting on [redacted] and up to and including in December 2019.

9.3 On multiple occasions, including in writing and verbally, the City advised [redacted] that the exit ramp complied with the Australian Standard, as detailed in paragraphs 7.1 and 7.3 of [redacted] revised submissions. [redacted] presentation to the Council on [redacted] and to a Special Meeting of Electors on [redacted] (at which the CEO was present) also included copies of multiple emails and notes of discussions referred to in part 7 of [redacted] revised submissions.

9.4 In December 2019 the City identified that the exit ramp did not comply with the Australian Standard. The City wrote to the builder requiring it to stop work until the design was compliant. Work on the site was halted on 10 January 2020.

9.5 On 21 January 2020 City representatives including the [redacted] met with [redacted] about the matter. The City finally agreed to seek independent advice and conceded that its interpretation of the Standard has been incorrect. The required the builder to submit revised plans.

9.6 On 24 February 2020 the builder emailed the City to state it had achieved compliance with the Australian Standard. A reply email from the [redacted] queried if the exit ramp 1 in 20 section was 6m long.

9.7 [redacted] and [redacted] have not been provided with a copy of the amended design for the ramp despite making an FOI request and multiple other requests. Curiously, the City says that the details of the approved amended design are public documents and are available on request.

9.8 The ramp has been constructed. [redacted] and [redacted] are not able to determine whether the ramp complies with the Australian Standard. The City says the ramp now complies and they have inspected to confirm this is the case. [check]

9.9 [redacted] and [redacted] have provided addresses of other developments where the ramp does not comply with the Australian Standard and other planning R Codes.

Discussion and findings

9.10 The City's submissions do not dispute the above version of events. It says the City noted the concerns of [redacted] and included condition 18 in the planning approval as a means of ensuring there was a requirement to comply with the Australian Standard.

9.11 The City says it relied on the accuracy of the drawings and the advice of the builders' engineer that the design of the ramp shown on the application and final drawings was complaint. It says it did take notice of [redacted] arguments but did not agree with them.

9.12 The submissions say that 'later' because of [redacted] ongoing concerns, it sought the advice of an independent engineer.

Question 16A: Whether the City acted reasonably and appropriately in determining that the exit ramp was compliant before December 2019 (noting that the City later conceded it was not compliant)?

Question 17A: Whether the City acted reasonably and appropriately in corresponding with [redacted] and [redacted] about the matter?

9.13 It was not reasonable that the City did not agree that there were errors in the plans following [redacted] complaints about this issue in March 2017 when it was first raised, or in August 2017 when he continued to raise the issue.

9.14 It took the City almost 3 years to seek independent advice and concede that the ramp design did not comply with the Standard. This is unreasonable and unacceptable.

9.15 I agree with [redacted] that the error in applying the standard should have been obvious to anyone that looked at the standard and the approved plans.

9.16 It was not reasonable for the City to rely on the builder's engineer in the circumstances where an important safety concern was raised and where, if the City were incorrect

(which it was) this would have ramifications for the safety of other developments in the municipality.

Question 18A: Whether the City should have issued the building permit for the work on [redacted] given the certification by the private building surveyor and the non-compliant ramp design?

9.17 The requirement to comply with the Standard was found in condition 18 on the planning approval. The NCC does not reference the Standard and therefore, the certificate of design compliance provided with the building permit application was not required to certify compliance with Standard.

9.18 The City says it relied on the certification by a qualified engineer. As noted above, I do not agree that the City should have relied on the certificates of builder's engineers given the complaint made by [redacted]

9.19 It follows that the condition 18 of the planning approval was not met and therefore building permit should not have been issued by the City approving the ramp design.

9.20 The ramp design was later amended before the ramp was constructed.

Question 19A: Whether the exit ramp is now compliant, noting the most recent correspondence between a City planning officer and the builder?

9.21 The City says the ramp has been inspected by City officers and confirmed to be compliant.

Question 20A: What actions the City has taken to investigate the alleged non-compliant ramps at other addresses put forward by [redacted]

9.22 In its initial submissions the City says, 'in respect of other ramps that [redacted] alleges are not complaint, it is considered that these are not a matter for this review'.

9.23 It is most certainly within this review for me to comment on the City's actions in relation to other ramps which have been improperly constructed and may be a public safety risk.

9.24 The City said, 'it has initiated certain actions' and 'the City continues to consider these matters.' It says, 'a number of these ramps in other developments were approved and constructed in accordance with approved plans.'

9.25 In my meeting with City officers they said that there had been a review of some sites and they would provide more information.

9.26 The City's further information says, in summary:

(a) it gathered information about sites where the ramps had been approved;

(b) it inspected all sites and assessed the ramps against its revised interpretation of the Australian Standard;

(c) where construction had not commenced, it required amended plans; and

(d) where construction had commenced it has liaised with and continues to liaise with owners to arrange mitigation measures such as mirrors, signs, flashing warning lights, footpath markings, and demarcation of pedestrian path or cross over.

9.27 It appears the City did not appreciate the importance of this question in making its initial submissions to this review. It is not an excuse to say, 'that they were approved and constructed in accordance with approved plans.' This does not make them safe and complaint. Any such approvals were in error and bring great risk legal to Council if there is an injury or fatality due to the unsafe condition of these ramps.

9.28 In responding to my draft report [redacted] and [redacted] have provided their assessment of the City's response to the 12 sites (other than the [redacted] site) that they have told the City contain non-compliant ramps. They say that:

(a) for 8 of these there is no evidence of any additional measures installed;

(b) for 2 sites mirrors have been erected which they say are inadequate as they are above the driver's eyeline so cannot be used by the drivers exiting the ramps;

(c) for 2 sites there are painted warnings, one of which was pre-existing.

9.29 Whilst I am relieved to hear that actions have been taken by the City, I note the additional report from [redacted] and [redacted] which suggests the actions have been inadequate to date.

10. Basement Excavation

Question 21A: Whether the City acted reasonably and appropriately in issuing the approval for the building work without requiring BA20 consents to be obtained?

Question 22A: Whether the City acted reasonably and appropriately in:

(a) issuing the amended approval for the building work?

(b) not requiring BA20 consents to be obtained before amending the building permit?

(c) not meeting with [redacted] to explain the proposed stabilisation work?

Question 23A: Whether the City's actions against and communications with the builder about the initial excavation, amended building permit and subsequent stabilisation works were reasonable and appropriate?

Question 24A: Whether the City acted reasonably and appropriately in its response to complaints about the excavation made by [redacted] between early January 2020 and 11 June 2020?

Facts and evidence relating to these questions

10.1 The building work for the development included excavation along the boundary between the Site and [redacted], for a basement.

10.2 Part 8 of [redacted] and [redacted] revised submission sets out their complaints and refers to photographs, emails and other documents relevant to their complaints. All of the material provided by [redacted] about the excavation close to their boundary has been considered as part of the independent review. A summary of the issues are set out below.

10.3 On 24 September 2019, the builder met with [redacted] to discuss the development. There was a discussion about the basement excavation and the builder advised they intended to use grout to stabilise the sand and that there was no work required on [redacted] land.

10.4 The same day the builder also wrote to the City stating that there was no impact on [redacted] property and that it was not required to obtain signed BA20 forms.

10.5 [redacted] and [redacted] made an FOI request for building permit documents which they received in December 2020. The certificate of design compliance of the building permit refers to Geotechnical Consultants Report J190101044 001 R Rev 0 dated 19 February 2019 (**Geotech Report Rev 0**). A copy of that report was not provided.

10.6 On 28 December 2019, [redacted] returned from overseas to find the basement excavation was closer than 1.5m from their boundary and approximately 2.7m deep and no stabilisation work was apparent. [redacted] and [redacted] have provided photographs of the excavation and described it in detail in several emails.

10.7 On 7 and 10 January 2020, [redacted] met with the acting site supervisor, builder and developer in relation to the stabilising the excavation. On 7 January 2020 sand was backfilled against the excavation wall immediately as requested by [redacted] to stabilise the walls. On 10 January 2020 [redacted] was advised by the builder's representatives that they had a geotechnical report but were waiting on the slope analysis and that they intended to cover the excavation walls with shade cloth, held in place with steel mesh and star pickets. [redacted] was concerned that would be ineffective to prevent slip circle failure and was a danger to [redacted] property and to workmen completing footings at the base of the excavation wall.

10.8 On 14 January 2020, [redacted] attended the City's offices and asked for information about the basement excavation stabilisation. The City officer advised [redacted] to contact the WA Building Commission.

10.9 [redacted] and [redacted] requested information from the builder including the Geotechnical Report Rev 1, the Certificate of Design Compliance, and the plan for stabilising work along the boundary with their house. On 20 January the builder provided a copy of the Geotech Report Rev 0 and a sketch titled 'Proposed Grout Support'.

10.10 The Geotch Report Rev 0 (which had been referenced in the certificate of compliance design) included a basement excavation drawing showing a relatively stable 1 to 1.7 slope extending out to 4m from the boundary of [redacted]. All the stability analysis in the Report was based on the basement excavation being 4m from the boundary of [redacted]. However, the site drawings show the basement for the development to be 1.524m from [redacted]. The report also referred to grouting under [redacted] house footings and said there could be minor disturbance to brick paving.

10.11 The document titled 'Proposed Grout Support' was dated 20 February 2019. It showed the excavation 1.5m from the boundary and that cement grout would be injected under the footings of [redacted] house.

10.12 [redacted] spoke to the engineer and was told that Geotechnical Consultants Report J190101044 001 R Rev 1 was dated 21 February 2019 and that the Rev 1 showed the basement 1.5m from the boundary consistent with the site drawings. Despite requests, a copy of Rev 1 has never been provided to [redacted] It would appear that Rev 1 and the proposed grout support were prepared after Rev 0 but that the Rev 0 version was listed on the CDC and relied on for the design.

10.13 [redacted] asked the builder for a copy of the redesign to account for the over excavation. The builder provided them with a memo from their engineer dated 30 January 2020 setting out options for stabilisation of the wall including grouting and a piled wall.

10.14 The builder sought consent to install grouting under [redacted] property on 31 January 2020. On 2 February 2020 [redacted] replied. They denied the builder access to grout under their house footings for a range of reasons, including that other than the sketch 'Proposed Grout Support' they had no technical details from the builder as to how the work would be carried out. [redacted] and [redacted] raised concerns about the proposed piled wall option and sought further information of how this would be achieved.

10.15 Between 24 February 2020 and 16 March 2020 there were emails between the City and the builder/developer about the design of the ramp and proposed works to stabilise the excavation adjoining.

10.16 On 15 April 2020, work recommenced on the building Site. [redacted] had been refused access to the revised drawings and remained uninformed about what was proposed. Given the over excavation that had occurred, they lacked confidence in the builder and wanted to see for themselves what was proposed. [redacted] advised the builder on 15 April 2020 that he had set up benchmarks around his house to detect any movement and monitoring bores inside the fence line to detect any ingress of cement grout.

10.17 [redacted] and [redacted] were not asked to sign BA20 forms in relation to the proposed stabilisation works.

10.18 In an email from [redacted] to the [redacted] dated 23 April 2020, [redacted] confirmed that he received a copy of the amended building permit but had not been given details of the proposed method of stabilisation by the builder. He asked if the [redacted] could talk he and his wife through an overview of the stabilisation work via a Zoom meeting. The meeting did not eventuate.

10.19 In emails between the builder and the [redacted] dated 1 May 2020 the builder said they did not intend to provide any documents about the proposed stabilisation works to [redacted] The [redacted] agreed the builder was not required to provide the requested documents. The [redacted] requested the builder provide copies of inspection reports for the stabilisation works. An email dated 13 May 2020 from the builder to the [redacted] contains a link to a drop box that is said to contain copies of the requested inspection reports.

10.20 On 10 June 2020 [redacted] sent an email to the City about a section of the stabilised sand wall collapsing filling the gap between the basement wall and the excavation. They also provided photographs showing are area excavated a further 1.8m deep. [redacted] and [redacted] asked the City whether the approved stabilisation works provided for this additional excavation. No reply was received from the City.

10.21 The stabilisation work has been completed. [redacted] and [redacted] report that no grout was detected on their property and no movement to the property has been detected to date. Movement of the boundary fence has been detected. They say that they have observed that their floorboards have opened up at the time that compaction works were being carried out at the site.

Discussion and findings

10.22 The City's position in relation to this matter is that it has no responsibility for or obligation to check the adequacy of the original or revised basement wall design or to ensure the builder complied with their obligation to build in accordance with the approved plans.

10.23 It says provided the builder or their engineer says that work close to the boundary will not result (after completion) in an adverse effect on the adjoining property, it cannot (or will not) question that advice and cannot require BA20 forms prior to issuing the building approval.

10.24 The City says it is not able to provide [redacted] with copies of the relevant documents showing the engineering design of the basement wall that was built on their boundary because they are not 'interested persons' within the meaning of the Building Act.

Question 21A: Whether the City acted reasonably and appropriately in issuing the approval for the building work without requiring BA20 consents to be obtained?

10.25 The Building Act provides in section 22 that a permit authority may refuse to grant the building permit applied for if it appears to the permit authority that there is an error in the information provided for the application.

10.26 In *Miller and City of Melville* [2012] WASAT 156, the SAT examined section 22 and the question of whether a council can refuse to issue a building permit if they are aware there is an error in the information provided. The facts were that the City had refused an application for a building permit on the grounds that some aspects of the proposed building did not comply with applicable building standards. The applicant appealed the City's decision to SAT arguing that the City had no power to refuse an application given the application was accompanied by a certificate of compliance design. The WA Attorney General was a party to the proceeding. He supported the applicant's argument saying it was not open for the City to go behind the terms of the certificate of compliance.

10.27 The SAT did not agree with the applicant and the Attorney General. It found that the City did have the power to refuse an application if it detected an error in the certificate of compliance. Relevant passages from the decision are as follows:

> *"34….The Act undoubtedly places primary responsibility for determination as to the question of compliance with building standards upon the building surveyor who provides the certificate of compliance under s 19. It can be accepted that the Act contemplates that is not the function of the permit authority to review a certificate of design compliance, and that in the normal course no such review will be undertaken. There is, however, a power given to the permit authority to refuse the grant of a building permit where an error is detected in information provided for the application….*

36 The fact that s 20 of the Building Act makes no provision for the permit authority to consider whether the proposed building will comply with all relevant building standards is not surprising. Undoubtedly the Building Act contemplates that applications for the issue of the building permit will not be subjected to more than one analysis to ascertain compliance with relevant building standards. The provisions of s 144 of the Building Act make that position quite clear. Mostly, therefore, the terms of a certificate of design compliance will not be subjected to review, and a permit authority will confine itself to considering whether it is satisfied of those matters of which s 20 requires it to be satisfied before the obligation to grant the building permit arises. Where, however, in the course of that analysis, for any reason the permit authority forms a genuine belief that there is an error as to compliance, we do not consider it inconsistent with the scheme of the Act that the power under s 22 to refuse to grant the application is enlivened. Mostly that is likely to occur where the non-compliance is clear and might be corrected by the certifying building surveyor when it is drawn to his or her attention. But where there is simply a difference of opinion between the permit authority and the certifying building surveyor, the matter can be determined by review by this Tribunal under s 119. The Building Act is clearly designed to ensure adherence to applicable building standards, and that objective is better served by resolution of differences of opinion through an orderly review system, rather than by a requirement that obliges a permit authority to grant a permit notwithstanding a belief that the structure to be constructed will not comply with the required standards Pollution."

10.28 I do not believe the City acted inappropriately in issuing the original building permit. Although it appears that the incorrect revision of the geotechnical report was referenced in the CDC, applying the Miller case to the present issue, and noting the City chooses as a matter of course not to conduct technical reviews of building permit applications, the City would not have been expected to identify the alleged discrepancy.

10.29 As the Geotech Report Rev 1 has not been provided, its adequacy and the adequacy of the original design for the basement wall is not in issue in this review.

10.30 In relation to the issue of a BA20. The City acted in accordance with the advice from Building and Energy that unless the building work, once completed, will adversely affect adjoining property, a BA20 consent is not required. Having received a report from an engineer that there would be no adverse effect on [redacted] and [redacted] property, the City acted reasonably in issuing the building permit without requiring a BA20.

10.31 The advice from Building and Energy about when a BA20 form is required is set out in factsheet entitled 'Work affecting other land'. It says:

Adversely affecting adjoining property

This is where the proposed design indicates that the building, when completed, will:

(a) *reduce the stability, bearing capacity of the land or a building or structure on the land;*

(b) *damage a building or structure on the adjoining land; or*

(c) *change the natural site drainage in a way that reduces the effectiveness of the drainage of the land or existing or future buildings or structures on the land.*

10.32 Section 20 provides that a building permit must be issued if the building work may adversely affect land beyond the boundaries of the land on which the works are being done and there is compliance with section 77.

10.33 Section 77 says:

Other land not to be adversely affected without consent, court order or other authority

A person responsible for work must ensure that the work does not adversely affect land beyond the boundaries of the works land —

(a) *unless each owner of the land that may be adversely affected consents to the work being done even though the land may be adversely affected in that way, and the work is done in accordance with the consent; or*

(b) *unless the work is done in accordance with an order under section 86(2)(b); or*

(c) *except in prescribed circumstances.*

Penalty: a fine of $25 000.

10.34 When the Building Act was introduced into the Parliament of Western Australia on 14 April 2011, in relation to protection of adjoining property, the Hon Simon O'Brien's second reading speech said:

"The Building Bill will clarify issues related to construction on boundaries that have caused anxiety and uncertainty for many years. The Dividing Fences Act provides a mechanism for seeking a contribution to the cost of building or maintaining a dividing fence, but does not specify construction standards or processes. The bill has been drafted to align with that act and reinforce the principle that a person's home is their castle and that other people must get permission to intrude, be they workmen seeking easy access to work on a neighbour's building or encroachment on the building itself. If permission is refused, a builder can seek a court order to get access, but cannot just march in. There are clear rules dealing with removal of fences, protection of adjoining buildings during construction, jointly owned walls, and quality of construction

along boundary lines. Local governments are given effective powers to intervene when a builder does the wrong thing."

10.35 It is not clear to me why Building and Energy considers that section 77 only applies where the proposed design, **when completed, will** affect adjoining land or property. The Act does not use these words. To the contrary section 20 says 'if the building work **may adversely affect** land beyond the boundary'.

10.36 Building and Energy's interpretation of sections 20 and 77 does not appear to be consistent with the intention of the government expressed in the second reading speech.

10.37 In its response to my draft report Building and Energy said that it does not interpret section 77 as applying only when completed works will adversely affect the adjoining property. It acknowledged that its information sheet suggests otherwise and said that it intended to amend the information sheet.

10.38 Notwithstanding the advice from Building and Energy that its information sheet will be amended for the purposes of my review, it was reasonable for the City to act on the advice of Building and Energy published at the time. I also note that the builder insisted strongly on this advice being followed by the City.

Question 22A: Whether the City acted reasonably and appropriately in:

(a) **issuing the amended approval for the building work?**

(b) **not requiring BA20 consents to be obtained before amending the building permit?**

(c) **not meeting with [redacted] to explain the proposed stabilisation work?**

Question 23A: Whether the City's actions against and communications with the builder about the initial excavation, amended building permit and subsequent stabilisation works were reasonable and appropriate?

Question 24A: Whether the City acted reasonably and appropriately in its response to complaints about the excavation made by [redacted] between early January 2020 and 11 June 2020?

10.39 The City has not made any specific comments in its submission about the revised basement design. Their comments in relation to this issue generally are set out above.

10.40 On the basis that the original basement design was not complied with due to soil subsidence and therefore excavation of the site closer to the boundary than approved, new or amended basement design drawings were prepared and lodged with the City.

10.41 On closer review of the Building Act since preparing question 22A for my consideration, I note that the Building Act does not provide a process for when there is a variation or amendment to an original design. It would therefore appear that in the

present situation, the new documents were lodged together with a certificate of design compliance and the City accepted those documents.

10.42 Consistent with its usual practice, the City did not undertake any review of the documents or if it did, as there was no 'approval' required or any power to 'refuse', and on that basis the documents were received. The City had full reliance on the builder's engineer that the documents were adequate.

10.43 Although at one point the builder asked [redacted] to consent to grouting to stabilise his land, consent was not provided so the builder proceed to construct the basement wall wholly inside [redacted]

10.44 The builder and City would have taken the view no BA20 consent was required given the Building and Energy advice discussed above.

10.45 The City asked the builder for copies of inspection reports issued by their engineer, which appear to have been provided. The City did not inspect itself. It says that is has no obligation to do so and may rely on the builder and their engineer to comply with the drawings.

10.46 Whilst the City could have chosen to be more proactive in its oversight of the revised design and inspection of the work, there is no duty do so. The position of the City is consistent with the comments made in the Miller case about the role of councils and on that basis, I must conclude that the City acted reasonably in relation to the revised design and construction of the basement wall. I also make this conclusion on the basis that the Building Act provides no process for varied designs to be approved by the City as the Permit Authority.

10.47 In relation to the provision of access to the revised engineering drawings to [redacted] the City says [redacted] and [redacted] are not entitled to the drawings under the Building Act as they do not meet the definition of 'interested person'. I agree that this is the case and on that basis the refusal to give access under the Building Act was reasonable.

10.48 The City's refusal to meet with [redacted] and [redacted] to talk to them about the revised design and give them some assurance is unfortunate but understandable. He Act does not allow the City to share details about the revised design and given the builder had made it clear he did not consent to access, a meeting with the [redacted] and [redacted] would not have been appropriate. It is unfortunate the builder was not more cooperative with [redacted]

10.49 In making this finding, I express my personal view that the role that the City has chosen to play in overseeing compliance of design and building work is very unfortunate. I understand it is consistent with how other local councils in WA perform their role as permit authority. In my view the City's position amounts to an abdication of responsibility to the private sector designers, builders, building surveyors and engineers. Many of whom will not be inclined to act in the public interest and will instead be driven by personal and commercial interests.

10.50 This state of affairs does not appear to be consistent with the vision held for the role of local government when the Building Bill was introduced. I quote again from the second reading speech as follows:

> *"The bill continues the role of local governments and other permit authorities in enforcing compliance with building standards and processes. A local government will monitor building activity in its area and can give notices requiring owners to improve, obtain approval for, or demolish unsafe or unauthorised buildings. The permit authority for a building will be able to inspect at any time and require compliance with certified plans. The bill provides a range of enforcement options, including infringement notices, improvement notices and prosecution for noncompliance. If dangerous situations are not being dealt with, the permit authority can take action itself and recover the costs from the owner or builder. I commend the bill to the house."*

10.51 I make these comments noting that the State Government appears to agree with or encourage councils to take this position. I say this based on the position taken by the WA Attorney General in the Miller case. I also think the interpretation of the Building Act by Building and Energy in its information sheet on works affecting adjoining property favours builders and developers over the rights of adjoining owners.

10.52 I am unable to make recommendations to the WA government in this review, but if I could, I would recommend that it urgently revise the Building Act's property protection provisions so as to reinstate the rights of adjoining owners. Reforms should provide for full disclosure of information in advance of proposed works close to a boundary that is at risk of affecting their property. Adjoining owners should have rights to compensation not just where damage occurs but also to pay for the adjoining owners to have proposed designs and methodologies reviewed by an independent engineer. They should also have rights to a dilapidation survey and the provision of overhead protection when multi storey developments are occurring close to existing buildings. The protection works provisions in the Victorian Building Act provide these types of protections for adjoining owners as well as a specialist appeal body that can resolve disputes between owners about protection works matters. It appears to me that with councils approving precinct developments such as the CBACP, these types of protections are urgently needed to support the implementation of those planning policy decisions.

Part B – [redacted] Complaints

The issues relating to this matter revolve around the construction of fences/walls on the boundary of [redacted] and [redacted]. [redacted] and his wife own [redacted].

1. Initial complaints about the limestone wall

Question 1B: Whether the City responded appropriately and reasonably to the initial complaints about the limestone wall leading up to and including its decision to issue the building order on [redacted]?

Facts and evidence relating to this question

1.2 The owners of [redacted] constructed a 51 metre long limestone brick wall along the boundary between [redacted] and [redacted] in about 2005 and 2006.

1.3 In 2012 [redacted] observed a crack in the wall. He obtained a land survey showing the wall encroached into his property between 100mm and 170mm.

1.4 On 1 August 2012 [redacted] contacted the City raising concerns about the structural stability of the wall and its encroachment. [redacted] followed up his complaint on 12 August 2012.

1.5 The City inspected the site on 13 August 2012.

1.6 On 19 September 2012, the City wrote to [redacted] asking him to obtain a land survey and report on the structural integrity of the wall. [redacted] responded on 5 October saying that given the permit for the construction of the limestone wall was issued to [redacted] the City should be asking [redacted] to obtain a report on structural integrity. The City proceeded to write to [redacted] on 5 November 2012.

1.7 On 25 November 2012 [redacted] wrote to the City noting that:

(a) the building permit issued by the City required the wall to be built wholly on [redacted] and the wall did not comply with that requirement;

(b) that requirement had been included in the permit because of an agreement between he and the neighbour that the wall would be built wholly within the boundary of [redacted]

(c) the onus was on [redacted] to demonstrate the wall was structurally adequate and they had been given adequate time to do so;

(d) on the basis that the wall is not structurally adequate the City should order that it be demolished;

(e) 'Issues relating to the non-compliance with the Agreement and replacement of Fence and the 14A Fence are civil matters between the Owners and ourselves.'

1.8 The City arranged for an engineer to inspect and report on the structural adequacy of the wall.

1.9 On 14 December 2012, the engineer engaged by the City concluded that the wall was structurally inadequate. It said sub grade had not been adequately compacted and the strip footing and piers were under sized. The report arranged by the City recommended as follows:

> *"We consider either the wall should be demolished and re-built in accordance with structural requirements on suitably compacted sub grade or additional attached piers are constructed on either side of the existing wall to support it."*

1.10 Relying on the report the City wrote to [redacted] on 17 December 2012 giving notice of the intention to issue a building order to demolish the wall.

1.11 On [redacted] the City issued a building order to [redacted] requiring her to demolish the wall.

Discussion and findings

1.12 The City acted appropriately in responding to the initial complaints of [redacted] It inspected the site within 2 weeks of the initial complaint in August. There was then a delay of about 1 month before it wrote to [redacted] in September asking him to justify the structural adequacy of the wall and its encroachment. This letter appears to have been sent in error. When [redacted] pointed this out, the City sent a similar request for information to [redacted] in November 2012.

1.13 After further prompting by [redacted] in November, the City obtained an engineer's report in mid-December, issued a notice of intention to order the wall be demolished on 17 December 2012 and on [redacted] issued the order.

1.14 It took approximately 6 months between the City receiving the initial complaint and issuing the order to demolish. [redacted] followed up the City to prompt further action at least 3 times. However, once the City had the engineer's report confirming the structural inadequacy of the wall, it acted promptly to issue a building order to demolish.

1.15 The initial delay was not ideal. However, there was no evidence that the wall was in danger of collapse. Having regard to the risk and the intervening end of year holiday period, the timeframe of 6 months was in my view reasonable.

2. Consent orders made by SAT March 2013

Question 2B: Whether the actions of the City relating to the SAT proceeding and its consent to the orders made by SAT on [redacted] were appropriate and reasonable?

Question 3B: The extent to which the City informed [redacted] about the proceeding or sought comments from [redacted] or his wife [redacted] prior to agreeing on consent orders?

Question 4B: If the City did not involve [redacted] or [redacted] basis on which that's approach was taken and whether it was reasonable in the circumstances?

Facts and evidence relating to these questions

2.1 [redacted] sought a review of the City's decision to issue the first building order at SAT [redacted].

2.2 On 28 March 2013 [redacted] and her husband attended a directions hearing for that proceeding. Member Ward presided. The City was represented by the [redacted]

2.3 A transcript of that hearing has been provided. In summary it records:

(a) [redacted] advised SAT of an engineer's report dated [redacted] which said that works could be done to the limestone wall to make it structurally adequate. [redacted] proposed that they be allowed to respond to the order by undertaking that work rather than having to demolish the wall as required by the order.

(b) In response the City's [redacted] said:

> *"Ma'am, the problem that exists with this wall is that there has been a surveyor's report, and the wall encroaches on the property next door. So the City is not able to order or agree to remedial works which will obviously have to take place on the neighbouring property as well. If there were an application by both property owners to do so, the City would have absolutely no problem with it. But the neighbour is objecting to any – as I understand it, the neighbour is objecting to any entry into his property.*
>
> *And as a result, the City has really no choice but to issue the notice because the wall is not built in accordance. We commissioned a separate engineer, some time back when – just before we did the notice, and the findings are exactly the same. The wall must either be demolished or repaired."*

(c) Tribunal Member Ward asked the extent of the encroachment and length of the wall, to which the [redacted] responded that the encroachment was 0.17 metres in some places and 0.1 metres in others and that the wall was 51.9 metres in length.

(d) [redacted] interjected and said the back half of the wall had been demolished so the relevant wall was only 25 metres. He then said the 0.17 encroachment was *'simply a pier that goes off on an angle from the front wall which can be trimmed*

back with no real difficulty to be honest. So the encroachment is only really 0.1 of a metre.'

(e) Tribunal Member Ward noted that the building order did not refer to the encroachment and was issued on the basis that the wall was structurally inadequate. [redacted] submitted that because of this, they proposed to address the structural issues, not the encroachment.

(f) the City's [redacted] said:

> *"We were not aware of the fact at the time of issuing the notice, I think, that the wall was encroaching. We were alerted to that fact by, I think the neighbour. We had a surveyor go on the site and take levels and marks, and that showed that there is an encroachment. The City is – does not [sic] involved in encroachments. We have had matters before SAT where we've attempted to assist parties to deal with issues like that and have on occasions been told quite candidly by presiding members. "What on earth are you getting involved in encroachments for". So we're reluctant to even get involved. So I don't even have to go there.*
>
> *The building license for this wall was issued to the property of the applicant. The wall has not been built in accordance with that, and it really is as simple as that. We understand that the neighbour would not consent to it be fixed. There are obviously other remedies that the applicant would have, I would suspect. I would imagine one of them would be approached. Maybe I shouldn't even say, but there are other remedies available. The City would have no objection to any of these remedies being sought, but we cannot get involved in that. It's as simple as that.*
>
> *There's a wall that hasn't been built in accordance with the building license, and we are duty bound. Of course, it is not stable to issue a notice for its remedial – for remedial work to be undertaken. If it cannot be undertaken because of going onto a property next door, there's a consent to demolish, but not to fix, we have got, really hands tied in the sense of what we can and can't do. In your hands, ma'am."*

(g) Tribunal Member Ward considered the encroachment issue was *'in the territory of dividing fences.'*

(h) [redacted] advised the Tribunal that they could repair the wall without entering the neighbour's property. This led the Member to conclude there were two options, comply with the order and demolish the wall or repair the wall without accessing the neighbour's property.

(i) There was discussion about the cost to repair, which [redacted] said would be about $2,000 versus the cost to replace the wall. He also told the court that if the wall had to be demolished because of the encroachment of 100mm, [redacted] would

require a replacement wall on the boundary under the Dividing Fences Act which would encroach more that the existing wall. He said they denied there had been any agreement for the wall to be wholly within their boundary. He said he had tried to explain this to his neighbour.

(j) Tribunal Member Ward asked for the City's position, to which the City's [redacted] said the City was only interested in a safe wall. The Member agreed that the issue of encroachment was one between the parties.

(k) The Tribunal proceeded to make consent orders which give [redacted] about 2 months to repair the wall, have an engineer issue a report to confirm that it had been made structurally adequate and provide that occurred, the building order would be revoked. There was some discussion that if 'it goes off the rails' the City could issue another notice or prosecute [redacted]

2.4 [redacted] became aware of the SAT hearing on [redacted] when he spoke to the City's [redacted] and [redacted]. He sent an email dated 9 April 2013 expressing disappointment that they had not been told what was happening. He had obtained a copy of the consent orders from SAT and was unhappy with the outcome alleging the City had failed to ensure compliance with the building permit. He confirmed that he did not consent to the wall being repaired or to access to the property for such repairs. He said he had lodged a complaint with the Building Commission against the builder and [redacted] in relation to the construction of the wall.

Discussion and findings

2.5 In its response to the summary of complaint and [redacted] material, the City says that its action to issue the first building order was based only on the structural concerns was warranted given the letter from [redacted] dated 25 November 2012 (paragraph 1.6 above) in which he said the order should be issued if the wall was shown to be structurally inadequate and that the issue of the breach of the agreement (i.e. that the wall be wholly within the [redacted] boundary) were civil matters.

2.6 The City says that the consent orders were intended to fix the structural issues and at that time, it was understood that this was the basis on which [redacted] expected the City to make the order. It is acknowledged by the City that after the SAT hearing it became apparent that [redacted] considered the City's first building order should have been made on the basis of the structural issues as well as the encroachment as the building permit covered both. The City says it accepted [redacted] submission to the SAT that the repairs could be done from within his boundary and that he had an engineer's report to support his request to resolve the structural issues through repair rather than demolition.

2.7 In his reply to the City's response, [redacted] says his main concern with the wall was always the encroachment. He says the City's the [redacted] was well aware of that and of the fact that the building permit required that there be no encroachment. He says the City could have clarified this if it was unclear and failed to do so. He asserts

that the SAT orders amount to the City consenting to that encroachment when it had no right to do so.

2.8 I consider the actions of the City during the SAT hearing to be appropriate and reasonable. The City' [redacted] advised the Tribunal of the issue of the encroachment. He told it of [redacted] strong objection to the repair of the wall and refusal to give access to his property for repair of the wall.

2.9 Although the City' [redacted] mistakenly told the SAT that the City was not aware of the encroachment at the time the building order was issued, this could be explained by the fact that it was a directions hearing so he personally may not yet have gained a detailed knowledge of the background to the matter. Further, I do not consider that this statement materially affected the position that Member Ward took or the order that she made.

2.10 Even though the SAT orders made are 'consent orders' I do not agree with [redacted] that the City effectively was consenting to the encroachment. It is plain from the transcript that this was not the case and the City's [redacted] was very clear in ensuring the Tribunal was aware of the encroachment and of [redacted] objection to the wall being repaired rather than demolished.

2.11 It was also the case that the engineer's report obtained by the City recommended demolition **or** repair so the City's [redacted] was not in a position to say that repair would not resolve the structural concerns with the fence.

2.12 I believe the Tribunal made the orders primarily having accepted the submissions from [redacted] that the wall could be repaired from their side, that the cost to demolish was not warranted given the engineer's advice and the nature of the repairs that were proposed. Member Ward also accepted that [redacted] had communicated with [redacted] about the encroachment and that separate proceedings may be taken in relation to those issues.

2.13 I accept that the actions of the City's [redacted] at the SAT hearing were informed by the 25 November 2012 letter from [redacted] where he stated that he would pursue the 'non-compliance with the Agreement' (earlier described as an agreement that the limestone wall not to encroach on his land) in civil proceedings. I also note the City's acknowledgement that the emphasis of [redacted] claims about what the City should do shifted to the issue of encroachment after the SAT hearing. I believe, at the time of that hearing, the City's [redacted] was acting on what he understood [redacted] wishes to be, namely that the City take action primarily due to his concerns about the structurally adequacy of the wall.

2.14 On the question of the extent to which the City informed [redacted] about the proceeding or sought comments from him or [redacted] prior to agreeing on consent orders, it is uncontested that [redacted] or [redacted] were not told about the hearing, did not attend and consequently there was no communication with them during the hearing before the orders were made.

2.15 Given [redacted] was not involved, was the approach of the City appropriate In my view it was. As noted above, the Tribunal was advised about the encroachment, that [redacted] objected to the wall being repaired and to any access to this property for that repair. I am satisfied that the Tribunal was informed of [redacted] position and nevertheless took the view that the issues of encroachment were for a different proceeding. Tribunal Member Ward also accepted the submissions of [redacted] and his engineer's report which were consistent with the engineer's report obtained by the City which provided for demolition or repair.

2.16 Whilst I consider the City's actions at the SAT hearing to be appropriate, I believe that with hindsight and the benefit of knowing how this matter has unfolded (which could never have been predicted at the time of the SAT hearing) it would have been prudent for the City to inform [redacted] about the proceeding and give him an opportunity to attend, seek to intervene or take any other action he chose to respond to the submissions put to the Tribunal by [redacted]

2.17 We will never know if a different outcome would have resulted but by not providing [redacted] with an opportunity to attend when it was clear that the outcome could affect his interests. It is understandable that he feels deprived of an opportunity to be heard. Whilst I have empathy for his perspective, I do not believe that the City's [redacted] acted inappropriately at the hearing on the basis of what was known at the time.

3. Repair of the limestone wall

Question 5B: Whether the actions of the City in response to the complaints about trespass, safety, lack of consent or building approvals for the repair work were appropriate and reasonable?

Facts and evidence relating to this question

3.1 On 9 April 2013, [redacted] wrote to the City about the SAT orders and asserted that the orders did not override the need for approvals and his consent before repairs could occur. He sought advice about options to prevent the repairs to the limestone wall from going ahead. Follow up emails were sent on 21 and 24 April 2013.

3.2 On 17 May 2013, [redacted] emailed the City advising that he had commenced proceedings in SAT for an interim order to prevent [redacted] from undertaking the remedial works to the fence without his consent. He also said in that email that on 15 April he had issued [redacted] with a notice of intent to demolish the fence and reserved his right to pursue that matter in the Fremantle Magistrates Court.

3.3 On 23 May 2013 at 12.24am [redacted] wrote to the City advising that [redacted] was undertaking work on or around the wall and expressing concerns about safety to workers on his property. He refers to the fence starting to rotate, substantial excavations and further

structural instability of the wall. He asked the City to immediately inspect the work and confirmed that they had not given consent to the work.

3.4 In reply on 23 May 2013 at 9.48am the City's [redacted] emailed saying he was under the impression the engineer's report gave an option of repair of the wall as it was not an immediate threat, which is why SAT ordered repair. He expressed concern over:

(a) the refusal to allow access for proper repair;

(b) the resultant, apparent inability to comply with the order from SAT to repair the wall; and

(c) the inordinate amount of time that the City is having to spend on this matter which seems possible, through cooperation, to have a speedy resolution.

3.5 Between 26 May and 3 June 2013 [redacted] exchanged emails with [redacted] whom he believed was carrying out the repair work. He demanded that work on the wall immediately cease and that workers stop trespassing on his property. On 3 June 2013 [redacted] says that there had been no workers entering his property since his request to stop trespassing but that the work had been completed.

3.6 On 28 May 2013 a letter from [redacted] engineer said that the repairs had been completed in accordance with their recommendations and that the wall was now structurally adequate.

3.7 On 10 June 2013 the City wrote to SAT to advise the consent orders had been complied with and the building order may be revoked.

3.8 In an email between City officers [redacted] and [redacted] dated 15 October 2013 (obtained my [redacted] under FOI), [redacted] says that he reviewed the files and found no complaints about trespass from [redacted] He says that trespass comes under the Dividing Fences Act and is a police matter. He says, "I don't think the City has jurisdiction on these trespass matters."

Discussion and findings

3.9 In essence, the City chose not to act on the claims by [redacted] that the repairs to the wall were unsafe and that they involved a trespass on his land.

3.10 I find that the City should have inspected the works given the concerns raised by [redacted] about safety. However, as it transpired there was no injury to any person, wall collapse or other event causing damage that [redacted] had feared would occur when he emailed the City on 23 May 2013. Therefore, the failure to inspect was of no consequence.

3.11 The City did not prosecute [redacted] in relation to the complaints about the repairs to the wall (which [redacted] continued to make after the repairs were completed). I believe that was a reasonable position for the City to take.

3.12 As can be seen from the chronology above, [redacted] complained about trespass to his land and safety concerns on 23 May requesting the City issue an order to stop the work.

3.13 The correspondence with [redacted] supports [redacted] allegations of trespass. [redacted] said on 3 July that since the request not to enter [redacted] property on 26 May, there was no trespass, implying that there was entry onto [redacted] land before this request. [redacted] also said that works were done to the wall after 26 May to complete the repairs and make the wall safe which is what [redacted] wanted.

3.14 There is no evidence that the City was aware of the email exchange with [redacted] and in any event, to the extent that [redacted] concedes there was trespass, this email was sent after the works were said to be completed by [redacted] engineer.

3.15 [redacted] also says that based on the nature of the repair works, it was obvious to the City that access to his side of the fence would be required.

3.16 [redacted] made it clear to the City that he objected to the repairs and to any entry onto his site to undertake them. However, on 17 May, he also advised he had issued proceedings in SAT seeking orders to prevent the repair work.

3.17 In its submissions to this review the City maintains that there was no evidence of trespass or safety risk, that [redacted] had advised that he was seeking orders to stop the repair work and that the work was certified by [redacted] engineer. The City says that in any event section 21 of the Dividing Fences Act allows entry to neighbouring property to affect repairs. That section says:

> *21. Power to enter adjoining land*
>
> *Every person engaged in constructing or repairing a fence under this Act and his agents and servants may, at all reasonable times during the construction or repairing, enter upon the lands adjoining the fence and do upon those lands such acts, matters and things as are necessary or reasonably required to carry into effect the construction or repairing of the fence.*

3.18 The repairs were being done pursuant to the SAT orders dated [redacted] which were made on the basis of submissions to the Tribunal from [redacted] that he would not need access to [redacted] property to complete those works.

3.19 To the extent that the City says it has no jurisdiction in relation to trespass, this is not correct. Section 81 of the Building Act makes it an offence to go on land beyond the boundary of the works land unless there is consent from the owner of the other land. Consent is not required if 'as a matter of urgency it is necessary to go onto the land to prevent imminent collapse of, or damage to any land, including a building or structure on the land; or where the other land is vacant or any building on the land is vacant. Any offence under the Act can be prosecuted by the City and therefore trespass is within its jurisdiction.

3.20 Whilst the City could prosecute for a trespass, and whilst I have concluded above that there is evidence of trespass, it is not clear that the City had that evidence. Further, [redacted] was completing the work pursuant to a SAT Order. There is also section 21 of the Dividing Fences Act which may have provided [redacted] with a right to access (or at least

may have complicated a prosecution). At this time [redacted] had told the City he was seeking orders to prevent the repair works and to pursue his rights regarding the encroachment. There is also no evidence that the trespass caused any loss or damage to [redacted] For all these reasons, I do not consider the City had an obligation to act on the alleged trespass and note that its decision not to do so was supported by legal advice it later received.

4. Decision to issue a second building order to demolish the wall

Question 6B: Whether the actions of the City in agreeing to issue a building order for demolition of the wall based on encroachment was appropriate and reasonable?

Facts and evidence relating to this question

4.1 On 16 and 27 June 2013 [redacted] emailed to the City's [redacted] complaining about the City's actions in relation to the repairs to the wall.

4.2 On 28 June 2013 the City's [redacted] replied on behalf of [redacted] stating (in summary):

(a) the City had acted on the complaints from [redacted] which resulted in an appeal to SAT against a building order;

(b) the appeal resulted in an order from SAT to repair the wall;

(c) the City received certification from an engineer that the wall was repaired to their satisfaction;

(d) they were informed the repairs were affected without the need to access [redacted] property;

(e) the wall was built in 2004/2005 subject to an agreement between the parties, to the exclusion of the City;

(f) SAT did not wish to deal with the encroachment as the wall predated the Building Act;

(g) the wall is now structurally sound which was achieved without gaining access to [redacted] property;

(h) on his own admission, [redacted] has lodged a case in the Magistrates Court under the Dividing Fences Act;

(i) it is evident that [redacted] desires an outcome that is different to that which has been achieved, at their instigation;

(j) the City upholds the Act and Regulations and does not act on behalf of property owners in their disputes with neighbours;

(k) [redacted] opinion that City's officers do not have an appropriate understanding of the City's obligations is a personal opinion and warrants no response;

(l) [redacted] was invited to meet with the City's officers and he did not avail himself of that opportunity to meet.

4.3 On 30 June 2013 [redacted] wrote to [redacted] expressing his dissatisfaction with the City's [redacted] reply and asking the City to prosecute [redacted]

4.4 On 1 July 2013 [redacted] wrote to [redacted] inviting him to complain to the WA Ombudsman. On 3 July 2013 [redacted] made a complaint to the WA Ombudsman.

4.5 On 30 August 2013, a senior investigator from the office of the WA Ombudsman, wrote to [redacted] saying she was satisfied that the City addressed his concerns and provided an explanation regarding its position on the matter. She quoted from the 28 June 2013 email from the City's [redacted] She said further that the appropriate avenue to pursue in respect of the boundary fence was under the Dividing Fences Act and confirmed that [redacted] had advised that an action had been commenced by him under that Act. She said she had closed her file.

4.6 After numerous further communications with the City in which [redacted] asserted that the encroachment was a breach of the building approval and must be acted on by the City, and after seeking legal advice, on 4 April 2014, the City advised [redacted] that it intended to issue a building order for the demolition of the wall.

4.7 On [redacted] the City issued a building order to [redacted] requiring them to apply for a building permit to alter the wall to comply with the building licences [redacted] The reason for the order was the encroachment which was said to be in breach of the building licenses.

4.8 It is noted that [redacted] has provided a copy of Magistrates Court orders dated [redacted] referring to a proceeding between [redacted] and his wife (Applicants) and [redacted] (Defendant) which state that the *"Claimant's Form 53 Application is dismissed for want of jurisdiction"* and that costs are ordered in favour of the Defendant. It appears this proceeding was under the Dividing Fences Act and that [redacted] claim did not proceed.

Discussion and findings

4.9 The City's position is that because of continued complaints by [redacted] throughout 2013 and into 2014 about the encroachment of the limestone wall, the City sought legal advice and determined that it would proceed to order [redacted] to demolish the limestone wall.

4.10 The City says that it was not aware until seeking legal advice that the encroachment amounted to a breach of the building permit for which they could take action. This position is not consistent with:

(a) the letters from the City to [redacted] dated 19 September 2012 and [redacted] dated 5 November 2012. These letters say the building permit provided for the fence and retaining wall to be erected wholly within [redacted] The November letter goes on to say the encroachment is not in accordance with the building approvals; and

(b) the City's reasoning for why the original building order to demolish was not issued on the basis of the encroachment, being that the encroachment was to be pursued by [redacted] as a civil matter, not because the City did not believe it was a breach of the building approval.

4.11 I find it hard to accept that the City did not know that it the encroachment was contrary to the building permit and could be the basis for an order to demolish. I believe that as a result of significant pressure from [redacted] the [redacted] of Council agreed to have the City's lawyers review the matter and make recommendations as to what action it could take. It was in response to the lawyers' advice that the building order to demolish was issued. The advice also recommended no action be taken in relation to the remedial works to the wall and the alleged trespass allegations.

4.12 As noted above there were numerous complaint letters sent to the City by [redacted] They refer to a broader range of complaints than are not within the scope of my review. Whilst I am not going to comment on those other complaints, the broader context for the interactions and the decision of the City to take some action, namely order the encroachment to be addressed, should be viewed with this in mind.

4.13 Whilst the City had a legal basis to issue the building order which led to the wall being demolished, in my view it was open to the City not to have taken that action.

4.14 As a general proposition, the exercise of any enforcement powers or functions by Councils or any other regulator remains at the discretion of the decision maker. It is not the case that the City **must** take enforcement action in response to every breach it becomes aware of. For example, it is common for prosecution agencies to publish a policy which sets out factors it will take into account when determining whether to exercise its discretion to prosecute. The City has an Enforcement and Compliance Policy. Putting to one side the strength of evidence and ability to prove a breach, it is usual practice to consider broader public interest, resources, public safety and attributes of the accused such as culpability, age, explanations given for the conduct and the level of cooperation with the investigation. As a result, not all alleged breaches of laws are prosecuted by police and government prosecution authorities. Similarly, the City has a discretion not only on whether to prosecute but also when to issue orders or take other actions in response to breaches of legislation for which they have enforcement responsibility.

4.15 The City says it acted on legal advice when determining to issue the building order. I am not privy to that advice, nor would I expect to be. I agree there was a legal basis to issue the building order to demolish the wall. However, my view is that notwithstanding the fact that the limestone wall encroached over the boundary in

breach of the building permit, it remained open to the City to exercise its discretion **not** to issue the building order to demolish. Factors such as the time since the wall was built, the denial by [redacted] of any agreement about the location of the wall, their action in undertaking repairs (which had been certified as appropriate), the fact that the wall straddled the boundary (which is commonly how such dividing structures are built) and the extent of the encroachment were all relevant together with the fact that the breach of the building permit based on encroachment was not a safety issue or one that impacted the public.

4.16 My views appear consistent with the advice from the WA Ombudsman dated 30 August 2013 that the City had acted appropriately, and that [redacted] should pursue any property rights he had in relation to the encroachment via civil proceedings.

4.17 In addition, having the limestone wall demolished was never going to resolve [redacted] wishes, which were for the alleged agreement with [redacted] father made eight years earlier to be honoured by the construction of a new limestone wall inside the boundary of [redacted]

4.18 Since the original wall was constructed, [redacted] had completed the construction of their home which included extensive decking, tiling and swimming pool equipment laid between their home and the wall. The City had no power or ability to require [redacted] to comply with the alleged agreement. The only way that [redacted] would ever achieve the outcome he desired was with the cooperation of [redacted] Therefore, the demolition of the wall had the potential to and did exacerbate the dispute between [redacted] and [redacted] Unfortunately, although the City did what [redacted] wanted, it would find themselves tangled in this dispute for several years.

4.19 It would seem that the City was 'worn down' by [redacted] persistent complaints. In his submission to me [redacted] says 'we undertook significant lobbying of Parliamentarians, State agencies and other oversight bodies. We were incensed with the City's repeated failures.'

4.20 Given my view that it was open to the City not to issue an order to demolish the wall, I find that the fact that it did was a very reasonable outcome from the perspective of [redacted] However, the time it took for the City to receive and respond to the ongoing complaints, seek advice and make this decision was excessive and perhaps reflective of the pressure brought to bear by [redacted] 'lobbying of Parliamentarians' and others. It was not until 18 months after the initial complaint, 12 months after the wall was repaired and 10 months after the WA Ombudsman issued its outcome letter on the matter that the building order that led to demolition was issued.

4.21 This delay was unsatisfactory for not only [redacted] but also [redacted] who since undertaking the repair works 12 months earlier must have believed that she had met the City's requirements.

5. Consent Orders made by SAT [redacted]

Question 7B: Whether the actions of the City in relation to the SAT proceeding were appropriate and reasonable including its interactions with [redacted] and [redacted] (or the legal representatives) prior to and at the mediation hearing?

Facts and evidence relating to this question

5.1 [redacted] sought a review of the second building order by the SAT (proceeding [redacted]).

5.2 On 14 September 2014 lawyers for [redacted] wrote to the City offering to settle the SAT proceeding by agreement to demolish the wall and build a new wall. The offer was subject to approval by [redacted]

5.3 [redacted] was not made aware of the offer by the City or [redacted] lawyers.

5.4 On 17 September 2014 [redacted] applied to SAT to be joined as a party to the proceeding. The application was dismissed. The SAT made an order that [redacted] be allowed to intervene subject to that being limited to making oral submissions at the conclusion of the final hearing, with liberty to apply in the event of a material change. In the same order the matter was referred for mediation. The result of this order was that [redacted] was not entitled to participate in that mediation.

5.5 On [redacted] SAT made orders as part of a mediation in which it notes the consent of [redacted] to an order for [redacted] to apply for a permit to demolish the wall and for demolition of the wall within 60 days. It states that after demolition, the building order will be set aside.

5.6 [redacted] says he consented to the SAT order to demolish be he did so not having seen a copy of the second building order and therefore not realising that the City's order purported to require alteration to the wall, which he believes would have meant a new wall would have to be provided.

Discussion and findings

5.7 Given [redacted] was not a party to the proceeding and the communication from the lawyers for [redacted] was without prejudice, there was no obligation on the City to provide the 14 September 2014 letter to [redacted]

5.8 [redacted] was not entitled to be at the mediation given the decision of SAT that he not be joined as a party.

5.9 The agreement reached by the City and [redacted] was for the demolition of the wall. This differs from the second building order which was for the wall to be altered to comply with the building licence, namely to not encroach over the boundary of [redacted] In his reply to the City's submissions, [redacted] concedes that the City may not have had the right

to issue the order on the terms it did and may have had no choice to revert to orders for demolition only.

5.10 I find that in general the actions of the City in relation to the SAT proceeding were appropriate and reasonable including its interactions with [redacted] and [redacted] (or their legal representatives) prior to and at the mediation hearing.

5.11 In April 2014, the SAT had found that the original limestone wall was not constructed consistent with the conditions that [redacted] had proposed to [redacted] in that it was constructed without reinforcing bars, the footings were inadequate and the wall was not constructed wholly within the boundary of [redacted] The SAT also found that [redacted] claim for compensation in relation to the wall had been commenced after the statutory time limit of 6 years since the wall was constructed. Therefore, in essence, the SAT found that even if there was an agreement for the wall to be wholly within the boundary of [redacted] it was no longer enforceable.

5.12 This means that at the time that [redacted] agreed to demolish the wall, she did so after [redacted] had been unsuccessful in seeking to enforce his alleged agreement with [redacted] to have the wall built within [redacted] and in his proceeding under the Dividing Fences Act.

5.13 With hindsight, it should have been obvious to all parties concerned that the agreement to demolish was short sighted. Going down this path with no clear plan or agreement about what was to replace the limestone wall, in circumstances where it acted as a pool barrier was always going to lead to uncertainty about what would occur next. It was that action, taken by the City and the two neighbours by consent that was the catalyst for the ongoing complaints and anxiety that has occurred. Given the action was taken by consent, I make no specific finding against the City in relation to the outcome of this SAT matter.

6. Decision to accept compliance with permit to demolish

Question 8B: Whether the City's decision to accept that the demolition of the limestone wall and footings complied with the conditions on the demolition permit was appropriate and reasonable?

Facts and evidence relating to this question

6.1 [redacted] proceeded to obtain a building permit to demolish the wall dated [redacted] Conditions included:

(a) that the structural integrity of existing retaining walls located within the affected property boundary to be maintained at all times during the demolition;

(b) retaining walls that are NOT within the affected property boundary are to be removed and building and planning approval is to be obtained prior to the construction of adequate retaining walls to maintain approved ground levels;

(c) the swimming pool shall have fencing and gates provided in accordance with the *Building Regulations 2012* and AS 1926.

6.2 A notice of completion was issued on behalf of [redacted] on 28 January 2015.

6.3 On 30 March 2015 the City advised SAT that the wall had been demolished and the building order would be set aside.

6.4 From about May 2015 [redacted] wrote to the City several times to complain about several issues including that encroachments remained, the soil on [redacted] was not properly retained, the ground levels did not comply with the planning approvals for the site and the temporary pool fence was unsafe. (See for example email dated 22 May 2015 where [redacted] refers to steel pins that were put in in May 2013 to tie the old limestone fence to the [redacted] boundary wall. See also letter dated 28 June 2015 where [redacted] refers to encroachment of structural steel and the temporary pool fencing)

6.5 There are several photographs put forward by [redacted] showing the limestone wall:

(a) before its removal - for example pages 6, 7 and 8 of the document named 20210102 Preliminary review issue 2 – [redacted] boundary walls FIGURES Final.pdf;

(b) during the demolition of the wall – for example page 9 of the 20211002 document has photos from 8, 15, 28 November 2014 and 28 Jan 2015 and pages 11 and 12 of the document named 20210301 Review issue 4 – [redacted] pool safety compliance FIGURES Final) and the document 20141103 to 20151028 Photos [redacted] and

(c) several weeks after the demolition when new temporary and screen fencing structures had been erected – for example the document named 20210301 Review issue 4 – [redacted] pool safety compliance FIGURES Final has photos ranging from May 2015 to November 2016.

6.6 There are no photographs taken showing clearly the state of the boundary and any remnants of the limestone wall for the period after 28 January 2015 when the notice of completion was issued until 30 March 2015 when the City advised SAT that the wall had been demolished and the building order set aside.

6.7 It is apparent that temporary chain wire fencing was erected as a pool barrier. [redacted] commenced erecting a screen fence in mid-2015. Both of these matters will be considered further below. However, for the purposes of considering question 8B, I am concerned with whether the SAT order and demolition permit were complied with. This requires consideration of the evidence of the condition of the boundary between when the permit was issued and up to 30 March 2015 when the City accepted that the order had been complied with.

6.8 In his submissions on this issue [redacted] says:

(a) The demolition did not fully comply with the SAT orders and [redacted] conditions 7, 8 and 9.

The demolition was completed 39 days after the specified time.

The structural integrity of the retaining along the boundary was not maintained, nor was the ground level returned to the approved levels.

The swimming pool fencing during the demolition and post 28 January did not comply with appropriate standards.

The lack of structural integrity/adequacy of the remnant retaining wall along the boundary (notwithstanding the ground level was higher than approved); has evident by:

Visual inspections, that is the many photographs provided to the City over the many years should be evidence enough to most people, including Figure 5.2 and 5.3."

(b) The [redacted] engineer's report was as provided to the City. The report highlighted 'The construction detailing of the existing wall is substantially non-compliant with current design codes and standards',,, 'and complete demolition and reconstruction is recommended.

(c) The [redacted] engineer's report and photos, as provided to the City numerous times. The report confirmed 'that the majority of the lengths of the retaining wall that has been provided along this boundary is not structurally adequate...'

(d) B&E's opinion stated in its 17 June 2020 email to the City and its 21 July 2020 presentation to the City that align with [redacted] engineer's [redacted] report.

Discussion and findings

6.9 I find the City's decision to accept that the demolition of the limestone wall and footings complied with the conditions on the demolition permit was appropriate and reasonable.

6.10 Applying the evidence to allegations set out in [redacted] submission, I find as follows:

(a) The demolition permit required a notice of completion to be lodged within 7 days of completion. The notice of completion was dated 28 January 2015 meaning the works could have been completed by 21 January 2015. The SAT order provided for the demolition to be completed within 60 days of being granted the demolition permit which would have been by 20 December 2014. Therefore, the demolition work was completed about one month after the SAT order required.

(b) The demolition permit required the 'structural integrity of the existing retaining walls that are located withing the affect property to be maintained at all times during the demolition'. There is no evidence that that condition was not met. [redacted] complaints about the maintenance of retention walls and soil on [redacted] and related photographs and reports are directed at periods of time months after the demolition of the wall.

(c) The demolition permit did not require 'ground levels to be returned to approved levels' as asserted by [redacted]

(d) The swimming pool fencing will be considered further below.

6.11 The matters in item 6.10(a) to (c) above all refer to evidence that the retaining was not maintained after the works were completed, or during the demolition which is what the demolition permit required.

6.12 As to the encroachments that remained after the demolition, [redacted] first referred to steel pins encroaching in late May 2015 and he refers to them again in a letter dated 28 June 2015. The SAT determination [redacted] refers to [redacted] conceding that there are steel pins and that he had no objection to [redacted] sawing them off from his side.

6.13 Although it appears there were steel pins encroaching, I do not believe the City were aware of this at the time they approved the demolition. It is possible the encroachments of pins may not have been visible on inspection and [redacted] did not raise any objection to the City agreeing that the demolition had been completed between 28 January when the notice of completion was issued and 30 March 2015 when the City advised SAT that the permit had been complied with. I understand that [redacted] may have been overseas at the time, but nevertheless, the City were not aware of any objection to accepting the notice of completion.

6.14 In its submissions on this issue the City says it 'received the required notice of completion and therefore had no basis to refuse the notice of completion and accept that the process had been successfully carried out and that this was also observed by City officers on inspection.'

6.15 Although [redacted] was about one month late in complying with the SAT's orders, the delay was over the end of year holiday period and in my view, it was not a significant delay or worthy of any enforcement action by the City.

6.16 I believe the City acted appropriately and reasonably in accepting that the SAT orders to demolish and the demolition permit were complied with.

7. Construction of new screen fence, ground levels, swimming pool barrier complaints & unauthorised installation of the spa

Question 9B: Whether the City's actions in response to complaints about the steel framed screen was appropriate and reasonable?

Question 10B: Whether the City's actions in response to complaints about the remnants of retaining wall were appropriate and reasonable?

Question 11B: Whether the City's actions in response to complaints about non-compliant ground levels at [redacted] were appropriate and reasonable?

Question 12B: Whether the City's decision to issue a retrospective planning approval for the 'front fence' was appropriate and reasonable?

Question 13B: Whether the City's decision to issue a Building Approval Certificate for the steel framed screen fence and remnants of retaining wall was appropriate and reasonable?

Question 14B: What action, if any, could or should the City now take in relation to the steel framed screen fence, remnants of retaining wall and levels relating to [redacted] [redacted]?

Question 15B: Whether the City's actions in response to complaints about the adequacy of the swimming pool barrier whilst the new steel framed screen was under construction were appropriate and reasonable?

Question 16B: Whether the City's actions in response to complaints about the unauthorised installation of the spa were appropriate and reasonable?

Facts and evidence relating to these questions

7.1 Many of the communications between [redacted] and the City officers relating to questions 9B to 16B are referred to in the same or multiple emails from mid-2015 and are still continuing. The following summarises the issues and documents.

7.2 In mid-2015 [redacted] began constructing a new screen fence within the boundary.

7.3 A letter dated 13 August 2015 from [redacted] to the City's [redacted] at the City refers to the new screen, his lack of consent, that there are no permits, that there is trespass on his land and asking the City to take action.

7.4 On 27 August 2015, [redacted] also lodged a complaint with the Building Commission under section 5(1) of the *Building Services (Complaint and Resolution) Act 2011*. Details of this complaint are contained in the SAT determination [redacted]

7.5 [redacted] wrote subsequent emails to the City or had telephone calls with the City about gaps in the swimming pool barrier, encroachments into his land from the previous limestone wall, his objection to the new screen, and non-compliant ground levels.

Relevant emails and notes from [redacted] to the City are dated 1 September 2015, 28 September 2015, 12 October 2015, 2, 3, 4, 6, 8, 10, 11 November 2015.

7.6 The City responded to some of these emails. Responses from the City are dated 6 and 10, 18 November. In the 6 November 2015 the City's [redacted] states that the height of the new fence and existing retaining walls is compliant with development approvals and lower than the original masonry fence. He says there is no evidence the screen fence under construction is not structurally adequate and that based on a visual inspection there is no obvious boundary encroachment.

7.7 On 8 November 2015, [redacted] made a lengthy response with several attachments saying, in summary that:

(a) the permit to demolish required '[redacted] to remove all encroachments from my land, primarily the limestone fence, and re-build the limestone boundary wall';

(b) it was a condition of the demolition permit that '*If the retaining walls are NOT located within the boundary of* [redacted] *they are to be removed and Building and Planning Approval is to be obtained from the City of Melville prior to the construction of adequate retaining walls to maintain approved ground levels*';

(c) [redacted] substantially completed the demolition work in November 2014 that removed the majority of the limestone wall that was encroaching into his land;

(d) there is a lack of retaining of the ground built-up adjacent to the boundary;

(e) [redacted] has admitted in statement to the Building Commission there were still some minor encroachments;

(f) temporary pool fencing has been located on his land up until last month preventing him for determining his boundary and delaying work in his home;

(g) the City says that the new screen does not require a building approval which is contrary to Building Commission guidance.

(h) the demolition permit required the pool to have fencing compliant with AS 1926.1-1993 and the 1.8m bare mesh fence does not comply with that standard. The City has inspected that wire fence and has not recognised that it does not comply;

(i) the 'unauthorised fence' is a temporary fence until such time as the replacement fence consistent with his agreement in May 2005 is built. That agreement was validated by SAT [redacted]

(j) [redacted] contractors have accessed his land against his express instructions on multiple occasions;

(k) [redacted] has no approval to build up her land along the [redacted] boundary;

(l) the height of the unauthorised structure is 0.4m over the approved height;

(m) the location of the pool fence does to comply with the approved plans for the fence ([redacted]). There was a gap since 2008 which has recently been filled 'presumably as a result of a pool enclosure inspection.';

(n) decking has been installed around the pool that is 900mm above the front NW corner of [redacted] lot; and

(o) despite multiple pool inspections, [redacted] has again removed the wire mesh panel for an extended period over the weekend.

7.8 [redacted] 8 November 2015 email goes on to seek information about pool barrier inspections, he alleges that the City's pool inspector had a conflict of interest and asks the City to confirm that she does not have a social relationship with [redacted] family. He requests explanations and further inspections of the pool barrier. He asks that a building order be issued to remove the screen, reduce the levels around her pool and the ground levels. He goes on the make personal allegations against other City officers and the CEO.

7.9 On 10 November 2015 the City's [redacted] emailed [redacted] referring to his emails dated 4, 6 (x2) and 8 November addressed to various offices, the WA Ombudsman and the Public Service Commission. He says that officers have been monitoring the pool barrier in response to his concerns and found measures to be in compliance. He notes the fence is due to be complete that week. He also notes that from the photographs provided, that [redacted] has done what he considers adequate to minimise perceived risk. He assured [redacted] that the matter raised are being dealt with according to due process.

7.10 On 12 November 2015 the then [redacted] wrote to [redacted] summarising his complaints in a list of 7 items which he says are not exhaustive. He also referred to 10 other bodies that [redacted] had made complaints to about these matters. He said that there were 3 outstanding matters the City was dealing with, namely his review of the City's decision relating to his building permit, the City's prosecution of him and his application to the Freedom of Information Commissioner. He said the City would continue to deal with those 3 matters and any new matter but would no longer correspond on other issues and that all dealings on any new matter must be in writing. He said this restriction was made because (in summary):

(a) [redacted] behaviour had become 'so habitual, obsessive or intimidating that is constitutes an unreasonable demand on the agencies resources;

(b) he was satisfied the City had dealt with his issue and complaints correctly and that no material element had been overlooked or inadequately addressed; and

(c) all internal (and probably external) review procedures had been exhausted.

7.11 A copy of the [redacted] letter was sent to the Department of Local Government, the SAT, Federal and State members of Parliament, the WA Premier, the Mayor and elected

members of the City, the Crime and Corruption Commission, the WA Ombudsman, the Building Commission and the Office of the Information Commissioner.

7.12 On 18 November 2015, a Councillor also wrote to [redacted] providing details of inspections of the temporary pool fence and the City's ongoing monitoring of the fence. He notes that AS1926 does not provide temporary fencing requirements and says that fence heights have been measured and shade cloth installed to prevent footholds in the mesh. He says that inspections of the fence are ongoing.

7.13 On 23 November 2015 [redacted] wrote to Minister Mischin referring to the [redacted] reply dated 12 November and saying the [redacted] characterisation of him was unwarranted. He said the City's handling of his complaints was not honest, transparent and objective. He said the was at a stalemate with the City and requested a replacement of the City as the Permit Authority. He said the Ombudsman was still assessing his complaints, the Public Service Commission did not meet with him or seek evidence he had offered to provide and that it relied on the City's response without him having an opportunity to rebut. He said the SAT and Building Commission investigations had validated a number of issues that support his complaints in relation to the City's conduct. He referred to a 'recent pool tragedy at the Carramar family day care centre' and to his neighbour's pool barrier not being compliant. He then referred to additional inspection after the Councillor's email to him.

7.14 Minister Mischin responded on 10 February 2016 saying the State will not be appointed as the Permit Authority. [redacted] wrote to Minister Mischin again on 16 November 2016 expressing his concerns about the City's failures and referring to various events that had occurred (referred to below), including the City's admission in October 2016 that the screen fence ought to have had a building approval. He asked her to intervene.

7.15 [redacted] has provided CCTV recordings of a number of inspections of the pool barrier dated 9 November 2015 (x 3), 13 November 2015 and 18 November 2015.

7.16 [redacted] commissioned a report from an engineer on the new screen fence and retaining structure. The report dated [redacted] said the method of construction of the screen was unusual and the standard of workmanship was not tradesman like. It said there was a visible lateral movement at the top of the steel support columns and that soil under screen has soft spots and voids and that the remnants of the limestone wall were unsuitable as a retaining structure. It recommended demolition of the remnants of retaining wall and screen.

7.17 On 24 January 2016 [redacted] forwarded his engineer's report to the City's [redacted] asking him to take action to issue building orders requiring compliance with the demolition permit and removal of the screen fence. He says [redacted] contractor ought to be prosecuted for building the screen without a building permit.

7.18 A further email was sent from [redacted] to the then Mayor and 12 others (whom I presume were Councillors) on 8 February 2016, restating complaints including that the City's

[redacted] had not responded to emails dated 8 November and 24 January 2016.

7.19 A report from [redacted] engineer, dated [redacted] says the north and rear portions of the fence are adequate and the middle portion requires stiffening with additional posts.

7.20 [redacted] has provided a CCTV recording dated 20 March 2016 showing a chain wire section of the pool fence blowing over in the wind, indicating it was not fixed securely.

7.21 On 20 March 2016, [redacted] wrote an 18 page email (including attachments) to the then Mayor. He refers to a previous letter dated 16 March telephone and email exchanges on 18 March 2016. He attached photos and made complaints about [redacted] trespass on his and his use of rat poison on the boundary. He restates various historical aspects of his complaints including his objections to the screen fence and the unsafe pool barrier. He refers to repeated calls to the [redacted] and the [redacted] and to multiple inspections of the non-compliant pool barrier by City officers. He also says he is disappointed in the Mayor for failing to follow up since his site visit on 23 October 2015.

7.22 On 24 March 2016 the City wrote to [redacted] responding to 3 emails and phone calls from [redacted] saying the pool barrier had been inspected and was compliant and a building permit was not required for the steel framed screen fence. In relation to claims of trespass during the construction of the screen, the email said that the Dividing Fences Act allows for entry on adjoining land at reasonable times to carry out construction or repairs.

7.23 On 8 April 2016, [redacted] engineer provided advice that the screen had adequate capacity to support typical fence loading.

7.24 On [redacted] SAT handed down its decision in the matter of [redacted] and [redacted] [redacted] [redacted] SAT granted leave to appeal against decisions of the Building Commission. In summary and most relevant, the SAT concluded:

(a) steel pins from the original limestone fence were protruding into [redacted] property and should have been removed (paragraphs 25-26); and

(b) there is an arguable basis to contend that the demolition of the limestone wall was not carried out in a proper and proficient manner (paragraphs 33).

7.25 On 16 May 2016 [redacted] obtained a levels verification survey from a land surveyor which found that ground levels on [redacted] were higher than approved under the planning permit [redacted] in three areas on the boundary by 20mmm, 40mm and 100mm. Page 3 of the declaration says that the deck levels are 0.4 m higher than approved under the original 2005 planning approval.

7.26 On 3 June 2016 [redacted] wrote to the City about the finished ground levels and non-compliance with relevant planning approvals by [redacted] He says that the need for retaining

walls is a direct result of the non-compliant build-up of the ground levels. He says this means the fence is also 0.4m higher than approved under the 2005 planning permit.

7.27 On 9 August 2016 the City wrote to [redacted] asking them to verify compliance with ground levels specified in the relevant planning approval.

7.28 On 4 October 2016 the City wrote to [redacted] advising them that a building approval was required for the steel screen fence because it was a pool barrier and advising them to apply for a retrospective building approval. The same day, the City's [redacted] wrote to the authorised assessment advising that the City intended to ask [redacted] to apply for a retrospective permit and that it considered that the steel framed screen fence was structurally adequate based on reports from [redacted] engineer.

7.29 On 5 October 2016 [redacted] wrote to the City's [redacted] seeking an explanation for the City's failure to act to require a building permit for the screen fence when he raised this issue with them in 2015. [redacted] said he would object to any retrospective planning or building approval in relation to the steel framed screen and retaining structures.

7.30 On 3 November 2016 [redacted] arranged for an engineer's report on the steel framed screen fence and retaining structures. It said that the soil under the screen fence was not adequately retained. It also said that 'lengths of the screen wall framing have inadequate restraint from their bolted attachment only to the ends of decking timbers 19mm thick.' The report was commissioned by [redacted] Whilst I have not been provided with evidence that this report was given to the City, [redacted] assures me that it was.

7.31 On [redacted] the City issued a building order to [redacted] based on the unauthorised construction of the timber deck and steel framed screen requiring them to seek a Building Approval Certificate within 28 days.

7.32 The same day a pool inspector from the City attended [redacted] and [redacted] and inspected the pool barrier (refer to video and audio footage dated 14 December 2016). On 15 December 2016 and 4 January 2017 [redacted] wrote to the City's [redacted] about his interactions with the City's [redacted] that day. He also provides a redacted copy of a pool inspection report dated [redacted]

7.33 On 4 January 2017 the City wrote to [redacted] referring to his complaints about the City's [redacted] and about pool barrier compliance issues on 15 December 2016 saying that the City was satisfied that the pool barrier complies. [redacted] disputed the City's position in a letter to the [redacted] dated 12 January 2017 alleging misconduct and conflict of interest by City officers.

7.34 On [redacted] the City issued a Building Approval Certificate for the timber deck and swimming pool fence (i.e. steel framed screen fence). The certificate attaches reports from [redacted] engineer dated [redacted] as to the structural adequacy of the screen fence and drawings of the fence and retaining structures on which the fence is said to be built.

7.35 In an internal email between City officers dated 28 March 2017, a [redacted] advised that the wall height did not comply with the planning permit [redacted] in that it was 300mm higher than approved.

7.36 On [redacted] the City issued a retrospective planning approval for the as-built front fence, presumably allowing the levels and screen height to remain as constructed. Although the permit does not say that it also applies to the height of the deck, the plans show as built deck levels. A condition of this approval is the surface finish of the front fence within the primary street setback area is to be finished to the satisfaction of the City.

7.37 During the remainder of 2017, 2018, 2019 and 2020 [redacted] and the City continued to exchange emails about the various complaints of [redacted] the City's handling of those complaints and requests for the City to act. Examples include letters dated 19 May 2018, 25 June 2018, 8 October 2018 objecting to the issuing of the Building Approval Certificate for the screen. [redacted] made complaints about the unsafe pool barrier on 8, 17 and 23 December 2019, and responses from the City are dated, 20, 31 December 2019.

7.38 On the question of whether the BAC should have been issued for the screen fence, this has been the subject of investigation by Building and Energy including into the conduct of the [redacted] that issued the CBC. I note the following documents:

(a) a redacted email dated 17 June 2020 from Building and Energy says that it is Building and Energy's view that the statement of [redacted] engineer in his letter dated 21 March 2017 'falls short of providing confidence that the limestone wall provided sufficient footings';

(b) a letter dated 16 March 2021 from Building and Energy to [redacted] advising that the Building Service Board had found the City officer that issued the CBC had been negligent or incompetence in connection with carrying out building surveying work, namely the issuing of the CBC on 27 March 2017 relating to the screen fence had been cautioned; and

(c) a media statement issued by Building and Energy dated 22 March 2021 regarding the finding against the [redacted] saying that the certificate referenced ambiguous plans and technical specifications and did not record the inspections he had relied upon. It also said that the certificate failed to demonstrate compliance of the swimming pool barrier.

Discussion and findings

7.39 Before considering the detail of my findings on this group of questions, I note the general comments made by the City in its response to the above issues. The City says that the flood of emails from [redacted] in these issues was overwhelming and the City dealt with the correspondence to the best of its ability and within the constraints of its

resources. It says that it has been and continues to be an unreasonable challenge to respond to all of [redacted] emails and letters, let alone the recurring points contained in them. The City believes it has responded to the various issues raised but the position it has taken does not suit [redacted]

7.40 I am sympathetic to these comments from the City. In undertaking this review I have not seen all of the communications between the City and [redacted] but based on what I have seen, the number of emails and the volume of information and issues in them is overwhelming and at times confusing.

7.41 By continuing to send emails when earlier emails have not been responded to, this creates confusion and puts the City in a position where at any one time [redacted] can and does claim that his complaints are outstanding. Further, it is likely to require the City to expend significant resources to develop written responses to large numbers of emails covering multiple issues making it all too hard to get on top of.

7.42 I can see that the City has made attempts to 'draw a line in the sand' by taking a position on certain issues and saying it will not take any further action. [redacted] refuses to accept that the City is entitled to do this. He is mistaken. The City has a discretion not to act even where breaches are evident. As a regulatory body, it cannot and should not act on every breach that comes to its attention.

7.43 In response to the City taking this position, [redacted] has, at times, sought to escalate his complaints to the [redacted], Mayor, Councillors, Parliamentarians, other bodies or the media.

7.44 As part of his escalation he has layered his complaints about breaches of the Building Act or other laws with allegations of misconduct, corruption, incompetence or impropriety by individual officers. This has had an unreasonable impact on the City's resources and whilst I have no doubt about [redacted] belief in the allegations he makes, in a number of cases they are without merit and seek to make the underlying complaints more serious than they actually are.

7.45 In an effort to set out clearly my findings on questions 9B-15B, I will deal with each question one by one making reference to the relevant submissions from the City and [redacted] in turn.

Question 9B: Whether the City's actions in response to complaints about the steel framed screen were appropriate and reasonable?

7.46 I intend to deal with this question having regard to the period between mid-2015, when the screen fence was erected and October 2016, when the City advised that the screen fence required a building approval. The complaints made after October 2016 are addressed in the subsequent questions and findings below.

7.47 The complaints raised by [redacted] that I will consider in answering this question are:

(a) that the steel fence required building approval;

(b) that the steel fence was structurally inadequate; and

(c) that the remnants of the retaining walls were inadequate to retain the soil within [redacted]

Building approval for the screen fence

7.48 The City notes that it could only require demolition of the limestone fence. It could not compel [redacted] to construct a new masonry fence within their boundary which is what [redacted] seemed to expect.

7.49 [redacted] says in reply that he was well aware that the SAT orders only required demolition. That may be the case now but there are references in his complaint letters to his expectation that the limestone wall would be replaced with a new wall (see his letter 8 November 2015 in which he asserted that the demolition permit required replacement of the limestone wall which was not correct). It is apparent that [redacted] remained of the view that [redacted] should reconstruct the wall in accordance with his alleged agreement with [redacted] father in 2005.

7.50 Given the existence of pool equipment, decking and tiles and the narrow area between [redacted] home and the boundary, it was always going to be physically difficult for [redacted] to construct a permanent fence and pool barrier from within their boundary.

7.51 [redacted] claims that following the demolition of the limestone wall, he has never been requested by his neighbour to allow access for them to build their fence nor has he received or issued notices under the Dividing Fences Act. He says that because his claim under the Dividing Fences Act in 2014 failed, he believes, based on legal advice, that he would be unable to use that Act to resolve his dispute with his neighbour.

7.52 The City says it believed that the screen fence erected in mid-2015 was able to be constructed without the need for a building approval. In about October 2016 it advised that because the screen fence was acting, in part as a pool barrier, a building permit should have been obtained. Once the City accepted that a building approval should have been issued, it advised [redacted] that she was required to have the screen fence approved. The City believes it has fully addressed the complaints about the screen fence and remnants of the retaining wall including corrective action in relation to the stability of the screen fence when this was raised with the City.

7.53 [redacted] disputes the City's position. He takes little comfort in the fact that the City has conceded it was wrong about the screen fence not needing a building approval. He says the City only conceded their error because of his continued complaints and says this is evidence of the City's culture of incompetence and ignoring complaints.

7.54 Work on the screen fence commenced in mid-2015, about 3 months after the City advised the SAT that the limestone fence had been demolished. [redacted] first complained and asserted that a building permit should have been obtained in August 2015. The City rejected the claims by [redacted] that the fence required a permit for 15 months.

7.55 It was not reasonable for the City to deny that building approvals were required for the screen fence. It was not reasonable for that denial to continue over 15 months. The City only conceded its error after persistent complaints by [redacted] and I am satisfied the City would not have otherwise taken action to ensure the fence had the required approvals.

7.56 On 24 January 2016 [redacted] provided the City with a report from an engineer which said the method of construction of the screen fence was unusual and the standard of workmanship was not tradesman like. It said that soil under screen fence had soft spots and voids and that the remnants of the limestone wall were unsuitable as a retaining structure. It recommended demolition of the remnants of retaining wall and screen.

7.57 [redacted] obtained a report from an engineer 3 weeks later in February saying that work was required to stabilise the screen fence. In May [redacted] engineer issued a letter saying the screen fence was adequate.

7.58 I presume [redacted] sought the reports from the engineer and acted on their advice at the instigation of the City in response to the engineering report commissioned by [redacted] There is no direct evidence of this.

7.59 I conclude that the City acted reasonably in response to the complaint that was made by [redacted] about the structurally adequacy of the screen fence once he had provided then with the report from an engineer.

7.60 However, it was not reasonable for the City to accept the report from [redacted] engineer that any structural inadequacy that had been identified by it and [redacted] engineer, was rectified when [redacted] engineer issued its follow up report in [redacted] This is consistent with the investigation and decisions of Building and Energy discussed further below.

Question 10B: Whether the City's actions in response to complaints about the remnants of retaining wall were appropriate and reasonable?

7.61 [redacted] complained about the unretained soil adjoining his boundary from about mid-2015. He advances 2 arguments about the retaining wall.

7.62 First, he says the soil build up does not comply with levels required under the original planning approval issued in 2005 for the front fence and pool deck and that the need for retaining as arisen from [redacted] non-compliance with that planning permit. This issue is considered further below.

7.63 Second, [redacted] refers back to the demolition permit for the wall which he says required [redacted] to construct retaining walls. The demolition permit condition said:

That the structural integrity of existing retaining walls located within the affected property boundary to be maintained at all times during the demolition.

Retaining walls that are NOT within the affected property boundary are to be removed and building and planning approval is to be obtained prior to the construction of adequate retaining walls to maintain approved ground levels.

7.64 These conditions do not compel [redacted] to construct retaining walls and just as the City could not compel [redacted] to build a fence of a particular type, it cannot compel her to build retaining walls.

7.65 The demolition permit only required the structural integrity of the existing walls to be maintained 'during the demolition' and the walls NOT within [redacted] were to be removed and building and planning approval be retained prior to the construction of new walls.

7.66 As noted above, there are no photos of the condition of the retaining walls at the time the City advised SAT that the demolition of the wall was completed. If retaining walls were removed because they were on [redacted] then all that was required was for [redacted] to obtain approvals prior to constructing new retaining walls. It is not possible to know whether there were existing retaining walls close to but wholly within the boundary of [redacted] but given the evidence that the limestone wall and its footings, which acted as the retaining wall, encroached for the length of the boundary, this is unlikely.

7.67 [redacted] engineer's report said the new screen wall was not adequately supported by the soil under it. [redacted] engineer took a different view and said the structure was adequate but his report appeared to make the conclusion based on the screen being supported by the decking and paving, not the retaining area under it.

7.68 Whilst I agree with [redacted] that the retaining structures were non-existent in places or inadequate resulting in gaps, soft spots and unretained soil, I do not consider the City had any power to require new walls to be built based on the conditions of the demolition permit.

Question 11B: Whether the City's actions in response to complaints about non-compliant ground levels at [redacted] were appropriate and reasonable?

Question 12B: Whether the City's decision to issue a retrospective planning approval for the 'front fence' was appropriate and reasonable?

7.69 These two questions are considered together. [redacted] says the ground levels on [redacted] do not comply with the 2005 planning approval for the front fence and pool deck. He raised this issue in mid-2015 saying that the need for retaining arose from the non-compliant ground levels.

7.70 [redacted] relies on a levels verification survey from a licensed surveyor dated [redacted] A copy of the survey was sent to the City on 3 June. The City wrote to [redacted] on 9 August asking them to verify that the ground levels complied with planning approvals.

7.71 An internal email between City officers dated March 2017 provides an assessment of the levels and confirms that the front fence is 300mm that was approved under the 2005 planning permit. The planning officer says, 'it is a little complicated as the deck itself does not require approval as it does not constitute site works as it was a free standing construction on top of a complaint retaining wall.'

7.72 On [redacted] a 'retrospective planning permit' was issued for the front fence. The attached plans show highlighted drawings of the front fence and side fences including the new screen fence on top of a limestone retaining wall. There is no reference to the deck, but the as built level of the deck is shown on the drawings. Condition 2 says 'The surface of the front fence within the primary street setback area shall be finished to the satisfaction of the City.'

7.73 I find the City's action to issue a retrospective approval to confirm the as built fence heights was unreasonably slow (taking 2 years) and that it has failed to properly inform [redacted] of its response to his complaints about this issue.

7.74 Despite my queries to the City about this permit during my meeting with them, it did not provide a clear explanation.

7.75 I find the decision to issue the retrospective planning approval to regularise the as built fence conditions was a necessary enforcement response. The conditions were as built for several years so by issuing an approval it did not result in any works to change the fence heights or pool deck height. As much as breaches of height restrictions on a planning permit should not be readily tolerated, it would have been unreasonable for the City to require [redacted] to lower the level of this whole are and the associated fences when they had been in place for so long.

7.76 The delay in resolving this issue is associated with the City's denial for 15 months that the screen fence required a building permit. If they were labouring under the impression that the screen fence could be built as of right, this probably also caused them to choose not to act on the complaint about non-compliant fence and ground heights required under a 10 year only planning permit. This may be an explanation, it is not an excuse.

7.77 Compliance with condition 2 remains outstanding. The City says [redacted] cannot complete the outside of the screen fence to their satisfaction because [redacted] won't allow access to do that work. [redacted] says he has never been asked for access. He says he cannot say whether he would give approval until he knows what is proposed. I believe although [redacted] may not have been asked by [redacted] for consent to access, she would infer that he would not give consent based on their protracted dispute.

7.78 I do not know whether the wall that [redacted] now intends to build within his boundary will obviate the need for compliance with the condition to finish the screen. I think the City should write to [redacted] explaining its actions. It should also seek to enforce condition 2 as it would appear that [redacted] has not made an adequate effort to comply with condition 2. [redacted] may use the Dividing Fences Act to seek a resolution to this issue if needed.

Question 13B: Whether the City's decision to issue a Building Approval Certificate for the steel framed screen fence and remnants of retaining wall was appropriate and reasonable?

7.79 On [redacted] the City issued a Building Approval Certificate for the timber deck and swimming pool fence (i.e. steel framed screen fence). The certificate attaches reports from [redacted] engineer dated [redacted] as to the structural adequacy of the screen fence and drawings of the fence and retaining structures on which the fence is said to be built.

7.80 The City says that 'it insisted on the required certification to determine the structural integrity of the screen fence, which was provided and on record.'

7.81 As noted above, Building and Energy have found that the [redacted] acted inappropriately in issuing the Building Approval Certificate for the timber deck and screen fence. It follows that the City's decision to issue the Building Approval Certificate was not appropriate or reasonable.

Question 14B: What action, if any, could or should the City now take in relation to the steel framed screen fence, remnants of retaining wall and levels relating to [redacted]?

7.82 I understand that the City has recently accepted a new CBC from [redacted] which covers the stone deck and steel frame, the screen fence and the spa. The City says the CBC is issued by a private building surveyor which included a report from an engineer.

7.83 I have not been provided with documents relating to these recent actions. It may have been appropriate to accept the CBC in relation to the spa and stone deck structure. I cannot comprehend how the City could accept a CBC in relation to the as-built screen fence. This is discussed further below.

7.84 Compliance with condition 2 of the 2017 planning approval remains outstanding. As I am not privy to the issues relating to the wall [redacted] propose to build on his land, I do not know whether the need for retaining and finishing of the screen wall will remains if [redacted] is allowed to build his new wall on his land.

7.85 The City should write to [redacted] clearly explaining its actions in response to his complaints.

7.86 Subject to the outcome with [redacted] new boundary wall, the City should enforce condition 2 of the 2017 planning approval. It would appear that [redacted] has not made an adequate effort to comply with condition 2. She may use the Dividing Fences Act to seek a resolution to this issue if they need to.

Question 15B: Whether the City's actions in response to complaints about the adequacy of the swimming pool barrier whilst the new steel framed screen was under construction were appropriate and reasonable?

7.87 The limestone wall was removed by late January 2015. Construction of the screen fence commenced in mid-2015 and whilst the area immediately adjacent to the pool in the front yard appear to have been completed by about December 2015, other sections of the fence adjacent to the rear courtyard and spa area remained under construction until about March 2016.

7.88 The City evidently conducted a large number of inspections of the temporary pool barrier in response to complaints by [redacted] does not dispute this and it appears uncontested that the City was responsive to many of the complaints made by [redacted] and that the City was monitoring the condition of the pool fence through regular visits to the site.

7.89 [redacted] has included inspection records which he says are '[redacted] pool barrier inspections to March 2016'. There are 20 inspections listed between 23 January 2014 and 24 March 2016. Ten of these show the result as 'work order' which presumably means an order was issued to [redacted] to undertake work or action. The inspection records do not appear to list all inspections noted in the material provided by [redacted] for example, the CCTV recordings of inspections on 9, 13 and 18 November 2015 are not listed.

7.90 [redacted] complaints include:

(a) the failure to determine the pool barriers were non-compliant on all inspections;

(b) the failure to take action or effective action to address the non-compliances; and

(c) the time over which these issues continued – [redacted] says that pool barriers remained non-compliant at the time of this review.

7.91 In response the City says that it monitored the pool barriers and was satisfied that the levels of safety were reasonable and acceptable. It says it asked [redacted] to mitigate safety issues which were sometimes done immediately and other times the subject of a work order which was complied with promptly. Details of each of the 10 work orders shown in the inspection records are not provided but [redacted] does not dispute that work orders were issued and actions were taken in response to some of the inspections.

7.92 I do not accept the City's position is that the pool barrier was 'at all times compliant', although it seems to have concluded that on attendance at some inspections this was the case. It seems the City tolerated the temporary wire fencing remaining in place over a lengthy period of time when the pool remained filled. The City says that it did all that was reasonable bearing in mind the lack of cooperation between the neighbours and the time taken to erect a permanent fence.

7.93 [redacted] wanted [redacted] prosecuted. His frustration also seems to be aimed at the City's responses to him saying that it was satisfied with the levels of safety and continuing to monitor the barriers.

7.94 [redacted] had a particular issue with a section of wire fence propped between the screen and the wall of the dwelling which was not fixed and he says was removed for lengthy periods. He refers to CCTV footage of inspectors apparently being content with the fence being propped against the wall rather than fixed securely to prevent its removal or dislodgment. [redacted] was also frustrated by gaps under the fence or between sections of the fence which the City did not require to be closed promptly or at all.

7.95 It was inevitable that one consequence of the removal of the limestone wall was that the pool barrier would be removed and temporary arrangements would need to be in place whilst a replacement fence was constructed. Given there was no agreement between the neighbours as to the replacement fence, it was inevitable that there would not be a prompt resolution to the fencing and permanent pool barrier replacement.

7.96 As noted above, the City could not compel the replacement of the boundary fence based on the conditions of the demolition permit. However, they could compel the requirement for a compliant pool barrier. Although it was a condition of the demolition permit that a complying pool barrier be maintained, that permit was considered complied with on 30 March 2015 at which time the City ought to have taken some purposeful action to order appropriate pool fencing or emptying and covering the pool pending a permanent fence being in place.

7.97 I find the City was responsive to some of [redacted] complaints about the pool barrier. The City inspected frequently and it observed that the pool barrier was non-compliant several times. It chose to request these issues be addressed either verbally or with work orders and was satisfied with the response. The City chose not to escalate to infringement notices or prosecution. These decisions were open to the City initially. However, my view is that the pool barrier issues continued for too long.

7.98 I find that the exercise of discretion not to issue and infringements or escalate its enforcement response after allowing a reasonable time for [redacted] to comply was unreasonable. In making this finding I do not take the view that [redacted] should necessarily have been prosecuted. My view is that the City should have acted to ensure more secure temporary fencing, closing of gaps etc. If this was too difficult, the City should have required the pool to be temporarily decommissioned until a complying barrier was in in place.

7.99 Although I have said above that enforcement decisions are at the discretion of the City, where non-compliance is ongoing despite several warnings and where the breach relates to a safety risk, the City should escalate its response to mitigate against the safety risk.

Question 16B: Whether the City's actions in response to complaints about the unauthorised installation of the spa were appropriate and reasonable?

7.100 The City has said it carried out inspections of the spa and was satisfied that it was safe at all times. It says on each inspection the spa was empty and the City accepted that it only held water when it was being used. The City says it was of no threat to [redacted]

7.101 This question is not whether it was a threat to [redacted] Pool barrier standards are in place to prevent children under 5 from accessing pools and spas, not to prevent adults from accessing pools and spas.

7.102 The City says it has recently examined this issue more carefully and has now taken enforcement action which has resulted in the issue of a Building Approval Certificate for the spa.

7.103 I conclude the City acted unreasonably in response to complaints about the unfenced spa. It was not appropriate to allow the spa to remain without a complying pool barrier on the basis that it had no water in it when the City visited.

7.104 The City's acknowledgement that action should have been taken and its recent action to require an approval for the spa and its barrier is welcomed but it took too long for the City to act. The City should also notify [redacted] of the outcome of his complaints about the unauthorised spa.

8. Unauthorised pool deck works and works between 7pm and 7am.

Question 17B: Whether the City's actions in response to complaints about replacement of the timber deck with a stone deck were appropriate and reasonable and what the current status of that response is?

Question 18B: Whether the City's actions in relation to complaints about noise and light spill between 7pm and 7am were reasonable and appropriate?

Question 19B: Whether the City's prosecution of [redacted] in relation to the noise abatement notices and Infringement Notice issued between [redacted] and [redacted] was reasonable and appropriate? Including:

(a) the number and scope of charges laid in the prosecution?

(b) the decision to withdraw 8 charges and proceed on one charge about one incidence of excessive noise at 8pm on Sunday [redacted]

(c) information given to [redacted] about the prosecution.

Facts and evidence relating to these questions

8.1 From about 27 April 2018, [redacted] began making complaints to the City about noise and light from construction work being carried out by [redacted] around her pool area between 7pm and 7am providing the City with photos and recordings of the works. [redacted] alleged the work was unauthorised or in breach of conditions of current building approvals.

8.2 On 15 May 2018 the City wrote to [redacted] querying whether the filming of private activities being carried out by [redacted] on her land was legal under the *Surveillance Devices Act 1998* and stating that contrary to his complaints, the work being carried out did not appear to be work under the current building permit and may be work that did not require a building permit. I was alleged [redacted] allegations that the work was being carried out in breach of the time restrictions under a building permit were knowingly false and misleading. On 25 May 2018, a further 7 page letter was sent to [redacted] in response to various questions set out in his complaints, most of which are not within the scope of this question for review.

8.3 [redacted] objected strongly to the 15 May letter and complained about the City officer to the [redacted]. The [redacted] replied on 28 May 2018 rejecting the complaints about the officer.

8.4 Between May 2018 and November 2019 [redacted] continued to complain about construction noise and light between 7pm and 7am. The City issued an infringement notice on [redacted] in relation to the light spill. Noise abatement notices were issued on [redacted] 7 and [redacted] 1 and [redacted].

8.5 Witness statements from [redacted] dated 22 May 2018 and 20 November 2019 set out each alleged instance of construction noise and light between 7pm and 7am. The May 2018 statement refers to 8 alleged incidents on [redacted] and [redacted] and [redacted] The November 2019 statement refers to 32 alleged incidents on [redacted] and [redacted] and [redacted] and [redacted], [redacted] and [redacted] and [redacted] The statements provide detail of several instances where the noise continued into the night until 4am and refer to calls to the City at various times during the works. The 20 November 2019 statement was sought to support a prosecution of [redacted] by the City.

8.6 Nine charges were laid against [redacted] in relation to the breaches of the noise abatement notices. [redacted] was asked to be available to give evidence at a contested hearing on [redacted]. No copies of the charges or any court documents have been provided although [redacted] did ask for further information about how the charges related to the noise abatement notices and his complaints (see [redacted] emails 1 June 2020 and 2 September 2020).

8.7 On 1 June 2020 [redacted] complained at how long it had taken the City to prosecute [redacted] and said had it acted sooner he would not have had to put up with the late night noise and light for so long. [redacted] says he wants to be able to make a victim impact statement to the court. The letter notes that pool barrier complaints remain outstanding.

8.8 In a chain of emails between 2 and 7 September 2020, [redacted] was advised by lawyers for the City, The City's lawyers that *"The City has agreed to withdraw 8 of the 9 charges on the basis that* [redacted] *will plead guilty to one representative charge covering the period 26 September 2019 to 7 November 2019. The City had agreed to withdraw the charges because compliance had been achieved. That is, the City has not received any further*

complaints in relation to noise from the construction works at the property since November last year." And later that *"the proceedings provided an adequate incentive to remedy the non-compliance and deter subsequent non-compliance."*

8.9 A transcript of the prosecution hearing on [redacted] is provided by [redacted] The single charge to which [redacted] pleaded guilty related only to noise at 8pm on [redacted] (i.e. not the representative charge that the City's lawyer had referred to in his email to [redacted] on [redacted]

8.10 The summary given to the court by the City's lawyers referred only to the Abatement Notices issued between September and November 2019 (not to those issued in May, June, July or August 2019) and only by way of background and to demonstrate that [redacted] was given notices not to make noise after 7pm several times. There was a reference to the types of noise such as use of machinery, forklifts, hammers, chisels and grinding steel, welding and banging between 7pm and 7am. The infringement notice and the failure to pay it were mentioned but it was noted that there was no charge in relation to that breach. According to the transcript, [redacted] was fined $1,500, ordered to pay $2,500 in costs and a spent conviction was recorded.

8.11 On [redacted] the City issued a building order to [redacted] to remove the metal framing and stone paving as it was unauthorised work.

8.12 In my recent meeting with the City, it advised that it has now issued a BAC for the stone paving and steel frame.

Discussion and findings

8.13 In relation to the stone deck around the pool, [redacted] began complaining about this issue in 2018. It appears to have taken 2 years for the City to issue an order and a further year for the paving to be approved. This is too long. I do not know the action taken between the issuing of the order and the recent BAC. However, this City appears to have achieved retrospective compliance. Given there is no evidence of safety issues or other reason why the stone paving work should not have occurred, I find the enforcement action appropriate, other than the fact that it has taken so long. The City should notify [redacted] of the outcome of his complaints about the construction of the stone deck without a building permit.

8.14 The City's action to issue an infringement and 23 Noise Abatement Notices in response to the noise complaints was reasonable, so was its decision to prosecute given the egregious nature of the allegations. Charges in relation to 9 of the 23 abatement notices were issued but 8 of those charges were withdrawn.

8.15 The City has provided an email from its lawyers responding to the questions posed in relation to this issue. The lawyers say (in summary):

(a) 9 charges were laid as these were the charges for which there was prima facie evidence of a breach within the 12 month limitation period prior to charges being laid;

(b) on [redacted] a plea of guilty to 1 charge was accepted having regard to:

(i) there had been no noise issues since November 2019;

(ii) the plea of guilty to 1 charge was considered to reflect remorse;

(iii) [redacted] was unlikely to reoffend;

(iv) the history of the noise issues was provided to the court by way of background; and

(v) the costs of continuing to trial in circumstances where the issue the subject of the prosecution had been resolved;

(c) the actions of the City are consistent with the compliance and enforcement policy adopted on 21 July 2020 which says that officers will favour the minimum level and type of enforcement action consistent with addressing the matters set out in section 10 of the policy.

8.16 Having regard to the transcript of the prosecution, it is evident that in the summary, the prosecution did refer to the issuing of abatement notices in the period between [redacted] and [redacted] However, [redacted] lawyer objected to the court having any regard to the fact these notices were issued and said his client denied that he committed offences in relation to those notices.

8.17 The Court said very clearly that it did not treat the single charge a representative of other breaches and in sentencing that it was dealing with an isolated incident on 10 November. Further that there was no evidence of unreasonable noise on any of the other occasions. The court also heard from [redacted] lawyer that the charge that did proceed related to noise occurring just after 8pm for a brief period of time only. He said it should be treated as at the low end of the range given the audio (a recording of which had been played to the court) and the time of day.

8.18 Some of the charges that were withdrawn related to noise occurring much later in the evening or in the early hours of the morning. For example, on [redacted] at 2 am and 3.18am, after a notice had been issued on [redacted]

8.19 I do not agree that the decision to proceed with a single charge of noise that occurred at 8pm was representative of the charges that were withdrawn or the alleged conduct of [redacted] more generally. Further [redacted] was told in the email from the lawyer dated 7 September that the City intended to proceed with 'one representative charge covering the period [redacted] to [redacted] In my experience, when proceeding with a representative charge, the dates in the charge are amended to cover

the period so as to ensure that the court does have regard to the whole period when determining penalty. This is not what occurred here and it is obvious from the transcript that the mere mention of earlier notices being issued had no bearing on the penalty that was issued for the single charge.

8.20 Having said this, it is a matter for the City to determine whether to proceed with a prosecution and if so, how it will negotiate the outcome having regard to factors such as the public interest, the actions of the accused, potential costs and the strength of the evidence.

8.21 I cannot say the decision to proceed on only one charge was not warranted given I was not privy to discussions with the [redacted] lawyers and the potential defences that may have been proposed. However, I note that in providing the explanation for the approach that was taken, the City's lawyers have not said that the strength of the evidence was a factor in its decision to withdraw 8 charges.

8.22 Further, I don't agree with the characterisation of the outcome as representative of the 9 charges laid. I am also unsure as to why charges were not laid sooner, perhaps in the midst of the 7 months whilst the noise was being made. This may have deterred [redacted] from continuing with this behaviour. Instead, the City waited until the works were finished and then claimed that [redacted] had proactively shown remorse and been cooperative in ceasing to make the noise when this does not appear to have been the case. No remorse was expressed on behalf of [redacted] during the hearing.

9. Investigation by Building and Energy

Question 20B: Whether the City's actions in response to the complaints investigated by DMIRS were appropriate and reasonable?

Question 21B: What actions the City has taken in response to the findings by DMIRS relevant to this review and what the current status of that response is?

Facts and evidence relating to these questions

9.1 On 17 June 2020, Building and Energy emailed the City with comments on its investigation of [redacted] complaints. In relation to the screen fence, it said:

(a) it had reviewed the drawings supplied with the application for BAC and compared those with what was constructed based on photographs supplied by [redacted] and his engineer (report dated [redacted]);

(b) the City said it took account of [redacted] engineer's report dared [redacted] which 'confirmed that the limestone wall provided sufficient footings for the screen fence the subject of the BAC';

(c) [redacted] engineer's report actually says 'Our initial inspection and certification on the screen fence at the above address included a review of the complete structure included the base connection and lateral support. Whilst our original inspection report and certification (refer attached) may not have clarified this, we can confirm that the screen fence, the base connection and lateral support from other structures is satisfactory for the typical screen fence loadings.'

(d) [redacted] engineer's reports fall short of providing the City with confidence that the limestone wall provided sufficient footings;

(e) it has video showing draining flowing from [redacted] through the screen wall/footings indicating water is not being retained. It noted the report referred to the screen It is suggested the City set aside the Building Approval Certificate for the wall;

(f) the plans approved with the Building Approval Certificate for the steel framed screen and retaining wall do not reflect photos of the conditions on site; and

(g) the email went on to discuss the ability to amend or withdraw the BAC.

9.2 A presentation from Building and Energy dated 21 July 2020 summarises meetings and emails between the City and Building and Energy. It contains 24 photographs of the retaining wall comparing it to the drawings approved for the BAC. There are several notations next to photographs for example:

(a) Photo 5 – approx. 300mm of unretained soil face below exposed pavers. Three service pipes buried in the soil face have become exposed as the soil eroded and two are now falling out onto the no 12 property at the southern end. Unretained soil is present of waste materials have been stacked but not correctly mortared. This is not adequate retaining wall construction;

(b) Photo 10 – screen post on shims is observed to have collapsed downwards with loss of material below it. This is not adequate retaining wall construction.

(c) Photo 11 – after approximately 1M length of mass limestone retaining (joints not mortared) the construction reverts to pavers overlaying a non-retained vertical soil face which is eroding. The soil is confirmed to be fill soil rather than natural soil because it exhibits contaminating particles of other building materials and I [sic] has a masonry footing below it. At the southern end of this exposed length of soil face is a length of crudely mortared limestone rubble that is eroding out at void locations.

(d) Photo 12 – Crudely mortared limestone retaining sand and rubble inclusions, inadequate mortar joints. This is not adequate retaining wall construction.

9.3 In March 2021 the Building Service Board found that the City's [redacted] that had issued the CBC had been negligent or incompetent in connection with carrying

out building surveying work, namely the issuing of the CBC on 27 March 2017 relating to the screen fence. The [redacted] was cautioned

9.4 A media statement issued by Building and Energy dated 22 March 2021 said that the certificate referenced ambiguous plans and technical specifications and did not record the inspections the [redacted] had relied upon. It also said that the certificate failed to demonstrate compliance of the swimming pool barrier.

Discussion and findings

9.5 In its submissions to this review the City says:

(a) Building and Energy's investigation resulted in the lowest level of disciplinary caution to the [redacted] for not personally carrying out the site inspection. At the time the City relied on a team approach to do site inspections, as a group. However the City accepts Building and Energy's opinion that the signing officer should do the inspection.

(b) The actions taken by the City include changes in procedure, that the City does not issue CBC for retrospective applications.

(c) Building orders have been issued to [redacted] for the pool deck and fence and the spa.

9.6 In my meeting with City officers on 13 August 2021 they advised me that Building and Energy found the surveyor should not have issued the CBC because he did not personally inspect. There was nothing wrong with the actual structure. I referred them to Building and Energy's media release which said the plans and technical specifications were ambiguous and there was no record of inspections relied on. They advised that they now had a new CBC from a private building surveyor and there was a new engineering report for the structure. I asked if they same drawings were relied on. They said there were some different documents.

9.7 The City's account of Building and Energy's findings is not correct. It did not find the officer acted inappropriately because he did not inspect. It found that there was no record of the inspection that he relied on. It also found the plans and technical specifications relied on to be ambiguous.

9.8 I find the City has not acted reasonably in its actions relating to the approval of the screen fence either in March 2017 or more recently. The findings of Building and Energy in 2020 were evidently that the retaining structure under the screen fence was inadequate. Based on the photographs, the as built condition of the retaining wall does not reflect the drawings that were approved when issuing both the June 2017 retrospective planning approval and the March 2017 BAC.

9.9 As I have not seen the documents relating to the most recently issued CBC, I cannot say for sure whether there is a more accurate depiction of the as built construction in the approved drawings. However, given that there has been no change to the screen

and unretained area under it, I find it hard to comprehend how the City could have accepted a new CBC for the structure. The approved drawing must match the structure and the structure itself has not been changed and remains inadequate with regard to the retaining walls.

9.10 If the position is that the screen is structurally adequate regardless of the state of the unretained area that is under it, then I still say the structures should not be approved because they do not prevent water, soil or rubble from falling across the boundary.

9.11 I have found above that the City was not required to compel [redacted] to build retaining walls as part of the demolition permit issued in 2015. I maintain that view. However, in constructing their new boundary fence, even if it was entirely within her boundary [redacted] was required to build a structure that would properly retain the soil.

9.12 The City took the position for 15 months that the new fence could be built as of right and therefore, it had no role in what was built. Even if [redacted] was able to build a 1.8m high fence as of right, it would still need to be an adequate structure.

9.13 When the City conceded that an approval was required, it became squarely its responsibility to ensure the fence was appropriate and properly documented. What has been built must be reflected in the approved plans and it is not appropriate for the City to have accepted a CBC from any building surveyor without conducting its own assessment of the application. I refer to the Miller case where SAT found that a council could refuse an application for a building permit if there are errors in the documents presented to it. The solution to this matter is not to change the City's policy to not issue CBCs for retrospective building approvals anymore. In circumstances such as these where the as-built structure is not reflected in the drawings and does not prevent soil and debris from falling across the boundary , the City should not blindly accept a CBC from a private building surveyor.

9.14 If [redacted] could not get access by consent to [redacted] to build her replacement fence after the limestone wall was demolished, she could have used the process under the Dividing Fences Act to obtain orders to construct her fence.

9.15 I can't help but restate the observations I have made above about the decision to require demolition of the limestone wall. Going down that path with no clear plan or agreement about what was to replace the wall, in circumstances where it acted as a pool barrier was short sighted. It was that action, insisted upon by [redacted] for many months and eventually taken by the City and the two neighbours by consent through the SAT orders, that was the catalyst for years of ongoing complaints and anxiety.

10. Any other enforcement action taken by the City against [redacted]

Question 22B: Whether the City's enforcement actions taken against [redacted] were appropriate and reasonable having regard to:

(a) how the issues giving rise to the action came to the attention of the City;

(b) the date the City became aware of the issue;

(c) the date it took each action;

(d) the outcome or current status of the enforcement action.

Question 23B: Whether when the City has declined to take action in relation to alleged non-compliances by [redacted] (not already discussed above) it has acted reasonably and responsibly?

10.1 I am unable to answer the questions based on the evidence I have been given. Now having completed this report and given the extensive assessment that has been undertaken I do not consider it necessary to answer these questions.

Part C – [redacted] Complaints

[redacted] was the previous owner of [redacted] and [redacted] shared a duplex building which included a party wall along part of the boundary between the two properties. The survey-strata plan dated **13 July 2016** also shows easements in relation to the party wall and an intrusion.

[redacted] has made complaints to the City about the circumstances surrounding the demolition of the portion of the duplex on [redacted]

1. Decision to issue a demolition permit

Question 1C: Whether the City acted appropriately and reasonably in its decision to issue the Demolition Permit, including:

(a) Whether it should have been a building permit or demolition permit?

(b) Whether the City should have required evidence of a BA20 consent or court order prior to issuing the demolition permit?

(c) Whether the information provided by the applicant about the proposed 'make good' works was adequate to support the issuing of the demolition permit?

Facts and evidence relating to this question

1.1 In May 2017, the owners of [redacted] sought [redacted] consent to demolish their half of the duplex. They provided [redacted] with a BA20 form, being an approved 'Notice and request for consent to encroach or adversely affect' form to ensure compliance with s77 of the Building Act.

1.2 [redacted] says he had discussions with the owners and the proposed demolisher. On 25 July 2017, [redacted] sought further information about the proposed demolition, to which he did not receive a response.

1.3 [redacted] did not sign the BA20 form to consent to the demolition. No order of the Magistrates Court pursuant to section 86 of the Building Act in relation to the proposed demolition was sought or issued.

1.4 In late July or early August 2017, the demolisher made an application to the City for a demolition permit for 'demolition of duplex half and site clear' at [redacted] The application from indicates, via 'tick boxes', that the proposed work will adversely affect the other land ([redacted] but that consent or a court order had not been obtained.

1.5 Following an initial assessment of the application, the City requested and received additional information from the demolisher as follows:

(a) on 9 August 2017, the City requested additional information including photos showing party wall and roof construction, details of maintaining adequacy of existing building and written authority from adjoining owner at [redacted]

(b) on 11 August 2017, the City received additional information from the demolisher;

(c) on 14 August 2017, the City requested further information on the proposed 'make good' and weatherproofing. The email:

(i) Stated additional information was required on the drawings: "are the roof eaves within the 'easement' to remain on the neighbour's side or are they to be removed? Please confirm if both brick walls forming the cavity 'party' wall are up to the underside of the roof tiles?"

(ii) Recommended that a site inspection be carried out by the [redacted] and [redacted] to discuss the proposed 'make good' works and to determine whether the works to be completed require a BA20 or BA20A form to be obtained from the adjoining strata owner.

(d) on 21 August 2017 photos were taken of the exposed roof frame and party wall;

(e) on 30 August 2017 the demolisher provided the City with details for the works to 'make good' the party wall; and

(f) on 7 September 2017, the City sought further information about the structural engineer's details.

1.6 Based on the additional information, the City was satisfied that the proposed demolition would be wholly contained within [redacted] and would not adversely affect the land at [redacted] or affect the structural, waterproofing of noise insulation capacity of the party wall. The City's position is set out in letters sent to [redacted] dated 26 October 2017 and 8 February 2018.

1.7 On [redacted] the City's then [redacted] issued Demolition Permit number [redacted] to the demolisher for the demolition of [redacted]

1.8 The demolition permit states it is for 'Demolition of Duplex Half' and that the demolition work must be carried out in accordance with the conditions set out in the permit. The Demolition Permit consists of the BA6 form and attached plans and other documents approved as part of the permit, which include details to 'make good' the party wall.

1.9 In its submissions to this review the City provided a 2 page document dated 27 July 2017 with information about demolition to the brick wall and drawings. Both are stamped as approved as part of the demolition permit on [redacted]

1.10 On 11 September 2017, the City wrote to 'The Occupier' of [redacted] as a courtesy to advise them that the Demolition Permit had been issued. The letter enclosed a copy of the Demolition Permit.

1.11 In late September to early October 2017, the duplex on [redacted] was demolished. The demolition was completed on about 7 October 2017.

1.12 [redacted] first became aware of the demolition on 2 October 2017, when he was contacted by his tenant who lived at the duplex.

1.13 In response to a complaint from [redacted] the WA Ombudsman's office concluded (27 September 2018) that:

> *"Under the provisions of the Building Act relevant to your case, and as set out in the Permit Authority Advice, the City is required to check that consent or a court order is in place if there will be actual adverse effects on other land as defined in section 3 of the Building Act (section 77). This requirement does not extend to party walls (section 79) or access to other land to do work. The City is not required to check that consent or a court order is in place for these matters. Accordingly, the City was only required to have evidence of your consent or a court order prior to the issuing of the Permit if the works would adversely affect your land."*

Discussion and findings

1.14 In its submissions to this review the City says that under section 21 of the Building Act the City need only require consent be obtained from an adjoining owner in accordance with section 77. Section 77 refers only to situations where the demolition may adversely affect 'land' and although there was a party wall involved in the demolition, there was no adverse effect on 'land'. It is said that 'land' is not intended to include buildings because the term 'building' is not used in section 77.

1.15 First, section 77 uses the term 'adversely affect land' which is a defined term that expressly includes 'damage, or reduce the structural adequacy of, a building or structure on the land.' Second, the *Interpretation Act 1984* (WA) says that in every written law the term 'land' includes buildings and other structures. Therefore, I do not agree that section 77 and the requirement to obtain consent, only applied where there might be an adverse effect on 'land' as opposed to a building.

1.16 The City says that although section 79 of the Act expressly requires consent be obtained in relation to party walls, this provision was not applicable to the grant of a demolition permit. This may be so, however, as noted above, section 77, in my view did operate to require written consent where the land or building may be adversely affected.

1.17 The City says notwithstanding that section 79 did not apply, the City made further enquiries to satisfy itself that adequate precautions were proposed to be taken to make

good the party wall. It says that in order for consent to be required (presumably under section 77 or 79), there needed to be evidence of an actual adverse effect not just a prospect that there could be an adverse effect.

1.18 The City says that it was satisfied based on the evidence provided by the demolisher, that there would be no such adverse effect. To further address the issue, it imposed a condition on the demolition permit to ensure that there was an obligation on the demolisher to make the wall of [redacted] building comply with the Building Code of Australia.

1.19 In my meeting with representatives from Building and Energy in March 2021, their opinion was:

(a) it is not feasible that the demolition work could be undertaken without a requirement for make good works, meaning consent or court order should have been obtained from [redacted] under the BA20 process;

(b) the City should not have accepted the make good proposal, the scope of works set out were not sufficient to demonstrate the works would be adequate;

(c) there was a patio area supported by a common wall and when the wall was demolished this would leave a hole in the roof. It was entirely predictable that the work would adversely affect [redacted] property and the documents accepted by the City did not address these issues; and

(d) where there is a demolition of one half of a duplex, councils should issue both a demolition permit and a building permit for the associated make good works.

1.20 The opinion of Building and Energy is at odds with the opinion of the WA Ombudsman's office. The WA Ombudsman's office does not appear to have had the benefit of the opinion from Building and Energy on this issue when making its findings.

1.21 Given the expertise held by the officers of Building and Energy to consider the technical merits of the make good works proposal by the applicant, I accept the opinion of Building and Energy that the City should not have concluded that the proposed demolition would not adversely affect the party wall.

1.22 As to the question of whether there should have been both a demolition permit and a building permit, the City says that where the make good work is a minor part of the demolition you do not issue a separate building permit as it is 'make good' not construction. They say the fact the more work had to be done was a result of the builder damaging the wall which then led to the need for a BAC.

1.23 The Building Act says 'building work' includes "the renovation, alteration, extension, improvement or repair of a building or an incidental structure". Demolition work means "the demolition, dismantling or removal of a building or an incidental structure". Make good work appears to fit within the definition of 'building work'. The remaining party

wall must be altered to make it an external wall. Building and Energy's view that both a demolition and building permit are required accords with the definitions.

1.24 I therefore find that although the City may have been seeking to ensure there was not damage to the party wall by requesting details and assurances from the demolisher about the make good works, it should not have proceeded to issue the demolition permit without the written consent of [redacted]

1.25 Whilst the City is not responsible for the work that was carried out by the demolisher poorly, had it insisted on the applicant reaching agreement with [redacted] and or seeking court orders, the City would have minimised its involvement in the matter and been perceived as more independent when taking action to require the work to be brought into compliance.

1.26 I therefore find the City did not act appropriately and reasonably in its decision to issue the demolition permit, including that it should:

(a) have required a building permit and a demolition permit;

(b) have required written consent from [redacted] or a court order prior to issuing the demolition and building permits; and

(c) not have accepted the proposed 'make good' works as adequate to support the issuing of the demolition permit.

1.27 [redacted] also argues that the City should have prosecuted the neighbour for breaching section 77 or 79, namely for adversely affecting his building without his consent.

1.28 Whilst there may have been offences committed under section 77 or 79, in circumstances where the demolisher and adjoining owners acted in good faith on advice from the City that written consent from [redacted] was not required, a prosecution would not have been in the public interest. This however, serves as another reason why the City's decision not to require written consent from [redacted] undermined the process contemplated by the Act for addressing the rights of adjoining owners in circumstances such as these.

2. Response to reports on the Building Commission's investigation

Question 2C: Whether the City acted appropriately and reasonably in its decision to issue the building order dated [redacted]

Question 3C: Whether the City's building order addressed issues identified in the Inspection Report issued by the Building Commission on [redacted] and or the building remedy order dated [redacted]

Question 4C: Whether the City acted appropriately and reasonably in its decision to issue the Building Approval Certificate including:

(a) Whether that decision was consistent with the findings, recommendations and actions of Building and Energy, and if not, why?

(b) Whether the City acted reasonably and appropriately in relation to the seeking [redacted] account the issuing of the building remedy o [redacted]

Facts and evidence relating to this question

2.1 On 7 October 2017, [redacted] emailed the City's [redacted] to complain about the matter and in particular that the demolition permit had been issued without his consent or a court order. [redacted] requested various actions from the City, including that orders be issued to require the demolisher to immediately stop further work within 1 metre of the party wall and to adequately protect the wall from the weather and dust ingress until the consent issues are resolved.

2.2 On 26 October 2017, the City's [redacted] wrote to [redacted]. [redacted] did not receive this letter until 6 November 2017. The City's letter stated (as relevant):

(a) following the application for the demolition permit, the City requested and received additional information about the proposed demolition;

(b) *"Further information related to a request for greater clarity on "making good" of the party wall for the purpose of fire separation, and water proofing so as to prevent water entering the building"*;

(c) *"Structural engineer's details were also requested to ensure that the integrity of the roof eaves overhang within the easement was not affected, and to ensure that any repair works would be wholly contained within the subject demolition site";*

(d) *"The repair works as proposed (furring channels – posts – waterproofing sheeting) was considered to be incidental and did not require a building permit as per Schedule 4 (clause 2) of the Building Regulations 2012";*

(e) *"The City required a signed BA20A form from the adjoining owners, or, in the event that this was not possible, details of an acceptable alternative option which would insure [sic] that the structures would be protected and access to the adjoining and would be avoided. (s79) Building Act 2011";*

(f) *"Adequate details and clarification was provided of good work practises [sic] to be undertaken during demolition work. Receipt of this information enabled the City to issue a demolition permit".*

2.3 On that basis the letter stated the request for a building order to stop work is not supported. The letter also enclosed a copy of the demolition permit.

2.4 [redacted] contacted the City's [redacted] on 6 and 7 November 2017 to pursue his complaint and reiterate his request that a stop work order be issued.

2.5 On 7 November 2017, the City's [redacted] emailed to [redacted] stating:

"An inspection of the demolition and building works at [redacted] show that there has been no adverse effect on your property. The building works do not encroach onto your property.

Accordingly no stop work order, or any other action, will be issued or taken against the builder at this stage.

The City continues to monitor the situation".

2.6 In about November 2017, the Building and Energy became involved following a complaint from [redacted] about the demolition (Complaint No C153119).

2.7 On 29 November 2017, a meeting between representatives of Building and Energy and the City took place. It was agreed that the City would obtain advice on the application of relevant sections of the Act and proceed with a building order and require submissions in relation to a retrospective building permit for 'make good' works.

2.8 On 15 December 2017, the City gave the adjoining owners written notice that the City proposed to give them a building order requiring them to carry out specified remedial works to the party wall. The demolisher subsequently met with officers of the City and indicated it would respond to the City. The City did not receive a response.

2.9 An Inspection Report was issued by Building and Energy on [redacted] The report identifies action required in paragraphs (a) to (p) at the end of the Report, including to seek retrospective approval and obtain a building permit for the 'make good' works to the party wall, carry out works to the party wall to ensure compliance with the BCA and compliance with the demolition permit.

2.10 On 29 January 2018, the City's [redacted] emailed [redacted] to advise of the City's enforcement action, referencing the proposed building order and stating that following a further inspection by the City's officers, accompanied by an officer of the Building Commission, the City will progress to serve a final building order on the Owners "to enforce compliance in accordance with the City's original approvals".

2.11 On 8 February 2018, the City gave the adjoining owners written notice that the City proposed to give them a new building order requiring them to make good the party

wall in accordance with the specifications set out in pages 18 and 19 of the demolition permit. The notice enclosed a copy of the new proposed building order and provided the adjoining owners 14 days to make submissions to the City.

2.12 On 8 February 2018, the City also wrote to [redacted] to provide a further response to his letter dated 7 October 2017. The letter stated: (quotes from the 8 February 2018 letter are taken from the letter from the WA Ombudsman to [redacted] dated 28 September 2018)

> *"Prior to issuing the [Demolition] Permit, the demolition contractor provided the City with details of the manner in which the demolition works would be undertaken in order to ensure the demolition works would not:*
>
> *(a) adversely affect your adjoining land; or*
>
> *(b) affect the structural, waterproofing or noise insulation capacity of the party wall between the building being demolished and the building on your property".*
>
> *After considering those details, the City's officers were satisfied of the matters contained in s.21(1) of the Building Act and issued the [Demolition] Permit. In doing so, the City also imposed conditions requiring the structural integrity of all buildings and structures on your property to be maintained during the demolition works and requiring your building to be made good in accordance with the Building Code of Australia and relevant Australian Standards."*

2.13 The letter also set out the reasons why the City did not issue a building order requiring it to immediately stop work as follows:

> *"1. Requiring the demolition contractor to stop works would not have resulted in the works being completed in accordance with the [Demolition] Permit. It would simply have resulted in all works stopping at the site.*
>
> *2. Prior to giving a building order in circumstances where there is no imminent or high risk to people, property or the environment (such as was and remains the case in this instance) the City must first give the person to whom the order is to be given a notice of proposed order giving the person 14 days to make submissions in response to the proposed order..."*

2.14 The letter informed [redacted] that the demolisher had not carried out the works in accordance with the Demolition Permit and set out the enforcement actions taken and proposed to be taken by the City to ensure that the works would be completed in accordance with the Demolition Permit.

2.15 On 1 March 2018, the adjoining owners advised the City the works had been completed and applied for a Building Approval Certificate.

2.16 On 6 March 2018, a City officer(s) carried out an inspection. The officer(s) was not satisfied that the owners had complied with the proposed building order. On 15 March 2018, the City refused the application for a Building Approval Certificate.

2.17 On [redacted] the City issued building order (Number [redacted] to the adjoining owners. The building order specified that the demolition did not comply with the Demolition Permit and in particular, the works specified on pages 18 and 19 of the Permit to 'make good' the party wall have not been carried out. The building order directed the adjoining owners to 'make good' the party wall as per the specifications on pages 18 and 19 of the Demolition Permit within 14 days of the date of service of the order.

2.18 The adjoining owners sought a review of the City's building order in SAT. [redacted] was joined as an interested party to that proceeding on 22 May 2018.

2.19 The City and both owners wrote to the SAT before the return of the matter on 17 July 2018. [redacted] requested that SAT amend or substitute the City's building order to mirror the building remedy order issued by Building and Energy dated [redacted]

2.20 On [redacted] the day prior to the SAT hearing, the City's [redacted] issued Building Approval Certificate ([redacted] for "BCA Class 1a – Residential – Additional Leaf of Framing and Cladding to External Wall of [redacted]." In doing so the [redacted] approved a Certificate of Building Compliance issued on 10 July 2018 by a private building surveyor.

2.21 The Certificate references and attaches relevant documents including:

(a) a sectional drawn detail (one page) stated in the Certificate to be signed by [redacted] and

(b) a letter dated 9 July 2018 from [redacted] of ACOR MCE Consultants Pty Ltd stating that based on observations and measurements taken at a site inspection, "we are satisfied that the fixings, members, substrate materials and cladding have been correctly installed, are sized in accordance with typical construction practice and are structurally sound."

2.22 On [redacted] Senior Member Wallace of SAT made orders (stated to be made in chambers and with the consent of the parties) that the building order is revoked and that the Applicants are given leave to withdraw the application and that the application is withdrawn. The orders do not list [redacted] as an interested party.

2.23 [redacted] says that he was interstate on 17 July and had arranged to phone into the hearing. He said when he phoned, he was told that there was no hearing and that orders had been made in chambers by consent of the parties. He said he did not agree to these orders and was very angry that the City had issued a BAC when the work was not compliant which he says was evident given Building and Energy's building remedy order was outstanding.

Building Remedy Order

2.24 Building and Energy had issued a building remedy order on [redacted] It was based on information [redacted] and the demolisher provided to Building and Energy including engineering reports setting out competing views about the work to the party wall.

2.25 The proposed building remedy order dated [redacted] provides (as relevant):

(a) The plans approved when issuing the demolition permit are drawn by CP. There is no information of who CP is or what qualifications he holds;

(b) There is no evidence the demolisher's work has affected the structural integrity of the common wall (the photos of a crack in the wall do not evidence structural failure on their own);

(c) There are concerns over the structural integrity of the gable brickwork (although it is not clear if this was caused by the demolition work or was already an issue);

(d) The demolisher should obtain a structural report on the wall and if it is structurally adequate, apply for the BAC for the building work to the wall;

(e) The complaint about failure to provide sound insulation was dismissed;

(f) In relation to damage to the boundary fencing at the rear, there is no evidence this was caused by the demolisher

(g) The removal of the tree from the front yard was not approved under the demolition permit and the demolisher is required to make good.

(h) The make good works to the wall should have been carried out under a building permit. The owner should apply for a retrospective approval for the make good works.

(i) The make good works were inadequate or not compliant with demolition permit in several respects including, weather proofing, structural support for the common wall, damage to the patio, steel columns (multiple issues), fire rating of wall, lack of termite protection, moisture barriers, and the hip member was unsupported.

2.26 The building remedy order issued in July was consistent with the proposed building remedy order. The July order was informed by engineering reports from [redacted] and the owner of [redacted]

2.27 [redacted] advised me on 16 August 2021 that he had lodged a complaint with Building Services Board about the conduct of private building surveyor, that issued the Certificate of Building Compliance. The outcome of the complaint was communicated

to [redacted] in a letter from Building and Energy dated 11 August 2021. It says the Building Services Board found that the surveyor engaged in misleading conduct. No further details have been provided. I expect this decision is subject to appeal.

Discussion and findings

2.28 The WA Ombudsman found the City acted appropriately in:

(a) not issuing the stop work order when requested to do so by [redacted]

(b) refusing to issue the BAC when it was initially applied for; and

(c) for issuing a building order to require rectification works to the wall.

I agree with those findings.

2.29 In responding to these questions, the City says that it sought and followed legal advice on the process it followed. It says at no time was there a danger or safety issue on site but that the make good works did not comply with the Building Code of Australia. This non-compliance was addressed through the issuing of a building order to the owners the content of which the City's lawyers advised on.

2.30 The City notes that the failure by the demolisher to properly carry out make safe works to the wall was their responsibility and that [redacted] exercised his civil rights against the neighbour in a civil claim.

2.31 In my meeting with Building and Energy, it advised that:

(a) the City's building order did not cover all the issues Building and Energy had identified which made it difficult for Building and Energy to enforce its orders against the demolisher;

(b) the demolisher understandably was confused about why he should comply with the Building and Energy order when the City said its order had been complied with already;

(c) at the joint inspection after the demolisher had said it had complied with the City's order, there was a fair bit of difference between Building and Energy's opinion about the state of the rectification works and the City's opinion;

(d) the City was more willing to accept the assurances from the demolisher that the wall was now compliant than make its own assessment;

(e) whilst the City was cooperative it would have preferred a more coordinated and consistent approach to the issuing of orders by each body.

2.32 It is uncontested and clear on the face of the documents that orders made in the City's building order dated [redacted] are much less specific than the issues identified for rectification in the Inspection Report issued by Building and Energy dated [redacted]

[redacted] and its subsequent proposed building remedy order dated [redacted]. The City says this is because it received legal advice that it should only require compliance with the Demolition Permit and refer to the conditions in that permit. It says that the works required by Building and Energy were in relation to damage to the wall which was not work envisaged by the Demolition Permit.

2.33 I do not agree with the City. In most respects the works that Building and Energy said were required were directly related to the drawings approved with the demolition permit. The City chose to make broadly stated orders whereas Building and Energy's reports itemised all of the outstanding or inadequate issues related to the make good works.

2.34 Accepting that the City acted on legal advice and that their order was valid, it would have been appropriate and more collaborative for their order to reference the particular items identified by Building and Energy and say that these did not comply with the conditions of the demolition permit rather than just restate the permit conditions.

2.35 The City proceeded to accept the CBC and issue the BAC in the days prior to the SAT hearing. At this time the building remedy order remained outstanding. The City says it accepted a CBC from a private building surveyor. It appears it made a limited assessment for itself of whether the work has been properly completed. Building and Energy advised in my meeting with them that the City's view of what was reasonable and theirs was very different and the City was more willing to accept the word of the builder.

2.36 I find the City's approach unreasonable. In circumstances where a BAC was sought and the City was aware there was an outstanding building remedy order dealing with issues that went to whether the work was compliant, it should not have accepted the CBC until the building remedy order was resolved. In doing so it undermined Building and Energy.

2.37 As it transpires, the Building Services Board has found the surveyor issuing the CBC is guilty of misdealing conduct. Whilst the details of this finding are unknown, it suggests that the CBC may not have been appropriately issued. Further, I understand the subsequent to the withdrawal of the City's building order and the issuing of the BAC, Building and Energy continued to insist on further works in order for its order to be complied with.

2.38 Given the finding by the Building Services Board against the surveyor that issued the CBC, I find the City should not have accepted the CBC. A CBC from a private building surveyor does not remove responsibility from the City in circumstances such as these.

2.39 In making this finding I note that the protections from liability provided under sections 143 and 145 of the Building Act are subject to a person acting in good faith. Good faith is not blind acceptance of a CBC in circumstances where the is an outstanding building remedy order in place that deals with the very same issues that the CBC has been issued for.

2.40 Although I have found the City should not have accepted the CBC, I note that [redacted] no longer owns this property and the dwelling has now been demolished. Therefore, there is no further action required by the City in relation to this site. Further, whilst I have found the City's decision to issue the demolition permit without a BA20 consent and its actions in response to the damage to the wall unreasonable, the damage to the party wall was caused by the demolisher.

2.41 I also note that notwithstanding the conduct of the City, [redacted] received assistance from Building and Energy to have the damaged wall rectified and later obtained court orders for compensation from the demolisher (although the demolisher became insolvent before paying the compensation).

2.42 It is inferred from the City's submissions to this review that [redacted] attended at the SAT hearing on [redacted] and advised the Tribunal he was anxious to have the matter resolved as he was seeking to sell the property. The SAT was made aware of his complaint to Building and Energy and the engineering reports obtained by each of the owners. As noted above, [redacted] denies that he attended SAT on [redacted] He says there was no hearing that day. He says some of the matters set out in the City's submission were discussed at a previous hearing that he attended but he disputes what has been said in the submission.

2.43 Given I have concluded that the City acted unreasonably in issuing the BAC and consenting to the withdrawal of the building order, it follows that my view is that City did not act reasonably by consenting to the orders made in the SAT matter.

3. Policy and procedure regarding consent from adjoining owners

Question 5C: What policies and processes (internal and published) do the City have in relation to issuing building or demolition permits or requiring evidence of consent when similar applications for demolition of duplex buildings are made prior to and since this matter?

Facts and evidence relating to this question

2.44 Building and Energy or the City have published various documents that are relevant to issues raised by this matter. It says that it now requires the issuing of a building permit and demolition permit when duplex demolitions are proposed. It says that it requires BA20 consents in most cases but remains of the view that, based on the information sheet from Building and Energy, it can only insist on a BA20 if it is determined that the completed building work will adversely affect the neighbouring property.

2.45 I was also referred to the *Strata Titles Act 1985* and *Strata Titles General Regulations 1996* by the City. The Act provides in Schedule 2A for easements for access for certain work to walls on boundaries. Clause 12A says:

Easement for access for certain work

(1) If, under clause 3AB(1), the boundary of a lot or part of a lot is the external surface of a part of a building that constitutes a permitted boundary deviation or is on the boundary of another lot, the owner of the lot that includes that part of the building, and any of the owner's agents, employees and contractors, may —

(a) inspect, maintain, repair, renew or replace the part; and

(b) enter on the other lot, if necessary with vehicles, equipment, materials and other items, for the purpose of doing so.

(2) The rights created by subclause (1) are an easement burdening the other lot.

2.46 The *Strata Titles General Regulations 1996* (repealed on 1 May 2020) provides in regulation 14G:

14 G. Party Wall Easement, short form description and terms etc. of

The short form description for an easement for party wall rights is "Party Wall Easement", and the terms, conditions and provisions of and relating to the easement are as follows —

"1. The registered proprietor of the servient lot ("grantor") grants to the registered proprietor and every occupier of the dominant lot from time to time ("grantee") the right to use a party wall within or on the boundary of the servient lot for the support of the walls, floors, footings, ceilings, roofs or other parts of any building built or placed on the dominant lot.

2. The grantee may enter on the servient lot at any reasonable time with or without independent contractors, employees or agents and necessary materials, equipment and vehicles for the purpose of repairing, maintaining, renewing or otherwise remedying any failure to maintain the above right to use a party wall including the right to erect scaffolding or equipment as is reasonably necessary for upholding and maintaining the party wall. The grantee, in exercising such right must cause as little inconvenience as reasonably possible and must make good all damage caused in exercising the right of entry.

3. If the whole or the part of the building or buildings on the dominant lot which are supported by the party wall is destroyed, it must be reinstated within one year, or an extended period ordered under section 103O of the Act, after the destruction, and if it is not so reinstated this easement is terminated in respect of the whole or part which is destroyed. "

2.47 I am not convinced that these provisions applied to allow the owner of [redacted] to demolish their side of duplex without the consent of [redacted] or that if they did, they would override the need for consent under the Building Act. In circumstances where a duplex is being

demolished and an internal party wall is becoming an external wall arguably this is not repair, maintenance or renewal of the wall.

2.48 I have commented elsewhere in this report on the Building Act provisions for consent and the Building and Energy information sheet. I have said that I do not know the basis for the information sheet saying that consent is only required if work 'when completed' will adversely affect adjoining property. The Act does not use these words. I accept that because of this advice from Building and Energy the City is has interpreted the BA20 requirements this way in matters such as those involving [redacted] However, I do not accept that where half of a duplex is being demolished it is acceptable to do so without a BA20. The make good works required and the change of an internal party wall to an external exposed wall are such that the owner of the remaining wall ought to be well aware of and consent to the proposed make good works.

2.49 Finally, I note that [redacted] has referred me to a recent half duplex demolition in his neighbourhood. I am advised by the City that it issued a building permit, demolition permit and that a BA20 form was received. [redacted] alleges that the make good works have not been properly completed. I will not consider [redacted] allegations about the adequacy of make good works for this site. I do however, accept that the process followed for this neighbouring site is evidence that the City has indeed changed its process from when it issued the demolition permit for the [redacted] matter.

Part D – [redacted] Complaints

1. Temporary fence on retaining wall at [redacted]

Bearing in mind the outcome of the WA Ombudsman's investigation, the matters for the City's to respond to are set out below taken from [redacted] submissions as follows:

Question 1D: The City's 'building order' created unnecessary trouble;

Question 2D: The City was wrong to retrospectively provide arguments to the WA Ombudsman that they could make such orders under the Local Government Regulations on the basis that there was excavation work underway;

Question 3D: The City has shown no contrition or apologised for the trouble it caused.

Facts and evidence relating to these questions

1.1 [redacted] and his wife [redacted] own [redacted] In 2012 they were issued with a building permit to construct a dwelling and associated structures. The approval included the construction of boundary walls, including a retaining wall within [redacted] on the boundary with [redacted] There were several amendments to the building permit.

1.2 On 14 April 2016 a City officer wrote to [redacted] referring to complaints received by the City and seeking a written response within 14 days to the following:

(a) Provide a compliant safety balustrade to the right hand side retaining wall (western side of [redacted]). I suggest you discuss the dividing fence with your adjoining owners and agree on a suitable fence.

(b) Complete the unfinished eaves to the roof to the left hand side of the dwelling and install a suitable gutter and rainwater downpipes. Stormwater is to be contained within the property boundaries.

(c) Provide a licensed land surveyor certificate to establish the finished land levels to the left hand side adjacent to the adjoining wall. This is to confirm the land has not been reduced or lowered in height and if the retaining wall has been undermined.

1.3 The letter went on to say that 'Failure to resolve these matters may result in action being instigated to ensure safety and compliance with approvals granted is met.'

1.4 [redacted] refers to this as a 'building order'. For the purposes of this report, I will refer to it as 'the 14 April 2016 letter'.

1.5 On 18 April 2016 [redacted] wrote to the City officer stating that he should direct these issues to his builder and that there was no safety issue, no water runoff causing damage and that there has been no excavation close to the boundary with [redacted]

1.6 On 20 April 2016 [redacted] builder, [redacted] wrote to the City officer. He refers to discussions with 'Tony' and notes a temporary fence has been erected on the retaining wall pending a permanent fence being installed. He said that he was unable to complete the patio roof due to the ongoing dispute with [redacted] but was not aware of any damage caused by water runoff noting the unfinished roof was 1.5m from the boundary. He also said he had never excavated along the eastern boundary of the property.

1.7 On 2 May 2016 the City officer responded to [redacted]. He said that:

(a) the safety fence is not adequate and needs to extend the fill length of the wall and return to the face of the wall to prevent access to the top of the wall. He said the temporary fence must modified with immediate effect or a complying boundary fence installed to comply with 'BCA Part 39 Safe Movement and Access';

(b) the roof drainage system is to be installed to the relevant section of the roof and gutters and downpipes are to be installed;

(c) that he had acknowledged that the original ground levels had been altered and that confirmation from a licensed land surveyor of the existing ground levels and their consistency with the approved plans was required; and

(d) that a Notice of Completion had not been provided even though the building is occupied and that they would welcome comments in this regard.

1.8 [redacted] arranged for a land surveyor to prepare a land survey and make a comparison of levels against approved plans for both [redacted] and [redacted]. The land surveyor's statutory declaration dated 11 May 2016 concluded that there was a difference between approved and existing levels at 3 points on [redacted] He concluded that the levels on [redacted] were not less than shown on approved plans.

1.9 It is not known when this document was provided to the City, however in a redacted letter obtained under FOI from the City to an unknown recipient dated 7 June 2016, the City says that the matters have been addressed and ground levels are consistent with approved plans. That letter also says that the complaints have been addressed and refers to the installation of a safety balustrade to the boundary retaining wall and the installation of a suitable system for water runoff and collection.

1.10 On 30 July 2017 [redacted] wrote to the [redacted] referring to the 2 May 2016 letter. He:

(a) states that the building approvals issued to him by the City did not require a safety fence;

(b) states that that in referring to BCA Part 39, he assumes the City was referring to NCC (BCA) 2011 Part 3.9 -Safe Movement and Access;

(c) sates that NCC clause 3.8.2.2 requires 'a balustrade or barrier along the side of a delineated path of access to a building';

(d) asks that the [redacted] provide detailed reasons as to why the retaining wall is a delineated access way to our dwelling and requires safety barriers; and

(e) states that he would appreciate a prompt response so that they can remove the unsightly barriers and complete their work in this area.

1.11 On 31 August 2017 the City's [redacted] wrote to [redacted] saying:

(a) the retaining wall was identified as a hazard;

(b) that hazard was not evident at the time of issuing the building permit because of the existing fence;

(c) the reference to Part 3.9 of BCA was a guide only;

(d) there was a risk to children climbing onto the wall;

(e) you installed the temporary fence as requested in June 2016 and did not object until 20 July 2017; and

(f) that the City stands by its assessment of the hazard.

1.12 [redacted] complained to Building and Energy about the City's 14 April 2016 Letter and subsequent actions.

1.13 In an email from Building and Energy' to the City dated 5 September 2017, she queries the basis on which the City required [redacted] to install temporary fencing and the basis on which they now say that he must install a permanent fence on top of the wall. She comments that a safety fence may have been warranted during construction but now that construction is finished there is no basis to require a fence on top of the retaining wall. She sets out a draft proposed email to [redacted] advising him that he is at liberty to replace the temporary fence with a dividing fence at any time and that this is a matter between him and his neighbour.

1.14 Building and Energy later sent a slightly revised version of her proposed email to [redacted] on 12 September 2017.

1.15 [redacted] says that because the City did not communicate with him, he complained to the WA Ombudsman on 31 October 2017.

1.16 As part of the investigation by the WA Ombudsman's office, the City's [redacted] provided relevant documents on 12 June 2018. In that email he said that the legal reference used was incorrect (referring to BCA Part 39) but that some justification for the City's action can be found in regulation 11 of the *Local Government (Uniform Local Provisions) Regulations*, which allows the City to request an owner to securely fence a dangerous excavation.

1.17 The outcomes of the investigation by the WA Ombudsman's office are in a letter to [redacted] dated 27 September 2018.The Ombudsman's office found:

(a) Having received a complaint the City formed a view that the exposed retaining all was a safety risk to children;

(b) Having formed that view it was reasonable for the City to contact [redacted] to inform him and have the hazard rectified by suggesting that he agree on a dividing fence with his neighbour (referring to the 14 April 2016 letter);

(c) It was reasonable for the City to inform the builder of the standards required for the safety fence;

(d) As the excavation for the garage was adjacent to the retaining wall, the City had the power, and it was open to the City to use the power, to require safety fencing under regulation 11 of the Local Government Regulations. The City did not need to exercise that power because the builder modified the safety fence;

(e) The City provided [redacted] with the option of building a suitable dividing fence as an alternative to the safety fence in its April and May 2016 letter and in its response to his letter dated 30 July 2017.

(f) The refence to BCA Part 39 in the 2 May 2016 letter was in error. The City says in future it will refer all correspondence that includes refences to legislation to is governance team to check the relevant legislation prior to proceeding;

(g) The City's response to his complaint dated 30 July 2017 was reasonable.

1.18 [redacted] takes issue with the WA Ombudsman's conclusion that regulation 11 of the Local Government Regulations was applicable. He says that there was no excavation at the time the 14 April 2016 letter was issued. He says that the driveway and retaining walls were in place by September 2013 and that their finished state is not an excavation. He says that a City officer has confirmed this to be the case when she attended the property on about 15 May 2020.

Discussion & Findings

1.19 In response to this issue the City says that the 14 April 2016 letter was not and could not be construed as a building order. I agree with the City on this point. The letter does not use the words 'order' or 'notice' or refer to section 110, 111 of the Building Act. I note [redacted] points out that Building and Energy said the letter 'looked and smelled like a building order'. I do not agree with this description.

1.20 The City says that the new retaining wall posed a potential hazard. [redacted] does not refute this. He agrees there was a hazard but says there was no need for the City to issue a 'building order.' Building and Energy says the fencing may have been warranted during construction but was no longer warranted.

1.21 Given the City, [redacted] and Building and Energy all agree that there was a potential hazard and Building and Energy say the temporary fence was warranted during construction, it follows that the City's request to address the hazard with the temporary fence was not unreasonable.

1.22 In any event, [redacted] and his builder cooperated with the City and promptly erected a temporary fence in the manner requested by the City. [redacted] also demonstrated there was no issue with the ground levels by obtaining a land survey. The issue with the unfinished gutter was also resolved at that time with the City taking no further action.

1.23 The matter developed 12 months later when [redacted] wrote to the City saying he wanted to remove the temporary fence and complete works in this area. The City's [redacted] said the temporary fence could stay in place pending completion of the building work, or he could erect a safety barrier in its place.

1.24 This caused [redacted] to escalate his complaint to Building and Energy and within 6 weeks they advised him of the position reached after meetings with the City, namely that he could remove the temporary fence and may decide to construct a fence in consultation with his neighbour.

1.25 The matter could have ended there, however, [redacted] was not satisfied. He wanted the City to respond. When they didn't, he complained to the WA Ombudsman.

1.26 It was only in response to the WA Ombudsman's review of the complaint that the City's [redacted] raised the possibility that regulation 11 of the Local Government Regulations may have applied to justify the requirement to erect the temporary fence, which the Ombudsman agreed with.

1.27 The reference to regulation 11 appears to have caused [redacted] great distress. He felt it was a 'cover up' for the City to say that regulation 11 applied and insisted that it could not apply because his finished driveway was not an 'excavation'.

1.28 I do not believe the City's 14 April 2016 letter created unnecessary trouble. As noted above all involved believe there was a potential hazard caused by the wall.

1.29 I believe it was unnecessary for [redacted] to complain to the WA Ombudsman when Building and Energy had advised him that he could remove the temporary fence and erect a permanent fence if he chose to.

1.30 It was this complaint to the Ombudsman that led to regulation 11 being raised. I do not think the City's [redacted] needed to refer to regulation 11 as a possible basis on which action could have been taken. There is no evidence that regulation 11 was the basis for the 14 April 2016 letter. Further, whilst at some point there must have been an excavation in order to construct the driveway and retaining wall, I accept that by the time the City's [redacted] referred to regulation 11 as possibly applying, there was no longer an excavation next to the retaining wall.

1.31 [redacted] is at least as much to blame for the 'trouble' in relation to this matter. He persisted in finding ways to emphasis his dissatisfaction with what was in the scheme of things an unimportant matter.

1.32 I am mindful that at the time of this matter, [redacted] had several outstanding complaints about the City's actions in relation to other matters that are the subject of my review concerning [redacted] and [redacted] He appears to have been in a constant state of battle with the City, refusing to accept its responses and seeking to escalate and expand on his complaints wherever possible rather than allow matters to resolve, no matter how trivial. If this were an isolated matter, [redacted] may not have felt the need to prolong the matter by complaining to the WA Ombudsman's office and asking for it to be included in this review.

1.33 Given the findings of the WA Ombudsman's office and my views set out above, I do not believe that the fact that the City's has not apologised to [redacted] in relation to this matter is unreasonable.