

Item 12.1 – Petition Independent Investigation of building complaints.

Petition: *“We, the undersigned, all being electors of the City of Melville, respectfully ask Council to tall all necessary steps, using Council’s powers and duties conferred upon it by the Building or other relevant Acts of Parliament and independent of the CEO and the Administration, to investigate and RESOLVE to my satisfaction the complaints I have made since September 2021 in relation my rear neighbours’ unauthorised building works, inclusive of the retaining structures encroaching on my land without my consent.”*

The Petition was submitted by Dr Stevens on 20 February 2023. Dr Stevens asked [questions of Council at is 21 February 2023 ordinary meeting](#) (page 11), which were not substantially answered at the time.

On the 27 February 2023 Dr Stevens received a letter from the City’s lawyers (Attachment 1) accusing Dr Stevens of having an unauthorised wall on his land and threatening to issue a building in relation to it. This is contrary to the advice the City’s Patrick Hughes provided by email on 14 December 2022 where Mr Hughes stated “A boundary twinside retaining wall is indicated with the 1997 Building Licence for 89A Harris Steet, Licence No. 214-97”.

The City Lawyers’ letter was perceived as intimidating and threatening by Dr Stevens, an elderly pensioner, particularly as it was received after the petition about the complaints was submitted.

Dr Stevens has asked Council for an independent investigation to resolve the complaints he has been making since September 2021. The CEO’s recommendation to Council is that the CEO should investigate and report back to Council.

This may be akin to leaving the fox in-charge of the hen house, given the City’s Administration, the CEO and Mayor have had well over a year to investigate, review, and resolve these issues. In our mind the City has failed to properly investigate all the complaints and has not taken the appropriate actions.

We ask that Council amend the CEO’s recommendation, in accordance with s 6.11 (3)(b) of the City’s meeting procedures local law, to read:

That the petition bearing 20 signatures of residents be acknowledged, and a report be referred to the governance committee for consideration and report and brought back to the 16 May 2023 Ordinary Meeting of Council.

The CEO is to invite the affected property owners, and/or their representatives, to a Governance Committee meeting to present, for a minimum of 30 minutes each, any submissions they may wish to make on the Committee’s draft report prior to it being presented back to Council.

The CEO engage any independent experts at the discretion and direction of the Governance Committee, should the Governance Committee see that as necessary.

Reasons:

- a) There is potential for real or perceived conflicts of interests of the City officers investigating the City’s responses to Dr Stevens complaints since September 2021 and the City’s issuance of the retrospective building approval certificate (BA-2022-111) on 10 March 2022, which is why Dr Stevens specifically asked for an independent investigation and resolution. This can be addressed by the Governance Committee’s direction and oversight of any investigations, reports and recommendation.
- b) There is an apprehension of bias with any investigations the City’s administration undertakes on its own. A fair-minded lay observer might reasonably apprehend that the history of dealings between

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the City and affected property owners had caused the City to become determined to ensure that Dr Stevens did not succeed in his attempts to be properly heard by Council and have the illegal encroachments removed from his land and the damage to his property caused by the adjoining property owner's illegal building work resolved, not because of a desire to properly enforce the States building laws and standard, but out of a desire to defend its conduct and decisions.

- c) Inviting the affected parties to present to the Committee is required to adhere to the principles of procedural fairness and natural justice as outlined in the City's Complaints Management Policy.

Facts, issues, and contentions include:

- a) Dr Stevens, an elderly pensioner, is an innocent bystander; an innocent victim of illegal building work and the City's failure to properly enforce the State's building laws intended to protect such people.
- b) Dr Stevens' property has been adversely affected by unauthorised building works undertaken at the adjoining property. His property, without his consent, has been excavated, his boundary wall has been destabilized, his paving has consequently subsided, and the adjoining property owner's boundary/retaining walls do encroach onto his land (Attachment 3).
- c) The City failed to enforce the statutory BA20/BA20 processes requiring those responsible for the building work obtained Dr Stevens' consents prior to excavating and encroaching onto his land.
- d) The City could rely on the BA20/BA20As for Dr Stevens' consents for any remedial work ordered by the City. Dr Stevens' shouldn't be disadvantaged because of the adjoining owner's illegal work.
- e) It should have been obvious to the City prior to it issuing the building permit for the neighbour's new dwelling that significant excavations near the boundary were required and that such excavations would likely adversely affect Dr Stevens' property.
- f) The City directed Dr Stevens to get a survey done to prove the encroachments, which he did at a cost of over \$1,100 (Attachment 3). The City now refuses to act despite the encroachments being proven.
- g) There appears to be issues with the City's retrospective Building Approval Certificate (BAC), such as the approved plans and other material (Attachment 4) specify a 1.05-meter-high wall (top of wall to 29 m RL, ie circa Dr Stevens ground level) adjacent to Dr Stevens boundary, yet this is not what is in place.
- h) Legal advice obtained, Attachment 2, states that Council can not only issue Building Orders requiring the adjoining property owner to remove the illegal encroachments, but Council can also prosecute the adjoining property owner for the illegal building work to Dr Stevens property.

Retaining walls, per the City's local laws in relation to fences and other advice, do not fall within the jurisdiction of the Dividing Fences Act (DFA) via the Magistrates Court.

- i) It appears that the City did not comply with Bronwyn Weir's 21 September 2021 Recommendation 14 prior to the issuance of the retrospective BAC BA-2022-111 it issued on 10 March 2022 with respect of the adjoining property owner's illegal building work. That is, it is perceived that the City did not properly investigate or substantially review the adjoining property owner's retrospective BAC application, despite Dr Stevens' complaints inclusive of the encroachments.
- j) The issues with the City's handling of this matter, as experienced by Dr Stevens, appear systemic as similar issues have occurred in the past in relation to building work at 1 Maldon Way Mt Pleasant (see BO-2021-03), 8 Macrae Road Applecross and 255 Preston Point Road (cnr Harris Street) Bicton.

Attachment 1: City Lawyer’s, McLeods Layers, 27 February 2023 letter to Dr Stevens



Our Ref
Your Ref

PG:MELV:50364

27 February 2023

Dr Jeffrey Stevens

██████████
BICTON WA 6157

██████████
BICTON WA 6157

Dear Dr Stevens ██████████

Retaining walls on or near boundary

We act for the City of Melville and have been instructed to write to you both in relation to the retaining walls on or near the boundary between your properties ██████████ (Stevens Property) and (██████████ Property).

As you are both aware, portions of the limestone retaining wall located on ██████████ Property (██████████ Retaining Wall) are alleged to be encroaching onto the Stevens Property. The encroachment is not shown on plans approved by the City on 10 March 2022 for the ██████████ Retaining Wall. To the extent that the encroaching portions of the ██████████ Retaining Wall does not comply with the approved plans, it is unauthorised.

The ‘twinside’ post and panel retaining wall is estimated to be located approximately between 0.17m and 0.3m inside the boundary of the Stevens Property (Stevens Retaining Wall). The City’s records show the Stevens Retaining Wall was in place prior to the construction of the ██████████ Retaining Wall. However, the City has no record of the Stevens Retaining wall ever having been approved by the City. As a result, the Stevens Retaining Wall is unauthorised.

We understand Mr Stevens also has concerns about soil having been removed from his property during construction works on the ██████████ Property and that Dr Stevens believes the construction of the Scott retaining Wall has resulted in the subsidence of parts of the Stevens Property adjacent to the boundary between the properties. The City does not have the power to take any action in respect of those matters.

However, the City does have the power to give each party a Building Order under *s.110* of the *Building Act 2011* requiring remedial action to be taken in respect of the retaining walls to the extent that they are unauthorised.

In relation to the ██████████ Retaining Wall, the City can require ██████████ to remove the portions of the Scott Retaining Wall which encroach onto the Stevens Property. However, the City



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Claremont WA 6010
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McLeods
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can only require [REDACTED] to do that if Dr Stevens agrees [REDACTED] or his contractors entering his property to remove the encroaching portions of the wall.

In relation to the Stevens Retaining Wall, the City can only require Dr Stevens to take action in respect of that wall as it is located on his property, and has been for many years. Accordingly, if the City gives Dr Stevens a Building Order, it will require him to apply for a building approval certificate for the Stevens Retaining Wall.

While it is open to the City, for the reasons set out above, to give each of you a Building Order requiring you to remedy the unauthorised works, the City would prefer if you could resolve the matter amicably between yourselves. That is because giving Building Orders in this instance will not resolve the dispute between you.

If the matter cannot be resolved amicably, the parties may wish to consider commencing civil proceedings in the Magistrate Court. That may result in orders being made by the Court directing each of you to take specific action to resolve the matter. However, that is matter for each of you individually and one for which you each may wish to take your own legal advice.

In view of the above, please contact Patrick Hughes, Manager Building & Environmental Health, City of Melville, if you require anything further from the City to assist you both in resolving your dispute. In the meantime, the City remains hopeful that you can resolve this matter amicably between yourselves.

Yours faithfully



Peter Gillett
Partner

Direct line: 08 9424 6217
Email: pgillett@mcleods.com.au

Attachment 2: Legal Advice – City’s powers to deal with encroachments.

Hosgood Lawyers

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High Street
Fremantle WA 6160
Ph: (08) 9335 4143
Fax: (08) 9335 4435
admin@hosgoodlawyers.com.au
www.hosgoodlawyers.com.au

Our ref: JH:220211 (final)

Your ref:

8 March 2022

To: [REDACTED]
Citizens for Building Reform (WA)

by email: CitizensBR.WA@bigpond.com

Dear [REDACTED]

Local government enforcement powers for unauthorised encroachment of buildings and incidental structures

I confirm I am instructed to provide a very brief summary of the main enforcement powers available to a local government under the *Building Act 2011* (“the Act”) in respect of unauthorised encroachment of buildings and incidental structures.

Subject to various exceptions, s 76 of the Act requires the builder named in the building permit (or the landowner if no building permit is in effect) to ensure under that no part of a building or incidental structure is placed beyond the works land without the consent of the adjoining owner or court order. Failure to comply is an offence.

Conduct which breaches s 76 may also give rise to additional offences such as non-compliance with the building permit in breach of s 29 or doing building work without a building permit in breach of s 9.

The local government as permit authority is authorised to prosecute the above offences within 6 years of the alleged offence.

The local government may be able to issue a building order under s 110 requiring the unauthorised encroachment to be removed (reviewable by SAT under s 122). Non-compliance may allow the local government to give effect to the building order and recover the costs under s 118 and/or prosecute under s 112 within 3 years (if non-compliance was without reasonable excuse).

The builder named on the building permit can potentially be required to remove the unauthorised encroachment under a building order. But a building order can only be issued to the named builder while the building permit is still in effect.

Further or alternatively, a building order can be issued to a landowner at any time. But it appears a building order cannot require a landowner to do work beyond the boundaries of its own land. This would present practical difficulties in the case of unauthorised encroachment as a corresponding building order would also need to be issued to the owner of the adjoining land.

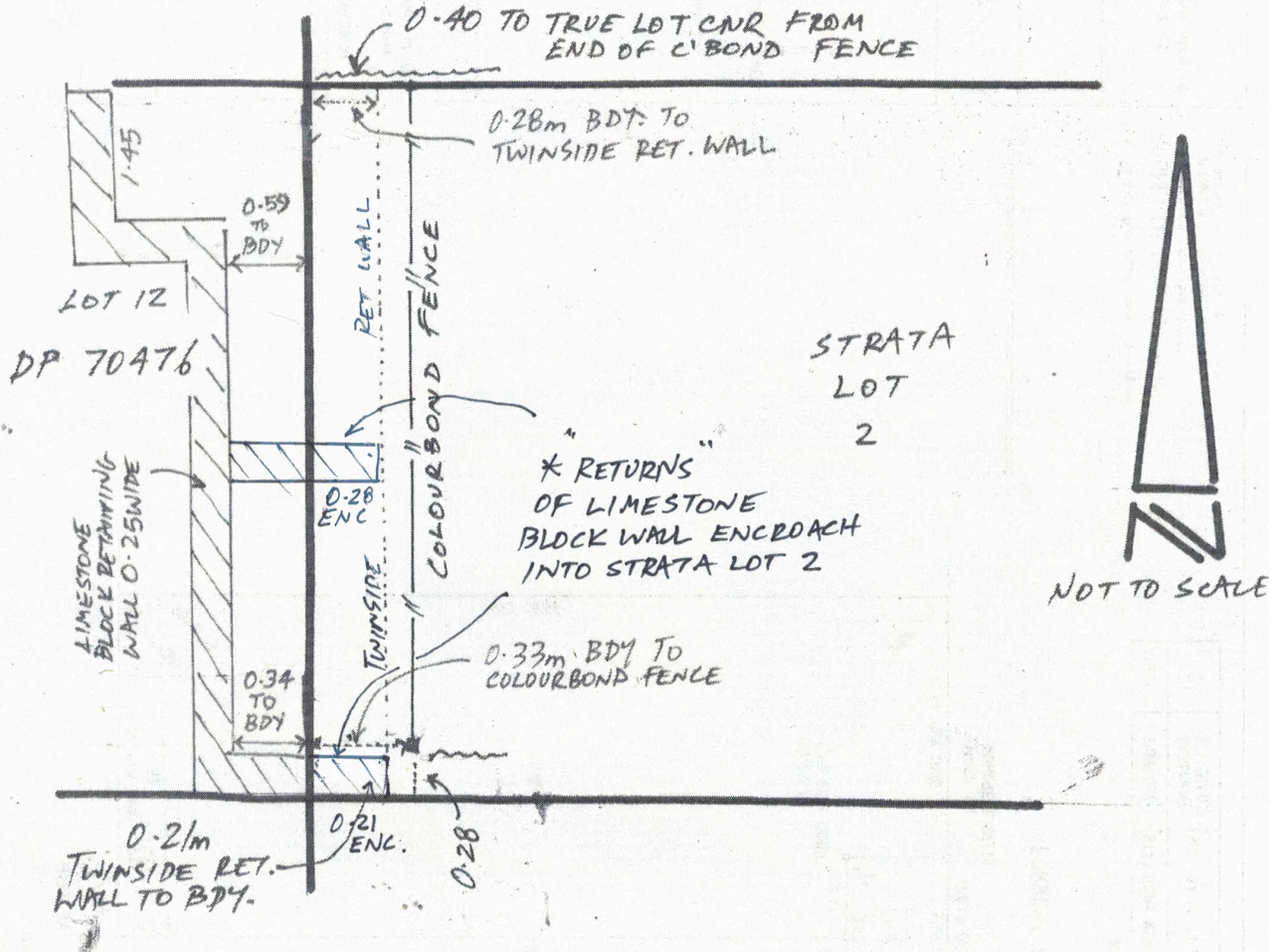
Yours faithfully

[REDACTED]
HOSGOOD LAWYERS
Julian Hosgood
Legal Practitioner Director
julian@hosgoodlawyers.com.au

Attachment 3: Boundary Survey paid for by Dr Stevens showing encroachments.

Naturaliste Land Surveys

19 Robertson Place, Bibra Lake, Western Australia 6163
Tel 041 145 0784 email pag@westnet.com.au
GRANT HALBERT P/L



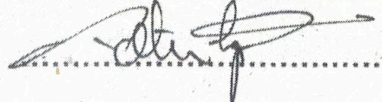
RE-ESTABLISHMENT SURVEY OF REAR BOUNDARY OF LOT 2 ON STRATA PLAN 31513 AND BEING KNOWN AS [REDACTED] BICTON

CLIENT: JEFFREY STEVENS
JOB NO. 2713A
CITY OF MELVILLE

INVOICE 4093
DATE OF SURVEY: 13.6.2022

REGULATION 25A CERTIFICATE

I, PETER A. GRANT, BEING A LICENSED LAND SURVEYOR AND APPROVED LANDGATE SUPPLIER, HEREBY CERTIFY THE RE-ESTABLISHMENT SURVEY OF THE ABOVE MENTIONED LAND BOUNDARY WAS CARRIED OUT IN ACCORDANCE WITH THE PROVISIONS OF THE LICENSED SURVEYORS REGULATIONS 1961. (GENERAL SURVEY PRACTICE)

SIGNED 

Attachment 4: extracts of plans and other material in relation to retrospective BAC BA-2022-111

