



## Building and Development Dispute Resolution Committees—Decision

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### *Sustainable Planning Act 2009*

<b>Appeal Number:</b>	<b>38 – 15</b>
<b>Applicant:</b>	Davina Chantelle Dixon
<b>Assessment Manager:</b>	All Construction Approvals
<b>Concurrence Agency:</b> (if applicable)	Cairns Regional Council (Council)
<b>Site Address:</b>	32 Denbeigh Street, Parramatta Park and described as Lot 12 or RP701433 – the subject site

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### **Appeal**

The appeal is made pursuant to section 532 of the *Sustainable Planning Act 2009* (SPA) against a decision by All Construction Approvals as Assessment Manager to refuse to issue a Certificate of Compliance (and instead to issue a Non-compliance notice) on the grounds that the Assessment Manager reasonably believed that a condition imposed under the Decision Notice issued by the Council on 10 July 2009 had not been met, namely, condition 6 – all floor levels in all buildings must be located 150mm above the Q100 flood immunity level of 2.7 m AHD.

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<b>Date and time of hearing:</b>	Friday 27 November 2015 at 11:00am
<b>Place of hearing:</b>	The subject site
<b>Committee:</b>	John Eylander– Chair Clayton Baker – Member George James – Member
<b>Present:</b>	Davina Dixon – Applicant Martin Accatino –Assessment Manager

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### **Decision:**

In accordance with section 564(2)(a) of the SPA, the Building and Development Dispute Resolution Committee (Committee) **confirms** the decision of the Assessment Manager that a Certificate of Compliance cannot be issued as all conditions proposed by the referral agency in the original Development Approval must be met.

### **Background**

The subject site is an affected premises under the Flood Management Code pursuant to clause 4.6.3 of the CairnsPlan – March 2009.

For assessable development under this clause, the performance criteria P1 requires the development to satisfy the minimum level set out in Table 1.

Table 1 relevantly provides for residential uses that the floor level is to be 150mm above one in one hundred year A.R.I. immunity.

On 19 May 2009, Damon House Relocators provided the Applicant with a quotation for a house lift and restump of the existing premises.

On 25 May 2009, the Applicant entered into a Master Builders minor works contract for the works "lift house, supply and fit stumps, steel beams and extend back posts as per plan".

On 10 July 2009, the Council issued Decision Notice reference 8/7/1656 relevantly providing at Clause 5 (Minimum Fill and Floor Levels):-

*'All floor levels in all buildings must be located 150mm above the Q100 flood immunity level of 2.7metres AHD, plus any hydraulic grade effect (whichever is the greater), in accordance with FNQROC Development Manual and Planning Scheme requirements. Council's current records indicate existing ground levels of approximately 3metres.'*

In or about 2009 or 2010 the Applicant engaged others to enclose the lower level of the home to include two bedrooms, an office, lounge, kitchen, bathroom and toilet.

On 9 December 2013, the Assessment Manager made an amended approval:-

*'The Development Application No.00014286 for the construction of a dwelling, raise & restump & additions (enclosing underneath house to include additional bedrooms, kitchen & bathroom) was assessed and approved with conditions.'*

On 4 November 2015, Brazier Motti produced a Q100 level survey for the subject site stating, "...the ground floor slab level at the front door of the property was observed to be at a height (AHD derived) of RL 2.634m".

With this survey result, the Assessment Manager issued a Non-Compliance Notice dated 6 November 2015 containing the reasons for non-compliance:-

*"Condition on decision notice not met. Condition 5 Ref no: 8/7/1656 (2160316) all floor levels in all buildings must be located 150mm above the Q100 flood immunity level of 2.7m AHD. The finish floor level is currently 216mm below this AHD level therefore a certificate of compliance cannot be issued as all conditions proposed by the referral agency in the original development approval must be met".*

### **Applicant Submissions at Hearing**

- The Applicant is an owner builder and engaged a contractor to perform the restumping and another contractor to enclose the lower level.
- The Applicant was under the belief Damon House Relocators marked the Q100 level on the fence and the Applicant assumed this was pursuant to a survey.
- The concrete slab was laid by another contractor.
- The enclosing of the home had been performed before the Applicant knew of the floor level issue.

- The Applicant is concerned about the value of the property.
- The Applicant seeks a notation on the final certificate to be placed on the Council records to protect future purchasers of the property.

### **Assessment Manager Submissions**

- The Assessment Manager submitted it was bound by the Council's Decision Notice that all floor levels in all buildings must be located 150mm above the Q100 flood immunity level of 2.7m AHD, plus any hydraulic grade effect.
- There has not been any consideration of hydraulic grade effect.
- The enclosed area includes habitable areas.
- There was no discretion upon the Assessment Manager to approve the works.

The Committee was able to enter the enclosed level as well as walk around the home. The Committee also observed the lay of the land and neighbouring properties. The Committee observed the enclosed level consists of habitable rooms including a kitchen, lounge room, office and bedrooms.

The roof height permits the slab height to be raised to a floor level 150mm above the Q100 flood immunity level of 2.7m AHD.

However, this would require the removal and replacement of windows, doors and air-conditioning units and plumbing fixtures. The Applicant submitted the costs to perform these alterations would be prohibitive. No quotation for these works was provided.

### **Material Considered**

The material considered in arriving at this decision comprises:-

1. Form 10 – Appeal Notice, lodged on 6 November 2015 with the Committee's Registrar;
2. The Applicant's grounds for appeal;
3. All Construction Approvals Non-Compliance Notice;
4. Cairns Regional Council Decision Notice reference 8/7/1656 dated 10 July 2009;
5. All Construction Approvals Tax Invoice dated 9 December 2013;
6. All Construction Approvals amended Development Application approval number 00014286 dated 9 December 2013;
7. Brazier Motti letter dated 4 November 2015;
8. Damon House Relocators quotation dated 19 May 2009;
9. Master Builders minor works contract dated 25 May 2009;
10. CairnsPlan – March 2009 Flood Management Code;
11. *Sustainable Planning Act 2009 (SPA)*;

12. *Building Act 1975 (BA)*;
13. Verbal representations by appeal parties at the hearing;
14. Building and Development Tribunal Decision File No.3/04/029.

## **Findings of Fact**

The Committee makes the following findings of fact:-

- The subject site is affected by the CairnsPlan Flood Management Code Clause 4.6.3.
- The Performance Criteria P1 provides the acceptable level of flood immunity for the new development is 150mm above one in one hundred year A.R.I. immunity.
- The finished slab height of the enclosed lower level has been surveyed at a height of RL2.634m (AHD derived).
- The Cairns Regional Council Decision Notice dated 10 July 2009 provides "all floor levels in all buildings must be located 150mm above the Q100 flood immunity level of 2.7metres AHD, plus any hydraulic grade effect (whichever is the greater) in accordance with FNQROC Development Manual and Planning Scheme requirements. Council's current records indicate existing ground levels of approximately 3 metres".
- The as built finished floor level is currently 216mm below this level.

## **Reasons for the Decision**

The finished floor level of the enclosed ground floor of the subject site is non-compliant with the Council's Decision Notice and Assessment Manager's approval. The raise and restump of the home allows for a finished floor height in compliance with the approved decision notice to be used as habitable areas.

The Decision Notice provides all floor levels in all buildings must be allocated above the flood immunity level. This does not permit a discretion to be applied for non-habitable areas.

The Applicant has referred to a decision pursuant to a decision of the Building and Development Tribunal (3/04/029) pursuant to the *Integrated Planning Act 1997*. In that decision the Building and Development Tribunal confirmed the decision of the Council to issue a final inspection certificate indicating non-compliance with the Council's minimum habitable floor level requirement. The result of this decision was a notation on the Burnett Shire Council records of this non-compliance. This decision can be distinguished from the current appeal as it is brought pursuant to the SPA and the decision is to be made with consideration of the Cairns Plan. A purpose of the Non-Compliance Notice is to show potential purchasers the approved work has not received a final certificate.

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**John Eylander**  
**Building and Development Committee Chair**  
**Date: 15 January 2016**

## Appeal Rights

Section 479 of the *Sustainable Planning Act 2009* provides that a party to a proceeding decided by a Committee may appeal to the Planning and Environment Court against the Committee's decision, but only on the ground:

- (a) of error or mistake in law on the part of the Committee or
- (b) that the Committee had no jurisdiction to make the decision or exceeded its jurisdiction in making the decision.

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

## Enquiries

All correspondence should be addressed to:

The Registrar of Building and Development Dispute Resolution Committees  
Building Codes Queensland  
Department of Housing and Public Works  
GPO Box 2457  
Brisbane QLD 4001  
**Telephone (07) 1800 804 833 Facsimile (07) 3237 1248**