



Building and Development Dispute Resolution Committees—Decision

Sustainable Planning Act 2009

Appeal Number:	10 - 14
Applicant:	Lawrence Interiors Pty Ltd
Assessment Manager:	Queensland Building Approvals
Concurrence Agency: (if applicable)	Gold Coast City Council (Council)
Site Address:	6 Narrogin Place, Burleigh Waters and described as Lot 31 on RP 222940 – the subject site

Appeal

Appeal under section 532 of the *Sustainable Planning Act 2009* (SPA) against the giving of an information notice under section 124 of the *Building Act 1975* (BA).

Date and time of hearing:	Monday 30 th March 2015
Place of hearing:	31/40 Cotlew Street East, Southport
Committee:	Geoffrey Mitchell– Chair Desmond Lang - Member
Present:	Nigel Lawrence – Applicant and Builder representing the property owner Darren Wright – Assessment Manager representative

Decision:

The Building and Development Dispute Resolution Committee (Committee), in accordance with section 564 of the *Sustainable Planning Act 2009* (SPA) **sets aside** the Form 61 Non-Compliance Notice and **directs the Assessment Manager** to decide the final stage Form 16 and Form 21 with the Finished Floor Level (FFL) of the subject premises at RL 4.11m AHD being the acceptable FFL to satisfy the requirements of the Council and the Building Code of Australia (BCA).

Background

Joseph and Jane Martin (property owners) own a residence at 6 Narrogin Place Burleigh Waters which also included a standalone double brick garage. They sought to convert the double garage into residential accommodation. The property is situated in a flood prone area.

On 3 July 2012 a material change of use application (MCU) was lodged with Council and approved on 13 July 2012 subject to certain conditions, one of which was that the proposed floor level was to be a minimum of 300mm above the designated flood level making it at least RL 4.21M AHD. This was above the existing garage floor level. Approval to build the

accommodation was given on 31 October 2012 and was also subject to the same condition. Further unrelated MCU applications were made and approved with the floor level condition remaining unchanged.

Lawrence Interiors Pty. Ltd. (Builder) subsequently constructed the accommodation and unfortunately constructed it with a floor level of RL 4.11m AHD meaning it was 100mm too low.

A further MCU application to rectify the situation was made on 19 June 2014. The Council approved the application on 1 August 2014 and substituted the original clause with the following:

- "a Building floor levels of garages and non-habitable rooms, constructed at approximately the same level as the main dwelling and attached to the main dwelling, must be at or above the designated flood level.*
- b Building floor levels of garages and non-habitable rooms, which are detached from the fabric but within the curtilage of a building and not to be used for storage of goods, can be a maximum of 600mm below the designated flood level.*

Information only:

Prior to the earlier of compliance assessment of the subdivision plan or the issue of a certificate of classification, a notation shall be applied to the rates card for each lot stating that the basement and/or property are subject to inundation during extreme storm events."

The Committee is advised that the property owners agree to the rate card noting.

On 21 February 2015 the Assessment Manager issued a Form 61 Non-Compliance Notice arguing the Council's new clause is too vague and uncertain and does not refer to habitable rooms. On the 25 February 2015 the Applicant lodged a Form 10 – Notice of Appeal against the Non- Compliance Notice with the Registrar of the Building and Development Committees.

Material Considered

The material considered in arriving at this decision comprises:

1. 'Form 10 – Appeal Notice', grounds for appeal and correspondence accompanying the appeal lodged with the Committees Registrar on 25 February 2015.
2. Form 61 Non-Compliance Notice dated 21 February 2015.
3. Letter from Council to Story and Castle Planning dated 1 August 2014.
4. E-mail from N Lawrence of Lawrence Interiors Pty Ltd to the Registry dated 2 March 2015.
5. Council application enquiry dated 2 March 2015.
6. Letter from Raymond Design to the Council dated 26 June 2012.
7. Letter from the Council to Cameron Raymond design Pty Ltd dated 13 July 2012.
8. Letter from the Department of Transport and Main Roads to the Council dated 11 July 2012; Letter from the Department of Transport and Main Roads to Cameron Raymond Design dated 11 July 2012; Letter from the Department of Transport and Main Roads to the Council dated 29 August 2012; Letter from the Department of Transport and Main Roads to Cameron Raymond Design dated 29 August 2012.
9. Letter from the Council to Cameron Raymond Design dated 14 September 2012 approving amended plans for the accommodation.

10. Application to the Council to change the existing MCU approval received 25 October 2012.
This application is not relevant for present purposes.
11. Letter from Storey & Castle Planning Consultants to Council dated 19 June 2014 requesting a change to the approved development approval (MCU application) because the project builder had constructed the new floor level 100mm too low.
12. Letter from the Department of State Development, Infrastructure and Planning to the Council dated 30 June 2014.
13. Council assessment of Storey & Castle's amendment application recommending that the application be approved with a notation on the property rates card to the effect that the floor level is 100mm lower than Council's requirements for a habitable floor level.
14. Letter from Council to Storey & Castle Planning dated 1 August 2014 approving the MCU application together with approved conditions.
15. Letter from Delf Industries to the Council dated 8 December 2014 and related email response to Delf Industries dated 15 December 2014.
16. Letter and conditions from Council to Storey & Castle dated 1 August 2014.
17. Letter from the Council to Cameron Raymond Design dated 14 September 2012.
18. First MCU application approval dated 13 July 2012 together with approved conditions.
19. Letter from Council to Delf Industries dated 6 November 2012.
20. Decision Notice Classes 1 & 10 – BA No: 2012/09/0064 for the application dated 31 October 2012 issued by Delf Industries Pty Ltd.
21. Form 16 Aspect Certificate dated 9 October 2014 issued by A L Sullivan, Licensed Surveyor.
22. Council's Planning Scheme Part 7, Division 3, Chapter 8 Flood Affected Areas
23. Council search indicating the property is flood affected.
24. Council flood Search.
25. *Sustainable Planning Act 2009 (SPA)*
26. *Building Act 1975 (BA)*
27. *Building Regulation 2006 (BR)*
28. Queensland Development Code MP 3.5 Construction of Buildings in Flood Hazard Areas (QDC MP 3.5)
29. Building Code of Australia 2012 (BCA (2012))
30. Verbal representations made during the hearing.

Findings of Fact

The Committee makes the following findings of fact:

1. The appeal relates to a residence at 6 Narrogin Place Burleigh Waters which also includes a standalone double brick garage.
2. The residence is within a flood hazard area within the Council region.

3. A MCU application was made and approved in 2012 to convert the garage into residential accommodation (MCU 2012/00359).
4. Throughout the application the proposed habitable floor level was to be the level designated by the Council plus 300mm i.e. RL 3.91m AHD + 300mm = RL 4.21m AHD.
5. Delf Industries Pty Ltd in the role of the initial Assessment Manager approved the construction of the accommodation on 31 October 2012 subject to the condition that the floor level was to a minimum of RL 4.21m AHD.
6. This MCU approval was subsequently amended but the changes are irrelevant to the present application.
7. Lawrence Interiors Pty Ltd as the builder, constructed the accommodation with the floor level at RL 4.11m AHD, 100mm too low.
8. On 19 June 2014 Storey & Castle Planning Consultants applied to vary the MCU approval by reducing the floor level to RL 4.11m AHD.
9. On 1 August 2014 the Council approved the MCU variation reducing the floor level to RL 4.11m AHD by inserting a new floor level clause together with the requirement that the property's rate card be noted that the floor level was below that recommended by Council.
10. Delf Industries Pty Ltd withdrew as the private certifier and were replaced by Queensland Building Approvals as the Assessment Manager.
11. On 21 February 2015 Queensland Building Approvals issued a Form 61 Non Compliance Notice to Lawrence Interiors Pty Ltd refusing to issue a final Form 21 certificate because the habitable floor level does not achieve minimum 300mm freeboard clearance required pursuant to Queensland Development Code M3.5 and Council planning Scheme AS 2.1.1 of the Flood Code.
12. On 25 February 2015 Lawrence Interiors Pty Ltd as the builder, lodged an appeal with the Building and Development Committee's Registrar

Reasons for the Decision

While the parties and Delf Industries Pty Ltd, as the initial Assessment Manager, lodged a significant amount of material in support of their positions, the question for the Committee is relatively simple. Is the Council's new floor level condition adequate in the circumstances or should it be replaced with one that reflects its own intentions?

Section 32 of the BA allows a local government to make or amend a local planning instrument that designates for the BCA or QDC matters prescribed under a Regulation.

Section 3 of the BR made under the BA allows a local government under a planning scheme or by resolution, to declare part of its area as a flood area and to declare the level to which the floor levels of habitable rooms must be built.

There is no argument that the Council as a local government could designate the subject premises to be in a flood area and to designate the minimum floor level for a habitable building.

At the hearing, Darren Wright as representative of the current Assessment Manager was supportive of the Applicant's position and simply argued the Council's new floor level clause was inadequate for him to issue the Form 21.

Part 7 Division 3 Chapter 8 of the Council's Planning Scheme (Planning Scheme) deals with flood affected areas. The purpose is stated as ensuring development does not cause or have the cumulative potential to cause damage and to provide development standards that will ensure the runoff from land and/or does not create any adverse environmental

impacts. The effects of flooding are to be managed by requiring specific design criteria for certain types of land use.

Developments are to be evaluated against criteria including whether any real damage is likely to be caused by the development, whether the development is likely to cause a cumulative impact on any damage and whether the development is likely to cause or worsen a flood hazard.

Clause 3.0 of the Planning Scheme lists the applicable performance criteria (PC) for building floor levels and PC2 specifically deals with habitable room floor levels. Acceptable solution AS2.1.1 requires that an allowance of at least 300mm is added to the designated flood level for habitable rooms or other allowance amount specified in a Local Area Plan.

The Assessment Manager relies on the solution to refuse to issue the Form 21 certificate. The Council was not a party to the appeal, nor did it provide any written submissions or documentation other than Council documentation provided by the other appeal parties.

Clause 7 of Council's approval of 1 August 2014 (Approval) justifies approving the proposed new clause relying on various sections of SPA and the view there were no planning scheme matters that required reconsideration during the approval process. Importantly Clause 7 of the Approval notes that individual circumstances of a development will be considered.

The Council's comments in Clause 8 of the Approval indicate that approval was based on the development size and its footprint. It is noted that the only change is to the floor level not the building envelope meaning that there would not be any additional water flow to contribute to a flooding event. The consequence for this development is that the building might flood earlier with the lower level than it may have with the higher floor level. The rate note warns potential buyers of this fact. Any possible consequential lessening of the property's value can be dealt with by others.

QDC MP 3.5 deals with the construction of buildings in flood hazard areas and applies to the lawful carrying out of building work on class 1 buildings. It commenced on 26 October 2012 which was after the date of the initial MCU, and after the application for building works was submitted to the initial Assessment Manager (06/09/2012), and as such is not applicable in this circumstance.

The performance clause PC2 of the Planning Scheme provides that the building floor level of habitable rooms must be raised to provide allowance for the hydraulic gradient above the main floodway, so as to meet the requirements of the BR and the BCA.

The BCA requires at P2.2.1 that surface water resulting from a storm having an average recurrence interval of 100 years must not enter the building. The BCA makes no reference to any "freeboard".

To alter the Acceptable Solution for Council's Planning Scheme an MCU application is required. The documents presented show that this application was made to Council with the specific purpose of addressing the deviation from the Acceptable Solution. In Council's Approval it shows that as the Council is satisfied that the development "extent and foot print" does not contribute to an increased flood risk, the Council's solution would be seen as approval of the deviation from the Acceptable Solution of requiring 300mm freeboard.

The Council designated flood level is RL3.9m AHD. As the constructed floor level of RL 4.11m AHD is higher than the designated flood level, the performance criteria is met for the purposes of the BCA and the Planning Scheme.

For the reasons provided, the Committee decides the Form 61 should be set aside and the Assessment Manager is directed to accept the “as built” floor level of RL 4.11 AHD as meeting the requirements of PC2 of Council’s Planning Scheme and the BCA

Geoffrey Mitchell
Building and Development Committee Chair
Date: 5 May 2015

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