



Development Tribunal – Decision Notice

Planning Act 2016, section 255

Appeal Number:	19 - 2018
Appellant:	Queensland Fire and Emergency Service (QFES)
Assessment Manager:	Shawn Brosnan, TT Building Surveyors Pty Ltd
Concurrence Agency: (if applicable)	N/A
Site Address:	620 Seventeen Mile Rocks Road, Sinnamon Park and described as Lot 2 on RP227041 – the subject site

Appeal

Appeal under the *Planning Act 2016* (PA), section 229 and schedule 1, table 3, item 3 by the Queensland Fire and Emergency Service (QFES) against a decision of a building certifier not to comply with the QFES' referral agency's inspection notice requiring the provision of a stair pressurisation system.

Date and time of hearing:	2.00pm, 21 August 2018
Place of hearing:	Office of the Development Tribunal Level 1 41 George Street Brisbane
Tribunal:	Stafford Hopewell – Chair Beverley Homel – Member Michael Moran – Member
Present:	Phillip Glen, (Building Approvals Officer, QFES) – Appellant Geoffrey Verrall (Manager, Building Fire Safety Unit, QFES) – Appellant Shawn Brosnan (Building Certifier, TT Building Surveyors) – Assessment Manager Ashley Trost (TT Building Surveyors) Mark Trotter (Architect) William Francis (Wesley Mission Queensland, representative of the Building Owner)

Decision:

The Development Tribunal (Tribunal), in accordance with section 254(2)(c) of the *Planning Act 2016* (PA) upholds the Appeal and replaces the decision of the building certifier (Mr Shawn Brosnan) not to comply with the QFES' referral agency's inspection notice with the decision to accept and act on the notice's requirement for a stair pressurisation system for Stair 3 and Stair 4.

Background

1. The Appeal is by the Queensland Fire and Emergency Service (QFES) against the decision of Mr Shawn Brosnan acting as the building certifier (Certifier) under the *Building Act 1975* (BA) not to comply with the QFES's referral agency's information notice and issue a certificate of classification without first giving the QFES an information notice in response to the QFES' inspection notice.
2. The alleged non-compliance with the QFES' referral agency requirements is in regard to a residential aged care facility where the QFES allege that the building is non-compliant due to the lack of stair pressurisation systems in two (2) stairways referred to as Stair 3 and Stair 4.
3. The residential aged care facility has been constructed for the Wesley Mission, Queensland, on land at 620 Seventeen Miles Rock Road, Sinnamon Park described as Lot 2 on RP 227041. The building is a Class 5, 7a, 9b and 9c with a rise in storeys of 7.
4. Fire Engineering Brief (FEB) meetings between the engineers for the project and the QFES were held during 2015 and an application for assessment as a referral agency for the building development approval (BDA) was received by the QFES on 26 November 2015. The QFES was unable to assess the referral within the statutory timeframe and a requested extension of time was refused.
5. Consequently, the BDA was issued on 29 February 2016 by Mr Shawn Brosnan as the assessment manager without referral agency advice from the QFES. The building has been constructed pursuant to that BDA.
6. Condition 65 of the BDA states that:

Stair 3 & 4 are external stairs and must be provided with permanent ventilation that extends to the underside of the ceiling of the stairway. This provision ensures compliance with the External Stair requirements of the BCA while further ensuring the objective of smoke relief and safety being provided.
7. Further, condition 77 of the BDA states:

This building contains Special Fire Services that are required to be inspected by a Building Approval Officer, Queensland Fire and Rescue Service. Inspections for these services are to be arranged directly with Queensland Fire and Rescue Service, Brisbane.
8. On 3 March 2016, the QFES issued a report assessing the application as compliant, and stating that the QFES is to be notified to inspect and test all referral agency aspects under the Building Regulation 2006 (BR).
9. Following the issue of the BDA, construction of the building was commenced and on 26 February 2018, the QFES was given notice to inspect under section 39 of the BR.
10. The QFES inspected the building and determined that Stair 3 and Stair were considered to be internal stairs and did not have stair pressurisation systems.
11. On 18 April 2018, the QFES gave the Certifier a notice of non-compliance; however the Certifier proceeded to issue a certificate of classification for the building on 19 April 2018 without responding to the notice given by the QFES. In particular, the Certifier did not give the QFES an information notice under section 40 of the BR stating that the Certifier did not agree with the notice given by the QFES.
12. The QFES is seeking to have the certificate of classification set aside. The Certifier has submitted that the QFES does not have jurisdiction to appeal the decision to give the certificate of classification on a number of grounds, including that the decision is of a type that is not reviewable.

13. A fundamental issue in the appeal is the characterisation of Stair 3 and Stair 4 and whether or not these stairs are 'external' stairs under the National Construction Code (NCC). Requirements for a special fire service under the BA do not apply to external stairs. Accordingly, if the stairs are external stairs (as is asserted by the Certifier), they do not require a special fire service and the QFES does not have jurisdiction in relation to them.
14. At the date of the Appeal, the construction of the building is completed.
15. The chronology of this matter is summarised in the supporting material attached to the Appeal filed by the QFES and was not disputed at the hearing (other than as discussed below). In summary:
 - (a) The first Fire Engineering Brief (FEB) meeting request was received by the QFES on 26 May 2015 and the meeting was held on 10 June 2015.
 - (b) A second FEB meeting request was received by the QFES on 19 June 2015 and the meeting held on 21 July 2015.
 - (c) A third FEB meeting request was received by the QFES on 7 August 2015 and the meeting held on 1 September 2015.
 - (d) The development application for the BDA was received by the QFES on 26 November 2015.
 - (e) Drawings and Fire Engineering Report (FER) were lodged with the development application and a revised FER was received by the QFES on 2 December 2015.
 - (f) The QFES did not issue a referral agency response within the relevant time period, an extension of time having been refused by the applicant.
 - (g) The QFES received a copy of the decision notice from the assessment manager on 1 March 2016.
 - (h) On 3 March 2016, the QFES assessed the application as compliant within the QFES' referral jurisdiction.
 - (i) On 26 February 2018, the QFES received a notice to inspect from the Certifier.
 - (j) Following a series of requests from the Certifier to postpone the inspection, the QFES inspected the building and gave notice of non-compliance to the Certifier. The alleged non-compliance was the lack of fire isolated exit pressurisation systems in Stair 3 and Stair 4.
 - (k) No information notice was given to the QFES by the Certifier about the Certifier's disagreement with the inspection notice.
 - (l) A certificate of classification was issued by the Certifier and received by the QFES on 26 April 2018.
 - (m) The QFES lodged the Appeal on 11 May 2018.

Jurisdiction

16. The QFES in its supporting grounds to the Appeal and oral submissions at the hearing, set out the basis upon which it submits that the Tribunal has jurisdiction to hear the Appeal. The Certifier has however challenged the jurisdiction of the Tribunal to hear the Appeal and provided a detailed written submission prior to the hearing.
17. At the hearing, the Tribunal advised that it noted the issues raised about its jurisdiction but had not yet made any determination on this issue and, in the interests of the efficient resolution of the Appeal, would hear the parties on the merits of the Appeal so that if it determined it had jurisdiction, it could decide the Appeal without further delay and inconvenience to the parties.

18. It is common ground between the parties that the jurisdiction of the Tribunal to hear the Appeal is dependent upon whether jurisdiction is enlivened under schedule 1, table 3, item 3 of the PA. This relevantly provides that a decision under the BA may be appealed to the Tribunal, if an information notice about the decision was given or required to be given under the BA.

QFES Representations on Jurisdiction

19. In summary, the QFES made the following submissions on the jurisdiction of the Tribunal in the Appeal:
- (a) The failure of the QFES to provide a referral agency response within the statutory timeframe has no bearing for the purposes of this appeal.
 - (b) The QFES received a notice to inspect under section 39 of the BR.
 - (c) The inspection was completed within the time frames agreed by both parties.
 - (d) The QFES inspection report was supplied to the Certifier.
 - (e) The Certifier disregarded the advice in the report.
 - (f) The Certifier did not give the QFES an information notice about his decision to disagree with the report.
 - (g) QFES has appeal rights to the Tribunal under the Planning Act.

Certifier's Representations on Jurisdiction

20. The Certifier provided detailed written submissions disputing the jurisdiction of the Tribunal to hear the Appeal. In summary, the Certifier's submissions were:
- (a) The only ground in schedule 1 of the PA which could provide the QFES with a right to appeal to the Tribunal is table 3, item 3.
 - (b) That item only allows an appeal to be made against a decision under the BA if an information notice was given or required to be given under the BA.
 - (c) The only requirement for a certifier to give an information notice under the BA is contained in section 124.
 - (d) The QFES Form 10 states that the decision notice against which the appeal was lodged was the certificate of classification, dated 19 April 2018.
 - (e) Section 124 of the BA does not require an information notice to be given by a certifier about the decision to issue a certificate of classification.
 - (f) Therefore a certifier's decision to issue a certificate of classification is not subject to appeal under the PA and consequently the Tribunal does not have jurisdiction to hear the Appeal.
 - (g) The requirement in section 40 of the BR for a certifier to give a referral agency an information notice if the certifier disagrees with the agency's decision in an inspection report is not a ground for an appeal to the Tribunal under the PA.
 - (h) The PA in schedule 1, table 3, item 3 does not make any reference to decisions under the BR – the trigger is an appeal against a decision under the BA.
 - (i) Alternatively, the inspection notice issued by the QFES did not comply with the statutory requirements.
 - (j) Referral agency inspections are limited by section 39 of the BR to checking that referral agency aspects comply with the development approval.

- (k) The conditions of the development approval did not require any fire isolated stairway pressurisation systems.
- (l) The QFES advice that stairwell pressurisation was required was added after inspection.
- (m) The legislative framework does not provide the QFES with an opportunity to impose additional requirements for the works at the inspection stage when the works have been completed.

Tribunal's decision on Jurisdiction

21. The Tribunal makes the following findings:

- (a) Referral agency inspections are governed by Part 6, Division 2 of the BR.
 - (b) Under section 39 of the BR, a referral agency must within 15 business days of receiving the notice to inspect, inspect the building work or inspect or test the special fire service and give notice as to whether the referral agency aspects are compliant or not.
 - (c) Section 41 of the BR provides that if a referral agency does not give notice, the referral agency aspects are taken to comply within 15 business days after the receiving the notice to inspect or any longer period agreed to between the agency and the building certifier within the 15 business days.
 - (d) Section 40 of the BR provides that if a certifier disagrees with a referral agency's inspection notice, the certifier must give an information notice to the referral agency.
 - (e) The Certifier did not give the QFES an information notice about his disagreement with the QFES inspection notice, but proceeded to issue a certificate of classification on 19 April 2018.
 - (f) The QFES is *a person entitled to be given an information notice under the Building Act about a decision*, the grounds of a right to appeal to the Tribunal against that decision under PA section 229 and schedule 1, table 3, item 3.
 - (g) Section 39 of the BR does not preclude the QFES from considering Stair 3 and Stair 4 at inspection if they come within the QFES referral agency aspects.
 - (h) The description of Stair 3 and Stair 4 as external stairs in the BDA does not exclude the QFES referral agency jurisdiction if, on inspection, the QFES consider the stairs to be internal stairs.
22. The parties agree that the QFES was given a notice to inspect on 26 February 2018 which was followed by numerous requests to delay the inspection due to the building being incomplete.
23. While the parties agree on the beginning and end dates (i.e. the QFES received the notice to inspect on 26 February 2018 and gave notice of non-compliance on 18 April 2018), there is substantial dispute about the timing of the intervening events.
24. According to the QFES, there were numerous requests to postpone the inspection as the building was not completed and based on the email correspondence attached to the Certifier's written submission, it appears that as late as 17 April 2018, the Certifier's representatives were requesting an extension of time from the QFES to 20 April 2018 on the basis that the works were not completed.
25. Based on the Tribunal's review of the material provided, it appears that both parties required extensions of the time to carry out their respective obligations but the overarching cause of the need for the extensions was delay by the builder in ensuring the building was completed and ready for inspection.

26. Having regard to the communication between the parties and their conduct, the Tribunal is satisfied that the notice of non-compliance given by the QFES on 18 April 2018 was in accordance with section 39 of the BR and the Certifier was required to act on the notice in accordance with section 40 of the BR.
27. The fact that the information notice was required under the BR and not under the BA is not material because section 7 of the *Acts Interpretation Act 1954* provides that in an Act, a reference to a law or a provision of a law includes a reference to the statutory instruments made or in force under the law or provision.
28. Therefore the Tribunal has determined that it did have jurisdiction to hear the appeal under the PA section 229 and schedule 1, table 3, item 3.
29. Regarding the QFES' power to raise new matters at inspection, the Tribunal's view is that as section 39 of the BR provides that a referral agency may inspect building work to check *the referral agency aspects* comply with the building development approval, the power to inspect must be read against the referral agency's jurisdiction in the *Planning Regulation*, not just the conditions of the approval.
30. Condition 65 of the BDA describes Stair 3 and Stair 4 as external stairs, stating that the ventilation of the stairs ensures compliance with the BCA. The Tribunal considers that this condition cannot be used to exclude the QFES referral agency jurisdiction. The stairs are not external because condition 65 states them to be external. They must be external either by definition or by function. In the absence of a definition of external stairs in the NCC it is open to the QFES to assess whether any stair which is a required exit is external or not.
31. While it would have been preferable for the QFES to have raised the characterisation of Stair 3 and Stair 4 in the FEB meetings and asked for details about their externality, this failure should not preclude the function of the stairs being within the QFES referral agency aspects on inspection.

Decision framework

32. The QFES as the appellant in the Appeal has the onus of establishing that the Appeal should be upheld in accordance with section 253(2) of the PA.
33. The Tribunal is required to hear and decide the Appeal by way of a reconsideration of the evidence that was before the person who made the decision appealed against, which in this case was the Certifier.
34. The Tribunal may nevertheless (but need not), consider other evidence presented by a party to the appeal with leave of the Tribunal or any information provided under section 246 of the PA.
35. The Tribunal is required to decide the Appeal in one of the ways mention in section 254(2) of the PA

Material Considered

36. The material considered in arriving at this decision comprises:
 - (a) 'Form 10 – Application for appeal/declaration', grounds for appeal and correspondence accompanying the appeal received by the Tribunals Registrar on 11 May 2018.
 - (b) Form 11 – Certificate of Classification issued by Shawn Brosnan dated 19 April 2018.
 - (c) Decision Notice – Development Permit for Building Work (Development Permit number 150203) issued by Shawn Brosnan dated 19 February 2016.

- (d) Fire Engineering Brief for Sinnamon Village Aged Care Facility by Wood & Grieve Engineers dated 23 July 2015 (Revision 1) tendered at the hearing.
- (e) Written submission from Shawn Brosnan dated 9 August 2018 regarding the jurisdiction of the Tribunal to hear the Appeal.
- (f) Photographs of Stair 3 and Stair 4 tendered at the hearing.
- (g) Oral submissions by both parties at the hearing.
- (h) Planning Act 2016 (PA).
- (i) Planning Regulation 2017.
- (j) Building Act 1975 (BA).
- (k) Building Regulation 2006 (BR).

Are Stair 3 and Stair 4 External Stairs

QFES Representations

- 37. The QFES inspected the building on 20 March 2018 (or 23 March 2018 as asserted by the Certifier) and formed the opinion that Stair 3 and Stair 4 are substantially enclosed with only limited natural ventilation provided on one side via a fixed louvered opening.
- 38. Due to this, the QFES does not consider that Stair 3 and Stair 4 are external stairs and, in the QFES' submission, this means that stair pressurisation is required under the Deemed-to-Satisfy (DTS) provisions of the NCC.
- 39. Alternatively, the QFES submits that the omission of a stair pressurisation system should have been addressed through a fire engineering analysis via a performance solution.
- 40. The QFES are therefore of the view that Stair 3 and Stair 4 are non-compliant as stair pressurisation is not provided (noting that stair pressurisation is a Special Fire Service and a matter within the QFES' referral agency jurisdiction).
- 41. The QFES further submits that the lack of stair pressurisation and the substantially enclosed nature of the stairways could result in smoke spread impacting visibility and tenability in the stairs, thereby compromising occupant evacuation and fire brigade intervention. This is viewed by the QFES as a serious safety concern given the building is a high risk aged care occupancy.
- 42. In the opinion of the QFES, Stair 3 and Stair 4 are not compliant and should not have been approved by the Certifier. The QFES submits that as a consequence, the certifier's decision to issue the certificate of classification was invalid and should be set aside.

Certifier's Representations

- 43. The Certifier asserts that Stair 3 and Stair 4 are external stairs, as they are isolated from the rest of the building by fire resistant construction and the wall of the stairs which is on the external face of the building contains fixed open louvres.
- 44. The Certifier further asserts that as there is no definition of *external stair* in the NCC, the definition of external wall, can be applied to stairs bounded by an external wall, provided permanent ventilation is provided to ensure smoke relief and safety.
- 45. The Certifier submits that the stairs in this building differed from those assessed in the Building and Development Dispute Resolution Committee decision in Appeal 07-16, as ventilation is provided by fixed open louvres in the external wall, rather than by ventilation openings at the top and bottom of the stair shaft.

Findings of Fact – External Stairs

46. The Tribunal makes the following findings of fact:
 - (a) Stair 3 and Stair 4 substantially enclosed with only limited natural ventilation provided on one side via a fixed louvered opening.
 - (b) Stair 3 and Stair 4 are not external stairs as they are bounded on 3 sides by walls and 1 side with fixed louvres providing ventilation in the external wall.
 - (c) A special fire service is required for Stair 3 and Stair 4, which is within the referral agency jurisdiction of the QFES.
 - (d) Under the deemed to satisfy provisions of the NCC, stair pressurisation is required or alternatively the omission of a stair pressurisation system should have been addressed through a fire engineering analysis.

Reasons for the Decision – External Stairs

47. Figure Part A0.2 illustrates the NCC Compliance Structure.
48. The Certifier has not demonstrated how his interpretation of the Deemed-to-Satisfy Compliance Solution meets the relevant Performance Solutions.
49. A1.5 *Compliance with all Performance Requirements* states: *Subject to A1.6, Class 2–9 buildings must be so designed and constructed that they comply with the relevant provisions of Section A and the Performance Requirements of this Volume.*
50. The Certifier has applied a literal interpretation of BCA D1.8 and assessed Stair 3 and Stair 4 as external stairs in lieu of being internal fire isolated stairs.
51. The Certifier’s interpretation relies on the walls between the stair and the building being external walls.
52. The BCA defines an external wall as: *External wall means an outer wall of a building which is not a common wall.*
53. There is no definition of *external stair* in the BCA, so the ordinary dictionary definition of *external* can be considered in interpreting the meaning of BCA references to an external stair;
54. The Macquarie Dictionary defines external as *of or pertaining to the outer part; ... situated outside something.*
55. A stair which is roofed and enclosed on 4 sides would under this ordinary meaning be considered internal.
56. This approach to determining whether Stair 3 and Stair 4 are internal or external is consistent with that applied in the September 2015 NSW Coronial Inquiry into fire at Unit 53, 4 West Terrace, Bankstown
57. The definition of “building” in Schedule 2 of the BA also assists:

building—

1A building is a fixed structure that is wholly or partly enclosed by walls or is roofed.

considering “external” as meaning “outside the building” or at least “outside the building’s external walls”, Stair 3 and Stair 4 are inside a building.
58. In addition, for the walls separating Stair 3 and Stair 4 from the building to be considered an external wall the following must apply:
 - (a) Part D1.8(c)(i)(A) an Fire Resistance Level of not less than 60/60/60
 - (b) non-combustible construction to satisfy Spec C1.1.
 - (c) a performance report to satisfy FP1.4 and Part F1.0.

(d) characteristics to satisfy Part J 1.

Submissions to the hearing did not establish if these parts of the external wall comply.

59. The FER report, part of the Decision Notice, assesses discharge of Stair 3 and Stair 4 against BCA Part D1.7. Part D1.7:
- (a) is specific to fire isolated stairs.
 - (b) to comply with D1.8 as an external the entire of Stair 3 and Stair 4 exit must be protected.
 - (c) the discharge at ground must also necessarily be external.
 - (d) the concessions for D1.7 discharge of fire stairs within the confines of the building cannot apply to a stair already considered external to the building.
 - (e) If the Building Certifier applied D1.8 to Stair 3 and Stair 4 and determined this negated the need to assess Table E2.2a, there was no need for consideration to be given to Part D1.7.
60. Stair 3 and Stair 4 in their current form cannot be pressurised given the louvre openings and the inability to contain air which gives rise to an argument that Stair 3 and Stair 4 may not be capable of containing smoke.
61. However, where open access ramps and balconies are permitted in lieu of a pressurised fire isolated stair, there is a criteria for openness.
62. D2.5 Open access ramps and balconies states:
- Where an open access ramp or balcony is provided to meet the smoke hazard management requirements of Table E2.2a, it must—*
- (a) have ventilation openings to the outside air which—
 - (i) have a total unobstructed area not less than the floor area of the ramp or balcony; and
 - (ii) are evenly distributed along the open sides of the ramp or balcony; and
 - (b) *not be enclosed* on its open sides above a height of 1 m except by an open grille or the like having a free air space of not less than 75% of its area.
63. Against the criteria of Part D2.5, Stair 3 and Stair 4 would most likely not comply as the area of the louvres is likely less than the floor. During the hearing the Certifier stated the open area of the louvre had not been quantified.
64. The Certifier's consideration of Part D1.7 but not E2.2 illustrate thought regarding the fire safety of the stairs, but are not indicative of a consistent approach to the interpretation of the clauses of the BCA.
65. The Tribunal agrees with the decision of the Building and Development Dispute Resolution Committee in Appeal 07-16, that the objective of the NCC for an external stairway serving as a required exit in lieu of a fire isolated exit is that it is freely venting to prevent smoke spread and logging.
66. The Tribunal is not satisfied that the design of Stair 3 and Stair 4 will achieve this objective and ensure smoke relief and safety as required by the BDA.
67. The Tribunal notes that the lack of a definition of what constitutes an external stair in the NCC means there is no guidance on the interpretation and application of the relevant standards to stairways. Given the importance of fire safety considerations, especially in high risk buildings such as aged care facilities, the Tribunal considers that

a definition which clarifies the meaning of external stair for fire safety and smoke management systems is urgently needed in the NCC.

Stafford Hopewell
Development Tribunal Chair
Date: 23 November 2008

Appeal Rights

Schedule 1, Table 2 (1) of the *Planning Act 2016* provides that an appeal may be made against a decision of a Tribunal to the Planning and Environment Court, other than a decision under section 252, on the ground of -

- (a) an error or mistake in law on the part of the Tribunal; or
- (b) jurisdictional error.

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

The following link outlines the steps required to lodge an appeal with the Court.

<http://www.courts.qld.gov.au/courts/planning-and-environment-court/going-to-planning-and-environment-court/starting-proceedings-in-the-court>

Enquiries

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