



## Development Tribunal – Decision Notice

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### Planning Act 2016

<b>Appeal Number:</b>	24 – 17
<b>Appellant:</b>	Queensland Fire and Emergency Services (QFES)
<b>Assessment Manager:</b>	All Construction Approvals – Harald Webber
<b>Concurrence Agency:</b> (if applicable)	N/A
<b>Site Address:</b>	65-69 The Esplanade, Cairns, Lot 2 RP 702098 and Lot 623 C 1981 – the subject site

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### Appeal

Appeal by Queensland Fire and Emergency Services (QFES) as an advice agency under section 528 of the Sustainable Planning Act 2009 (SPA) against the decision of an assessment manager to omit the advice provided for the building approval.

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<b>Date and time of hearing:</b>	2pm, 23 August 2017 (Hearing 1)
<b>Place of hearing:</b>	Meeting Rooms, Building Codes Queensland, Level 16, 41 George Street Brisbane
<b>Tribunal:</b>	James Dunstan – Chair Sam Le Noble - Member
<b>Present:</b>	<b>Applicant</b> Steve McKee - QFES Chris White – QFES David Job – QFES Mick Conway - QFES  <b>Assessment Manager</b> Harald Webber – All Construction Approvals  <b>Architect</b> Michael Martino – MMP Architects
<b>Date and time of hearing:</b>	2pm, 7 December 2017 (Hearing 2)
<b>Place of hearing:</b>	Meeting Rooms, Building Codes Queensland, Level 16, 41 George Street Brisbane
<b>Tribunal:</b>	James Dunstan – Chair Sam Le Noble - Member

**Present:**

**Applicant**

Steve McKee - QFES  
Chris White – QFES  
David Job – QFES  
Mick Conway - QFES

**Assessment Manager**

Harald Webber – All Construction Approvals

**Architect**

Michael Martino – MMP Architects

**Fire Engineer**

Graham Timms - ARUP

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**Decision:**

The Development Tribunal (Tribunal), in accordance with section 564 of the Sustainable Planning Act 2009 (or alternatively section 254 of the Planning Act 2016) **sets aside** the decision of the assessment manager and replaces it with a decision **refusing** the application.

**Background**

The approval granted on the subject site by the assessment manager is for a major alteration to an existing class 3 short term accommodation building. The alterations involve adding an additional storey to the building.

During the assessment and approval process, a referral was lodged to Queensland Fire and Emergency Services (QFES) as an advice agency in accordance with the provisions of Schedule 7 and 8 of the Sustainable Planning Regulation 2009 (SPR).

The original Fire Engineering Brief (FEB) dated 22 December 2016, submitted to QFES for assessment and comment contained a single proposed performance solution for protection of openings in the corridor, and reference to section 61 of the Building Act 1975 (BA) for the remainder of the building.

QFES provided comments dated 31 January 2017 that they did not support the proposal and questioned the suitability to apply section 61 (BA) for the remainder of the building due to safety concerns. As stated in this response:

*“The QFES has reservations concerning the suitability of this building as a backpackers even though the approvals process seems to confirm compliance. The wall on the northern side of the atrium/void has a distinct external facia appearance which lends itself to the possibility of it once having been the exterior of the building. It has been apparent from our dealings with other buildings on the Esplanade that building work has taken place without knowledge of the Council and has resulted in unsafe outcomes.*

*The fact that the QDC MP2.1 Budget Accommodation has been approved does not, in the opinion of this office, take into account the fire safety issues presented by the atrium/void construction. The definition in the BCA of atrium would require provisions of Specification G3.8 being implemented. It is the opinion of the QFES that the FEB be substantially revised to take into account of this fact”.*

The subsequent Fire Engineering Report (FER) dated 12 April 2017, submitted for advice agency approval, was not revised as per the advice from QFES, and contained the same single performance solution

QFES undertook a detailed assessment of the proposal and in accordance with Schedule 7, Table 1 of the SPR, provided an advice agency response. As part of providing their response, QFES engaged the services of a consultant building certifier to review and provide comments.

An extract from this assessment stated:

*In accordance with section 292 of the Sustainable Planning Act 2009 QFES advice to the Assessment Manager is that the fire safety proposals set out in the current FER is non-compliant. QFES considers that there are significant outstanding fire safety concerns associated with the current fire safety proposals for this high-risk budget accommodation building that require resolution. QFES advises that a suitable 'whole of building' fire strategy should be developed that can be explicitly demonstrated to achieve a satisfactory level of fire safety for the occupants of the building, and that will adequately facilitate fire brigade intervention".*

Upon receipt of the advice agency response, the assessment manager reviewed the advice, the assessment manager proceeded to approve the building works without adopting any of the QFES advice.

QFES reviewed the decision issued by the assessment manager and subsequently lodged an appeal of the assessment manager's decision to the Building and Development Dispute Resolution Committees (now known as the Development Tribunals) which was received 7 June 2017.

The first hearing was conducted at Building Codes Queensland, Level 16 Mineral House, 41 George Street Brisbane on 23 August 2017. During the hearing the following representations were made:

Applicant Representations:

- During the initial FEB assessment, issues were raised regarding the addition of an additional storey to the building, and implications on fire safety for the entire building;
- QFES are of the opinion the certifier did not act in accordance with the code of conduct – specifically undertaken works in the public interest;
- QFES during the FEB and FER assessment outlined that a *whole of building* approach was needed;
- MP2.1 compliance being previously issued does not imply the building is compliant in its current form with BCA requirements
- The void area is by definition an atrium under BCA;
- The additional storey increases the volume and dimensions of the atrium;
- The FEB/FER did not address atrium requirements under part G;
- The plans and specifications did not address the Deemed to Satisfy requirements of the BCA Part G for the atrium construction;
- QFES have major concerns with the whole building fire safety;
- QFES have concerns that although the new storey is compartmented by fire rated construction, it has an impact on the remaining building as it shares the atrium and existing egress paths;
- QFES generally have major concerns with FER lacking multiple items to be addressed, including:
  - Emergency egress and paths of travel;
  - Convergence of paths of travel;
  - Booster assembly location and construction;
  - Atrium construction and safety requirements;
  - Mechanical ventilation for atrium;

- Stairwell pressurization (required due to atrium);
- No consideration given to fire brigade intervention;
- Application of section 61 to the remainder of the building is not appropriate as there is an increase to risk of occupants

Assessment manager representations:

- The building is a 1960s construction and has always operated as a backpackers accommodation;
- Development approval was given for a fourth storey which the new building works approval relates to;
- The existing building is deemed to comply with the legislation at the time it was approved;
- The new storey being provided does not pose an increase in risk to occupants;
- The proposal involves upgrades to multiple parts of the building above the requirements of QDC MP2.1

Following this hearing, further submissions were made to the tribunal to address some of the matters raised. Some of these issues the applicant and appellant had felt these matters were not suitably addressed, and in the interest of natural justice and fairness, a second hearing was conducted at Building Codes Queensland, Level 16 Mineral House, 41 George Street Brisbane on 7 December 2017.

During this hearing, it was raised by the applicant that many of the concerns and items raised from the first hearing had not been addressed, and that no further assessment had been undertaken by the assessment manager on the existing building.

**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 Building And Development Dispute Resolution Committees Registrar on 7 June 2017 including the following:
  - a. Decision notice issued by Harald Webber dated 16/05/17 reference 00020944;
  - b. QFES advice agency response dated 14 May 2017 reference 17-00014
  - c. QFES amended advice agency response dated 30 May 2017 reference 17-00014;
  - d. Fire Engineering Brief reference 244275-75 dated 22 Dec 2016 by ARUP;
  - e. Fire Engineering Report reference 244275-75 dated 12 Apr 2017 by ARUP
2. Arup Fire Engineering Report reference 244275-75 dated 13 October 2017
3. Arup Fire Engineering Report reference 244275-75 dated 01 December 2017
4. Hydraulic services drawings reference 152984 by Gilboy Hydraulic Solutions, FH001, HS201, HS202, HS203 dated 20 November 2017
5. QFES Request for Comment on Fire Engineering Brief form dated 22-12-2016
6. Application to Assess/Reassess Special Fire Services and/or Alternative Solution Design dated 22/12/2016
7. QFES "Non-Complaint" letter to All Construction Approvals dated 14 May 2017

8. QFES "Non-Complaint" amended advice letter to All Construction Approvals dated 30 May 2017
9. 'Form 15 – Compliance Certificate' for emergency lighting, exit signage, smoke detection and alarm system dated 19/04/2017
10. Hydraulic services drawings reference 152984 by Gilboy Hydraulic Solutions, FS001 Rev A, FS002 Rev A, HS001 Rev B, HS002 Rev C, HS003 Rev C, FH001, HS201, HS202, HS203 dated 20 November 2017
11. Drawings by MMP Architects, Site Plan Rev C5, Ground Floor Plan Rev C6, Level 1 Floor Plan Rev C11, Level 2 Floor Plan Rev C11, Level 3 Floor Plan Rev C10, Level 4 Floor Plan Rev C10, Roof Plan Rev C5, Front Elevation Rev C4, Rear Elevation Rev C5, Northern Elevation Rev C5, Southern Elevation Rev C5
12. Electrical Services drawings by Sequal Consulting Group drawing E01 Rev C2, E02 Rev C3, E03 Rev C2, E04 Rev C2, E07 Rev C2,
13. Assessment decision reasoning email from Harald Webber to QFES dated 20 March 2017;
14. Sustainable Planning Act 2009 (SPA);
15. Sustainable Planning Regulation 2009 (SPR);
16. Building Act 1975 (BA);
17. National Construction Code Series, Building Code of Australia, Volume 1, 2016 (BCA);
18. Queensland Development Code MP2.1 (QDC)
19. Verbal submissions from all parties at the hearings

## **Findings of Fact**

The Tribunal makes the following findings of fact:

1. The building was originally constructed circa 1960s as a backpackers accommodation and has been operating during this time;
2. The proposed works involved creating an additional storey and increasing the volume and dimensions of the existing atrium/void;
3. As documented in the Fire Engineering Report, and through representations at the first hearing, the assessment manager has applied the provisions of section 61 (*Alterations to safe existing work may be approved on basis of earlier building assessment provisions*), section 68 (*Particular alterations not permissible*) and section 81 (*Building development approval for particular alterations may require existing building or structure to comply with building assessment provisions*) of the Building Act 1975;

### Interpretation and application of Atrium provisions

4. During the hearing, representations were put forward by the assessment manager that the void was not considered as an atrium. The proposal to provide a retractable roof system meant it was to be an open void and not considered an atrium;
5. The BCA defines an atrium as follows:

- Atrium means a space within a building that connects 2 or more storeys, and –*
- a) Is wholly or substantially enclosed at the top by a floor or roof (including glazed roof structure); and*
  - b) Includes any adjacent part of the building not separated by an appropriate barrier to fire; and*
  - c) Does not include a stairwell, rampwell or the space within a shaft*

6. Based on the definition, regardless of the roof being retractable through design, it is determined by the tribunal that the void area is substantially enclosed at the top of the space and is therefore by definition an atrium and must be appropriately addressed through either deemed to satisfy or a performance assessment;

#### Interpretation and application of Building Act 1975 Section 61

7. The intent of section 61 is to provide concessions for alterations to existing buildings, where the level of safety is not reduced.
8. The proposal for the building works involves:
  - a. Adding an additional storey to the building which increases the number of occupants within the building by approx. 36 persons;
  - b. Increasing the overall height and volume of the internal void/atrium;
  - c. Egress of the new storey through the existing fire exits within the building;
  - d. Relocating a fire egress stair discharge on the ground floor;
  - e. Provisions for new hydrant booster location;
9. Based on the above, it is determined by the tribunal that there is an impact to the existing fire safety provisions of the BCA due to the following:
  - a. Increased number of occupants egressing the building;
  - b. Increase in the effective height of the building;
  - c. Increase in the volume and dimensions of the atrium;
10. Therefore it is determined it is not appropriate to apply section 61 as the works have an impact on the existing level of fire safety and occupant safety within the building.

#### Interpretation and application of Building Act 1975 Section 68

11. The intent of section 68 is to allow concessions for alterations to existing buildings where:
  - a. There is no reduction in the existing level of fire protection;
  - b. There is no reduction in the existing level of fire resistance;
  - c. There is no reduction in the existing safeguards against spread of fire to adjoining buildings;
  - d. There is no reduction to the existing level of emergency egress from the building;
12. In the case of the building in question, it is determined by the tribunal that:
  - a. The increase in number of storeys and occupants has an impact on the existing level of emergency egress from the existing building;
  - b. The increase in the volume of the atrium
  - c. The re-design and relocation of the front egress stair has an impact on the existing level of egress from the building;

#### Interpretation and application of Building Act 1975 Section 81

13. The intent of section 81 is to allow concession for entire building upgrades where the works are more than 50% of the floor area of the existing building, and are considered to pose a risk to the safety of persons accommodated in or using the building;

14. The assessment manager has applied through the building approval, that the existing works are safe and did not impose conditions requiring upgrade of all or part of the existing building through application of sections 61 and 68;
15. In the case of the building in question, it is determined by the tribunal that application of concessions under sections 61 and 68 are not appropriate, and the requirements of section 81(3) should apply to the existing building – the building assessment provisions should apply to the building as if it were a new building due to the increased risk to occupants and fire safety;
16. The fire engineering report is considered to be inadequate to appropriately address the issues within the proposed alterations and existing building, as it fails to adequately address:
  - a. Part G of the BCA with regards to Atrium provisions, including but not limited too;
    - i. Mechanical ventilation requirements of the atrium;
    - ii. Bounding construction requirements and protection of openings;
    - iii. Additional special fire services required
  - b. Part E of the BCA with regards to additional requirements for stairwell pressurization for a fire isolated stair egressing from an atrium;
  - c. Others matters relating to general fire and occupant safety;
17. An inadequate response was provided with regards to reasons for not accepting the QFES advice agency response. A simple 4 paragraph email advising application of section 81 did not apply, and it was assumed the existing building complied prior to 1992 was all the response that was provided. The assessment manager did not specifically address the concerns of the QFES response. It is noted that no actual evidence of previous approval was provided to the tribunal;
18. During the hearing process, opportunities were provided for the assessment manager, architect and fire engineer to review and provide additional reports and documents to address the concerns raised. During this process, a total of 3 Fire Engineering Reports were reviewed prior to the second hearing;
19. Although improvement to the fire safety outcomes was proposed in limited scope, each revised report only addressed small sections of the building, however no additional assessment or documentation was provided by the assessment manager or fire engineer regarding the existing building and the level of fire safety being addressed holistically;

### **Reasons for the Decision**

1. The tribunal has reviewed all the above materials and finds that the subject building is an existing 3 storey budget accommodation being altered to increase to a 4 storey budget accommodation building;
2. The assessment manager has given insufficient consideration to the existing building, and the increase in risk to the general fire safety of the building;
3. The assessment manager has given no consideration to the advice agency response provided from QFES regarding the need for a “whole of building” approach to the assessment and design;
4. The assessment manager has incorrectly interpreted the application of Atrium provisions to the extension of the existing void and has not adequately addressed the appropriate provisions of Part G of the BCA;

5. The alterations to increase the total number of storeys from 3 to 4 poses an increased risk to the level of fire safety for occupants of the building;
6. The tribunal has determined reviewing all the evidence provided, and based upon the advice of Queensland Fire and Emergency Services that the proposed building works and performance solutions are non-compliant with the requirements of the Building Code of Australia and a whole of building approach for construction and upgrade must be applied for this development.
7. Therefore, The Development Tribunal (Tribunal), in accordance with section 564 of the Sustainable Planning Act 2009 (or alternatively section 254 of the Planning Act 2016) **sets aside** the decision of the assessment manager and replaces it with a decision **refusing** the application.

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**James Dunstan**  
**Development Tribunal Chair**  
**Date: 24 January 2018**



## **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.

## **Enquiries**

All correspondence should be addressed to:

The Registrar of Development Tribunals  
Department of Housing and Public Works  
GPO Box 2457  
Brisbane QLD 4001

**Telephone (07) 1800 804 833 Facsimile (07) 3237 1248**