



## Building and Development Dispute Resolution Committees—Decision

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### *Sustainable Planning Act 2009*

<b>Appeal Number:</b>	16 - 15
<b>Applicant:</b>	Queensland Fire & Emergency Services (QFES)
<b>Assessment Manager:</b>	Thomas Independent Certification (TIC)
<b>Concurrence Agency:</b> (if applicable)	Queensland Fire & Emergency Services (QFES)
<b>Site Address:</b>	31 Bourton Road, Merrimac, Qld, 4226 and described as Lot 13 on RP 162287 – (the subject site)

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### Appeal

Under section 532 of the *Sustainable Planning Act 2009* (SPA), this appeal is against the decision of the Assessment Manager to issue a Certificate of Classification for the Sage Apartments, against the inspection advice of the Queensland Fire and Emergency Services. The Certificate of Classification was issued without providing an information notice to the QFES, within the 5 business day period required under section 40 of the Building Regulation 2006.

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<b>Date and time of hearing:</b>	2.30pm Tuesday, 30 June 2015
<b>Place of hearing:</b>	Building Codes Queensland Office, Mineral House, Level 16 / 41 George Street, Brisbane, Queensland
<b>Committee:</b>	Chris Trewin – Chair Samantha Hall – Member Ken Crase – Member
<b>Present:</b>	John Harrison (QFES) – Applicant Peter Neilson (QFES) – Applicant Keith Thomas (TIC) – Assessment Manager Colin Wheat From Compass Consulting Group – (CCG) Dan Marchetti From Minamarc – Developer

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### Decision:

The Building and Development Dispute Resolution Committee (Committee) upholds the appeal and, in accordance with section 564(2)(b) of the SPA, **changes** the decision of the Assessment Manager to issue a Certificate of Classification by inserting the following restrictions on the occupation of the building:

Within 30 business days of the date of this decision:

- 1) The large bore suction connection feed pipe shall be upgraded to a minimum size of 150mm diameter in accordance with section 5.4.2 of AS 2419.1-2005 or the existing

100mm diameter feed pipe approved through an alternative solution assessed in accordance with the requirements of section 30 of the *Building Act 1975* (BA);

- 2) The on-site storage tanks are to have tank contents indicators installed in accordance with the requirements of section 5.4.4 of AS 2419.1-2005.

In accordance with Section 564(1) of the SPA, the Assessment Manager is directed to issue an amended Certificate of Classification (C of C) in accordance with the Committee's decision.

## **Background**

### Building Description

The building in question is the first stage of the Sage Apartments and is a 3 level residential development consisting of Class 2 units over a Class 7a carpark at ground level (development). The development is located at 31 Bourton Road, Merrimac.

### Approval Stage

In accordance with Schedule 7, table 1 of the Sustainable Planning Regulation 2009 (SPR), the Assessment Manager lodged an advice agency referral application (Referral) with the Queensland Fires and Emergency Services (QFES), which at the time was known as the Queensland Fire and Rescue Service, on 16 June 2014. The application form clearly identified as deemed to satisfy (DTS) and consequently, the assessment was carried out against the DTS provisions of the National Construction Code, Volume 1 (BCA).

The Referral was based on a hydraulic design prepared by Mclean Consulting Engineers and was deemed non-compliant by the QFES building approval officer (Paul Wild). There were a number of emails between the QFES (Paul Wild) and the Assessment Manager between 25 June and 11 July 2014 in an attempt to obtain compliance. The Assessment Manager emailed QFES (Paul Wild) and others, on 15 July 2014 advising that a new design would be prepared by Colin Wheat from Compass Consulting Group (CCG), who had been appointed as the replacement hydraulic consultant. A number of emails were exchanged on 16 and 17 July 2014 between the Assessment Manager and QFES (Paul Wild), which culminated in an extension of time being granted until 1 August 2014.

The design prepared by CCG and submitted to the QFES by the Assessment Manager clearly identified a large bore suction line of 100mm diameter. Despite this anomaly, the QFES (Paul Wild) issued a letter dated 8 August 2014, confirming that the Referral was compliant with the relevant DTS components, listing a number of dot points. The letter does not clarify the purpose of the dot points. They are simply titled "*Deemed to Satisfy Components*" of a special fire service. They could be intended to be either notes or conditions. Regardless, one of the dot points specifically refers to compliance with AS 2419 as follows:

*"provision of additional hydrant services as mentioned in AS2419"*

The Assessment Manager subsequently issued a decision notice on 14 August 2014 granting the building development approval (BDA) subject to 48 conditions and a list of numerous drawings (decision notice). The Committee has not been provided with the numerous drawings listed in the decision notice. However, the Assessment Manager did provide a copy of drawing number H\_603\_7\_P Rev A, titled Water Diagrammatic and drawn by S. Wheat of CCG. This drawing clearly shows a 100mm suction point from the fire storage tanks and carries the approved stamp of the Assessment Manager. Of interest, item 6 (IDAS referral agencies) of the Assessment Manager's decision notice identifies the following:

*"No referral agencies for this stage approval for the structure only"*

Some of the conditions of the BDA are pertinent to the appeal. For example:

Condition 14.0 of the decision notice relevantly states:

**“QUEENSLAND FIRE AND RESCUE SERVICE**

*All building work must comply with the requirements of the Queensland Fire and Rescue Service as per referral assessment received dated 8<sup>th</sup> August 2014 with the following condition;*

*...*”

Condition 15.0 of the decision notice relevantly states:

**“GENERAL**

*Approval is subject to full compliance with the Building Code of Australia and the Standard Building Law Regulation under the Queensland Building Act.”*

Condition 48.0 of the decision notice relevantly states:

**“CERTIFICATES**

*The following Certificates will be required at the completion of the project;*

*...*

*48.15 Installation of Hydrants to A.S 2419-2005*

*...*

*Queensland Fire & Rescue Service Final Clearance will also be required”*

On 14 August 2014, the Assessment Manager also issued a building compliance report (BCR) for the development. The BCR contains a list of 24 items that were checked as part of the assessment process and identifies how they satisfied the relevant requirements. Item 8.0 of BCR relevantly states:

**“8.0 SERVICES & EQUIPMENT**

**8.1 Hydrants**

*As documented complies*

*...”*

QFES (Paul Wild) issued a second letter dated 24 September 2014, confirming the Referral was compliant with the DTS components, listing the same dot points as those listed in the letter dated 8 August 2014.

The Assessment Manager issued an amended decision notice dated 25 September 2014. It is noted that item 6 (IDAS referral agencies) of the amended decision notice identifies the QFES as a referral agency.

Inspection Stage

Australian Fire testing Service (Bruce Dan) issued a Form 71 - fire hydrant and sprinkler commissioning certificate (No: 5281), dated 6 March 2015, indicating the system was compliant despite “Part E-Pump appliance booster test” being marked as “Fail”. A note clarified that the “Maximum flow rate that could be drawn for Part E-boosted test was 13 l/s”.

A number of Form 16 – Inspection Certificate / Aspect Certificate / QBSA Licensee Aspect Certificates were issued by Lee Philp of PDP Commercial P/L dated 25 March 2015. These certificates covered the hydrant and hose reel system, as well as all aspects of the hydraulics system installed.

On 9 March 2015, a QFES building approval officer (Glenn Tandy) issued an inspection report listing a number of areas of non-compliance.

Eleven (11) business days after the QFES inspection report, the Assessment Manager emailed a letter to QFES (Glenn Tandy) dated 24 March 2015, which attempted to justify the two major areas of contention listed in the QFES inspection report.

On 27 March 2015, QFES (Glenn Tandy) issued another inspection report listing the same items as being in non-compliance.

On 20 April 2015, Open Plumbing Pty Ltd T/as Open Fire (Samuel Hennant) issued a Form 71 - fire hydrant and sprinkler commissioning certificate indicating that the system complied. It should be noted that this certificate was attached to the CCG letter dated 17 June 2015 and not attached to the Certificate of Classification (C of C), along with the many other certificates.

The Gold Coast City Council (James Carter) issued a Plumbing and Drainage Compliance Certificate dated 1 May 2015.

Also on 1 May 2015, the Assessment Manager issued the C of C for the development. It is noted that the "final on-site assessment" and the "Fire Safety Measures" check sheets dated 1 May 2015 and signed by the Assessment Manager, list the hydrants as being installed and complying. The QFES received the C of C on 4 May 2015.

The Assessment Manager emailed the QFES (Paul Wild) on 11 May 2015 informing the QFES that the C of C had been issued, along with an explanation of why he disagreed with the QFES inspection advice issued by the QFES (Glenn Tandy) and why he believed the development complied.

On 14 May 2015 the QFES (Paul Wild) issued another inspection report listing the same items as being in non-compliance.

On 28 May 2015, the QFES (John Harrison) filed an Application for Appeal/Declaration – Form 10 with the Committees' Registrar.

## **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 Committee's Registrar on 28 May 2015.
2. Legal Opinion provided to the Developer by Thomson Geer Lawyers dated 25 June 2015.
3. Emails dated 17 February and 3 March 2015, between the QFES and the Assessment Manager, provided through the Committee's Registrar subsequent to the hearing.
4. Letter from CCG to the Assessment Manager dated 17 June 2015, provided at the hearing.
5. Report Titled "Appeal 16-15" prepared by the Assessment Manager, provided at the hearing.
6. Numerous other documents and extracts provided by the Assessment Manager at the hearing.
7. *Building Act 1975* (BA).
8. Building Regulation 2006 (BR).

9. Sustainable Planning Regulation 2009 (SPR).
10. *Sustainable Planning Act 2009* (SPA).
11. Building Code of Australia (BCA).
12. AS 2419.1-2005 (Incorporating Amendment No. 1) (AS 2419).

## Findings of Fact

The Committee makes the following findings of fact:

### Legal issues

The QFES' right to appeal the decision made by the Assessment Manager to issue the C of C arises pursuant to section 532 of the SPA.

Section 532 of the SPA relevantly provides that (emphasis added):

- “(1) If –
- (a) a person has been given, or is entitled to be given –
    - (i) an information notice under the Building Act about a decision other than a decision under that Act made by the Queensland Building and Construction Commission; or
    - (ii) ...

...

the person may appeal against the decision to a building and development committee.
  - (2) *An appeal under subsection (1) must be started within 20 business days after the day the person is given notice of the decision.”*

Schedule 2 of the BA relevantly defines “information notice” as follows:

- “*information notice, for a decision, means –*
- (a) *if the decision may be appealed under the Planning Act – a notice stating –*
    - (i) *the decision, and the reasons for it; and*
    - (ii) *all rights of appeal against the decision under the Planning Act; and*
    - (iii) *how the rights are to be exercised; or”*

Pursuant to section 37 of the BR, sections 38 – 40 of the BR relevantly apply if –

- “(a) *an entity was, for a building development application, a referral agency for aspects of the building work (the referral agency aspects); and*
- (b) *the building development approval applied for is granted; and*

- (c) *a condition of the approval requires the builder for the work to give the agency a notice to inspect it to check the referral agency aspects comply with the approval.*"

In respect of this appeal, there is no dispute between the parties about the following:

- (a) the QFES is a referral agency pursuant to the SPR;
- (b) the BDA was granted on 14 August 2014;
- (c) a condition of the BDA required the builder for the work to give the QFES a notice to inspect the work to check that the QFES' referral agency aspects of the building work comply with the approval.

The Committee has not been provided with a complete copy of the relevant BDA, however, given the parties at the hearing did not dispute the matters in paragraphs (a) to (c) as being facts, the Committee accepts that section 37 of the BR has been satisfied.

Pursuant to section 38 of the BR, the builder must give to the QFES a notice to inspect the building work when, under the building development approval, the QFES' referral agency aspects are at a stage where they must be inspected by the QFES.

Section 39(2) of the BR relevantly provides that if the QFES receives a notice to inspect pursuant to section 38 of the BR, the QFES may inspect the building work to check that the referral agency aspects comply with the building development approval.

Section 39(3)(b) of the BR relevantly provides that where the QFES decides to inspect the building work, the QFES must, within 15 business days of receiving the notice to inspect pursuant to section 38 of the BR, give the builder a notice stating the following:

"...

- (i) *the referral agency aspects comply with the building development approval; or*
- (ii) *the referral agency aspects do not comply with the approval, and the reasons why they do not.*"

Once a notice is received pursuant to section 39 of the BR, section 40(1) of the BR relevantly requires the building certifier to accept and act on the notice given under section 39(3)(b).

However, section 40(2) provides that section 40(1) does not apply if the building certifier:

"...

- (a) *decides to disagree with the decision the subject of the notice; and*
- (b) *gives the referral agency an information notice about the decision.*

Note –

*For the relevant appeal right, see the Planning Act, section 532.*"

In respect of the building work the subject of this appeal, the Assessment Manager gave the QFES a notice to inspect on 12 February 2015, in response to which the QFES issued a non-compliant Inspection Report dated 9 March 2015. It is noted that concerns were raised by the Assessment Manager during the hearing and by the legal opinion provided by Thomson Geer to the Developer that the QFES non-compliant Inspection Report was not given within the 15 business days required by section 39(3)(b). The Committee is satisfied that an extension of time

was sought by the builder and agreed to by the QFES as set out in email correspondence provided by the QFES to the Committee. The reason for the extension of time was due to the building not being ready for an inspection, despite the QFES having been given a notice to inspect.

A notice to re-inspect was given by the Assessment Manager to the QFES on 18 March 2015. The QFES provided a non-compliant Reinspection Report on 27 March 2015 pursuant to section 39(3)(b)(ii) of the BR, which stated where the fire hydrant system was non-compliant and requested that if the Assessment Manager disagreed with the non-compliant Reinspection Report, an information notice should be given to the QFES pursuant to section 40 of the BR (QFES' decision). On 1 May 2015, the Assessment Manager issued the C of C in respect of the building work. The QFES received the C of C on 4 May 2015.

The issue of the C of C by the Assessment Manager provided notice to the QFES that the Assessment Manager decided to disagree with the QFES' decision (Assessment Manager's decision). However, contrary to the requirement in section 40(2)(b) of the BR, the Assessment Manager did not issue an information notice to the QFES about the Assessment Manager's decision.

Turning back to the test in section 532(1) of the SPA, it relevantly requires that:

- (a) if the QFES is entitled to be given an information notice under the BA about a decision; then
- (b) the QFES may appeal against the decision.

Pursuant to section 40(2) of the BR, the QFES was entitled to be given an information notice about the Assessment Manager's decision, which, as evidenced by the issuing of the C of C, disagreed with the QFES' decision. Accordingly, the QFES has a right under section 532(1) of the SPA to appeal against the Assessment Manager's decision, which, as evidenced by the issuing of the C of C, disagreed with the QFES' decision.

The appeal was lodged by the QFES within 20 business days of receiving a copy of the C of C, in accordance with the requirements of section 532(2) of the SPA.

### Technical issues

It is noted that concerns were raised by the Assessment Manager during the hearing and by the legal opinion provided by Thomson Geer to the Developer, that the non-compliant inspection reports refer to compliance with the Building Code of Australia (BCA) and AS 2419 instead of the BDA, as required by section 39(2) of the BR. There are however, a number of conditions of the BDA that require the development to comply with the QFES referral assessment, specifically being compliance with the relevant provisions of the BCA and AS2419 as follows:

Condition 14.0 of the decision notice relevantly states:

***“QUEENSLAND FIRE AND RESCUE SERVICE***

*All building work must comply with the requirements of the Queensland Fire and Rescue Service as per referral assessment received dated 8<sup>th</sup> August 2014 with the following condition;*

*...*

*“provision of additional hydrant services as mentioned in AS2419”*

*...”*

Condition 15.0 of the decision notice relevantly states:

**“GENERAL**

*Approval is subject to full compliance with the Building Code of Australia and the Standard Building Law Regulation under the Queensland Building Act.”*

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...

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...

*Queensland Fire & Rescue Service Final Clearance will also be required”*

Condition 15 in particular is relevant, as it identifies that the work is to comply with the BA and its subordinate legislation. It is assumed the reference to “the Standard Building Law Regulation”, is actually to the BR. Regardless, AS2419 is a referenced document in Table 1 of Specification A1.3 of the BCA and therefore forms part of the BDA.

It should also be noted that the Developer, as the Applicant for the BDA, the subject of this appeal also had a right of appeal under section 532 of the SPA. This right is given by section 532(1)(b) of the SPA to appeal a decision under the BA by a referral agency about the inspection of building work, the subject of the BDA. Accordingly, if the Applicant held such strong concerns about the content of the non-compliant Inspection Reports issued by the QFES and considered that these reports did not refer to compliance with the BDA as required by section 39(2) of the BR, the applicant could have filed an appeal. However, no such appeal was filed.

AS 2419 forms part of the building assessment provisions, as it is a referenced document of the BCA and the BCA is nominated in section 30(1)(g) of the BA:

**“30 Relevant laws and other documents for assessment of building work**

*(1) Building assessment work and self-assessable building work must be carried out under the following laws and documents (the **building assessment provisions**)-*

...

*(g) the BCA;”*

The BDA was lodged and approved by the Assessment Manager, with advice from the QFES confirming compliance.

The BDA was lodged and approved subject to conditions, under the DTS provisions of the BCA.

Clause 4.3.3 Maintenance of AS 2419 stipulates that on-site storage shall be arranged to ensure at least 50% required volume is retained for use.

The on-site storage for the development only comprises 25% of the required volume, as 75% of the required volume is drawn directly from the Council main.

Clause 5.4.2 Large bore suction connection of AS 2419 stipulates on-site storage installation shall be fitted with at least one large bore suction point, fed by a pipe of not less than DN150.

Clause 5.4.4 Tank contents indicator of AS 2419 stipulates that each tank is to be fitted with an external indicator to show the water level of the tank.

The QFES inspection notices were compliant with the requirements of section 39(3)(b) of the BA.



The Assessment Manager issued the C of C despite the QFES inspection notice stating the development was not compliant.

The Assessment Manager did not give the QFES an information notice within 5 business days of receiving the QFES inspection notice, as required by section 40(2) of the BA.

The Assessment Manager, therefore issued the C of C before the building was “substantially complete”, as described in section 101(1)(e)&(k) of the BA:

**“101 Meaning of substantially complete**

*(1) A building has been **substantially completed** when-*

*...*

*(e) all fire safety installations are operational and installed as required under the building assessment provisions; and*

*...*

*(k) if the relevant development approval includes conditions advised or required by the referral agency and the conditions are about the building work for the building-the conditions have been complied with.”*

Section 102(3) of the BA states that a C of C must not be issued until all the requirements of section 102(1)(c) of the BA are complied with, where the building assessment provisions or conditions of the BDA for a referral agency inspection have been satisfied.

## **Reasons for the Decision**

### Legal issues

In the legal opinion provided by Thomson Geer, three legal issues were identified as being relevant for consideration by the Committee. Based upon the findings of fact of the Committee, the Committee decides the following in respect of those legal issues:

1. The QFES does have a right to appeal to the Committee under section 532 of the SPA.
2. The QFES does have a valid appeal as the non-compliant Reinspection Report dated 27 March 2015 was given in accordance with the timeframe provided in section 39 of the BR and thus section 41 of the BR does not apply as a referral agency notice was given. It was the Assessment Manager’s decision to disagree with the QFES’ decision set out in the non-compliant Reinspection report that is being appealed by the QFES in this appeal. It is also noted that the earlier non-compliant Inspection Report dated 9 March 2015 was given within an extended timeframe agreed between the parties, due to the building not being ready for inspection after the notice to inspect was given to the QFES by the builder.
3. The appeal should not be struck out as being invalid because, in accordance with section 532 of the SPA, it is lawfully directed towards the decision of the Assessment Manager to disagree with the QFES’ decision, which should have been communicated to the QFES by way of an information notice given by the Assessment Manager under section 40 of the BR. In the absence of an information notice, the decision of the Assessment Manager to disagree with the QFES’ decision was evidenced by the issuing of the C of C.

### Technical issues

The Committee finds that the appeal is upheld, for the following reasons:

- The BDA was issued by the Assessment Manager subject to a number of conditions that required the hydrant system of the completed project to comply with the DTS provisions of

the BCA and AS2419, despite the approved drawings clearly depicting the large bore suction line from the storage tanks as 100mm diameter. The Committee finds that conditions placed on the QFES advice and the BDA, were intended to ensure that the large bore suction line was sized in accordance with the minimum requirements of AS 2419. There were a number of arguments put forward at the hearing that a 100mm diameter, large bore suction line was adequate. While this may be the case, the Committee finds that any approval of a large bore suction line of a 100mm diameter would not be in accordance with the DTS provisions of the BCA and therefore not in accordance with the BDA.

- The required tank contents indicator was not provided, despite the express requirement of AS 2419 to provide one. Once again this conflicts with the requirement of the BDA. It was however, acknowledged by all parties at the hearing that a contents indicator was required and was proposed to be installed as part of the next stage of the development. The timing of the next stage of the development will be driven by factors that may cause lengthy delays. Given that stage 1 is currently occupied, the Committee finds that the contents indicator should be installed within a fixed time.
- The Assessment Manager should not have issued the C of C for the development until the building was substantially complete and the requirements of the QFES were satisfied in accordance with section 102 of the BA.
- The Committee finds that the on-site storage tanks can be completely emptied to undertake maintenance. AS 2419 requires storage to be arranged to ensure 50% of the required volume is available for use. It is not disputed that the on-site storage only provides 25% of the required volume of water, with 75% being drawn directly from Council's main. Therefore, even if the on-site storage is completely empty, 75% of the required volume of water is still available for use and the Committee finds that this satisfies the requirement of AS 2419.

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**Chris Trewin**  
**Building and Development Committee Chair**  
**Date: 21 August 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: 1800 804 833 Facsimile: (07) 3237 1248**