



**Building and Development Tribunals**

**Queensland Government**

Department of **Local Government and Planning**

**APPEAL**

**File No. 3-02-017**

*Integrated Planning Act 1997*

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## **BUILDING AND DEVELOPMENT TRIBUNAL - DECISION**

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**Private Certifier:** Mr Peter Burchard (Queensland Building Consulting Group, Toowoomba)

**Site Address:** 855 - 905 Ruthven Street, Toowoomba

**Appellant:** Queensland Fire and Rescue Service, Toowoomba

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### **Nature of Appeal**

The appeal was made by the Queensland Fire and Rescue Service (QFRS) pursuant to s 4.2.10 of the Integrated Planning Act 1997 (IPA) regarding the inclusion of residential accommodation in a proposed aged care facility for frail and dementia persons.

The proposed development included building work that is new construction. The appeal relates to a development application for building work that has been based on an *alternative building solution*. The QFRS were concerned for the fire safety afforded to occupants accommodated in the residential units in question and for the removal of fire.

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**Date and Place of Hearing:** 9:30am, Monday 15 April, 2002 at Level 25, Mineral House, 41 George Street, Brisbane Qld 4000.

**Tribunal:** *Messrs Greg Schonfelder, Chris Odgers and Russell Bergman* (Chair).

**Present:** The Appellant stated on the Form 10, Mr Paul Evans, Community Safety Manager, QFRS did not attend the meeting in person. *Messrs Bruce Males, Ross Williams and Bob Wing* on behalf of the Queensland Fire and Rescue Service, Toowoomba. *Mr Peter Burchard* of Queensland Building Consulting Group as private certifier. *Mr Ron Blake* of Stephen Grubitts & Associates as provider/author of the fire engineering report.

**Decision:**

The appeal by the QFRS is dismissed.

**Background:**

In their application, the QFRS appealed on the basis of four (4) concerns, two (2) of which related directly to *special fire services* and the remaining two (2) issues being (a) the size of the fire/smoke compartment containing central services and (b) the inclusion of two residential units into that fire compartment/area.

At the commencement of the hearing, the QFRS confirmed that since the time of making the appeal the two (2) matters relating to the *special fire services* installations were now fully resolved to their satisfaction in agreement with the certifier. However, the third and fourth matters, pertaining to the safety of residential units was still of concern to them.

There were two (2) primary issues for the Tribunal to decide. The first issue was the matter of jurisdiction. The second issue was to examine the process undertaken in adoption of the *alternative building solution*.

Mr Burchard raised the issue of “limits of jurisdiction” of the QFRS as denoted under IPA s 4.2.10, *Appeal by advice agency*. Mr Burchard claimed that as the remaining matter (ie. the locating of residential accommodation units in the central facilities area) did not specifically relate to *special fire services*, it was outside the jurisdiction of the QFRS. Accordingly, it was stated that the appeal application should be dismissed.

The QFRS countered this claim by presenting argument based on an interim expert assessment of the *alternative building solution* based on the Stephen Grubitts and Associates (SG&A) fire engineering report. The QFRS’s expert opinion was provided by Dr Marianne Foley of Holmes Fire and Safety. At the time, the QFRS advised the Tribunal that Dr Foley’s interim report would be followed soon with a final report in approximately one week. This final report was later received. Refer to Material Considered in this document.

Mr Blake on behalf of SG&A also tabled additional information at the Tribunal hearing. That material was an Addendum Report (dated March, 2002) to the main Alternative Solution Report. The QFRS officers acknowledged that this addendum report had been provided to them.

The Tribunal noted two particular policies of the QFRS. It understands that the QFRS has policies including (1) inclusion of fire hose reels as part of the fire fighting measures in this particular type of facility for aged care residential accommodation and (2) that residential parts should be excluded by at least smoke walling from central complex services facilities in this type of aged care facilities.

**Material Considered**

The Tribunal considered a range of written material as listed:

- *Form 10 - Building and Development Tribunals Appeal Notice* submitted by the Queensland Fire and Rescue Authority (Mr Paul Evans, Community Safety Manager, QFRS dated 26/03/2002.
- *Statement Grounds of Appeal* from the QFRS

- Copy of QFRA, *Special Fire Services, Notice of Assessment* and Appendix 1 (QFRS File No: 6294) dated assessed 23 December 2001, signed by Mr Bruce Males, Building Approvals Officer, Toowoomba.
- Copy of Development Application Decision Notice, Queensland Building Consulting Group, Pages 1 to 5 inclusive dated 18 March, 2002. Building Certifier was noted as Mr Peter Burchard, (QBSA) Accreditation No. A20333.
- Alternative Solution Report 2001/Q111.R2 for *Numylo Frail Aged Care Facility* dated September, 2001 prepared by Mr Ron Blake signed 24/12/01 of Stephen Grubits and Associates. Included were Pages 1 – 46 inclusive and (Merrin and Cranston Architects) Dwg No.s C574 WD 01 – 09 (inclusive).
- Addendum to Alternative Solution Report 2001/Q111.R2 dated March, 2002 prepared by Mr Ron Blake (as above) signed 28/03/02. Included were Pages 1 – 21 (inclusive).
- A written dissertation delivered by Mr Bruce Males, QFRS (copy attached in file) and dated 16 April, 2002 being the interim response from Dr Marianne Foley of Holmes Fire and Safety. Copies provided to all parties at hearing.
- Final Report by Dr Marianne Foley, Holmes Fire and Safety (Holmes ref: 97061) dated 18 April, 2002.
- Written dissertation delivered by Mr Peter Burchard of QBCG dated 8 April, 2002. Copies provided to all parties at hearing.
- *Fire Engineering Guidelines (FEG)* - First Edition, March 1996.

The Tribunal noted that the Alternative Solution Report 2001/Q111.R2 documentation included Dwg No.s C574 WD01 – 18 (inclusive). Copies of this Report to the Tribunal were WD01 – 09 inclusive only. Messrs Burchard and Blake provided the meeting with all listed drawings.

The Tribunal has also referred to the Integrated Planning Act 1997, the Building Act 1975, Standard Building Regulation 1993, the Building Code of Australia, and relevant information of the Executive Council of the Queensland Government.

### **Findings of Fact**

The first priority of the Tribunal was to determine whether the QFRS had proper grounds upon which to make an appeal. Reference was made to s4.2.10 of the IPA. This clause states that:

#### ***4.2.10 Appeal by advice agency***

*(1) An advice agency may, within the limits of its jurisdiction, appeal to a tribunal about the giving of a development approval if the development application involves code assessment for the aspect of building work to be assessed against the Building Act 1975.*

*(2) The appeal must be started within 10 business days after the day the decision notice or negotiated decision notice is given to the advice agency.*

Also noted was s 4.2.7 of the IPA that states:

**4.2.7 Jurisdiction of tribunals**

(1) A tribunal has jurisdiction to decide any matter that under this or another Act may be appealed to it.

(2) However, an appeal to a tribunal under this Act may only be about—

(a) a matter under this Act that relates to the Building Act 1975; or

(b) a matter prescribed under a regulation.

The matters being considered under this appeal are matters relating to code assessment under the Standard Building Regulation 1993 (ie. the Building Act 1975) and the Integrated Planning Regulation 1998.

All *special fire services* proposed for incorporation in the building under the development application have been assessed in accordance with the requirements of the IPA (for a referral [advice] agency) and Schedules 2 and 3 of the Standard Building Regulation 1993 and, subject to later inspection and testing, are to the satisfaction of QFRS.

Fire hose reels (FHR's) are not a *special fire service*. To ensure their inclusion or agree to their deletion under the application rests as a discretionary matter for the building certifier. SBR Schedules 2 & 3 and BCA Part E.1 refer.

In accordance with SBR 11 and 12, the building certifier must assess the proposed building design for code compliance in conjunction with all relevant information and requirements. eg. the SBR and BCA etc. The application has been assessed with due regard to size of all fire and smoke compartments and the decision by the certifier has been based on the findings of the *Alternative Solution Report* and *Addendum* provided by SG&A.

The Queensland Fire and Rescue Authority was subjected to a name change in November 2001 to the Queensland Fire and Rescue Service. Research undertaken by the Tribunal is that this action did not alter the status of the entity in terms of such matters including its authority, legal rights, responsibilities, liabilities and obligations under its own legislation and other legislation.

**Reasons for the Decision**

The Tribunal concluded that the QFRS has no ability to make a Form 10 appeal with the remaining *non-special fire services* matters. The Tribunal agrees that s 4.2.10 only applies where an assessment, carried out in accordance with the regulatory requirements by the QFRS as an advice agency, has not been adopted in full by the building certifier when giving his decision.

The Building Code of Australia requires under AO.4 that the *building solution* satisfy the relevant performance requirements. This application has clearly been assessed as an *alternative building solution* in accordance with the technical requirements of the BCA AO.5 using the FEG as the base reference document for that process.

As an *alternative building solution*, the QFRS continues to have a statutory obligation as a referral (advice) agency to assess all *special fire services* under the relevant legislation and to be a part of the development of that *alternative building solution*. In the case of Numylo, the advice role of the QFRS has occurred and was eventually, to their satisfaction.

Further, the QFRS has been appropriately involved in the development of the Fire Engineering Design Brief (FEDB). In s3.1, *Introduction* of the FEG, it states that:

*“A key element of the FEDB is to reach agreement by all parties as to the extent and form of analysis necessary to verify that the final package of fire safety measures meets their acceptance criteria.”*

It is also noted in s 4.2.4, *Fire Brigade Objectives* that:

*“Fire Brigades are obligated by their Legal Charters to protect life and property. Regard must be had to this broader objective ...”*.

There are a number of issues of note that arise from these extracts. While the FEG makes reference to agreement by all parties with regard to the FEDB, regrettably the guidelines do not make it clear as to what should occur in the event that consensus agreement cannot be reached by the assembled FEDB group.

The FEDB itself sets the framework (criteria) upon which the *alternative building solution* is then determined based on the cumulative efforts of all parties. For the Numylo project, the determination of the FEDB criteria was achieved. Also, the FEG do not make it clear as to what should implicitly occur when there are dissenting parties to the fire engineered solution when checking this to the agreed criteria of the FEDB. On that basis, general standards and principles of formal decision-making should apply.

The final Alternative Building Solution Report and Addendum, as presented to the building certifier, Mr Burchard, who has made his determination of whether to accept or reject the report in accordance with the requirements of the s12(2) of the Standard Building Regulation 1993.

It is understood that the QFRS's underlying reasoning for making their appeal is that they believe the occupants of the two (2) affected living units are disadvantaged and in an extraordinarily unsafe environment. This would concur with the FEG concerning their duty of service to ensure public safety and protection of property under all circumstances.

As the QFRS and as supported by their own professional advice (ie. Dr Foley) have issues with regard to some elements of the *alternative building solution*, it is recommended that each of the parties including expert representatives endeavour to reach consensus on all relevant technical details of the *Alternative Building Solution* report and do so as a matter of urgency.

If an acceptable level of agreement cannot be reached then, the QFRS has other options open to it. For example, s33 (1) *Making a complaint against a building certifier* of the Building Act 1975 provides the opportunity for complaints to be made to the accrediting body (QBSA) regarding the professional conduct of the building certifier. This process has further appeal rights under the legislation.

Because of the issue of jurisdiction and the subsequent decision to dismiss the appeal, the Tribunal did not fully examine all the details of the fire engineering report. However, as a general principal, it would be expected that residents within the central facilities compartment enjoy at least the same level of fire safety and conditions to those in other accommodation areas. Residents who are elderly and inhibited in some way must not be placed at a potential higher risk than others in similar circumstances. The Tribunal would suggest that, qualitatively at least, residents of the two (2) affected units have a degree of improved conditions should a fire emergency occur because they have a secondary means of escape which is direct to outside.

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**RUSSELL BERGMAN**  
**Building and Development Tribunal Chair**  
**Date: 7 May, 2002**

## **Appeal Rights**

Section 4.1.37. of the Integrated Planning Act 1997 provides that a party to a proceeding decided by a Tribunal may appeal to the Planning and Environment Court against the Tribunal's decision, but only on the ground:

- (a) of error or mistake in law on the part of the Tribunal or
- (b) that the Tribunal 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 Tribunal's decision is given to the party.

## **Enquiries**

All correspondence should be addressed to:

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