



**APPEAL**  
*Integrated Planning Act 1997*

**File No. 3/04/029**

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

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**Assessment Manager:** Burnett Shire Council

**Site Address:** 7 Holzberger Street, Moore Park

**Applicant:**

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### **Nature of Appeal**

Appeal under Section 91 of the Standard Building Regulation 1993 against the decision of the Burnett Shire Council to issue a certificate of final inspection in respect of a dwelling constructed on land described as Lot 45 on plan RP 42632, situated at 7 Holzberger Street, Moore Park, stating non-compliance with the Development Approval requirement for maintaining the Planning Scheme provision for a minimum habitable floor level of 3.6 metres AHD.

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**Date and Place of Hearing:** 12.00, Tuesday 22 June 2004  
at 7 Holzberger Street, Moore Park

**Tribunal:** Geoff Cornish

**Present:** Applicant  
Part owner  
Burnett Shire Council representatives

### **Decision**

In accordance with Section 4.2.34 (2) of the Integrated Planning Act 1997, I **confirm** the decision of Burnett Shire Council to issue a Final Inspection Certificate for the dwelling indicating non-compliance with Council's minimum habitable floor level requirement of 3.6 metres AHD.

## **Background**

The matter concerns a decision by the Burnett Shire Council, having identified that the dwelling had been constructed too low and not in accordance with the approval that had been given, to issue a Final Inspection Certificate indicating non-compliance with Council's requirement that the dwelling be constructed with a minimum habitable floor level of 3.6 metres AHD. Further, Council proposed to place a notice on Council's Rates Records showing that the dwelling had been constructed 0.291 metre below the minimum habitable floor level required for properties within that portion of the Shire that may be subject to flooding.

The applicant, was hoping to avoid having any notification of non-compliance appear on the Final Inspection Certificate and therefore on Council's Rates Records that may adversely affect a future sale of the property by the owners, sought Council approval for the construction of an alternative scheme designed to prevent the property from being flooded. The alternative proposal was subsequently rejected by Council, and the Final Inspection Certificate was issued containing the notation of non-compliance.

## **Material Considered**

1. Certificate of Final Inspection issued by Burnett Shire Council on 24 April 2004.
2. Building and Development Tribunal Appeal Notice, dated 20 May 2004, appealing the Council's decision, together with attached documents and setting out reasons for the appeal.
3. Plans of the proposed alternative solution.
4. Written submission from Burnett Shire Council dated 15 June 2004.
5. Written submission from Payne Butler Lang Solicitors on behalf of the applicant and dated 17 June 2004.
6. Written submission from Burnett Shire Council dated 21 June 2004.
7. Verbal submissions by the applicant and one part owner on 22 June 2004 setting out why the appeal should be allowed.
8. Verbal submissions by Burnett Shire Council on 22 June 2004 setting out Council's reasons for refusing the application.
9. *Standard Building Regulation 1993.*
10. *Building Act 1975.*
11. *Integrated Planning Act 1997.*

## **Findings of Fact**

I made the following findings of fact:

1. The dwelling has been completed and the final inspection undertaken.
2. The dwelling has been constructed at a level that is 0.291 metres below Council's minimum habitable floor level as required by the Council's adopted Strategic Plan and the Development Approval issued for the erection of the dwelling.
3. The applicant discovered the error in levels after the foundations had been poured and while the house was under construction.
4. The applicant continued to erect the dwelling without rectification of the problem, choosing instead to propose an alternative solution.
5. The alternative solution of a drained bund wall around the property was intended to prevent future flooding of the property and enable Council to not place any notation of non-compliance on the Final Inspection Certificate
6. Burnett Shire Council, by its solicitor's letter of 25 February 2004, rejected the applicant's submissions in respect of this alternative solution on the grounds of potential liability.
7. Council issued a Final Inspection Certificate on 24 April 2004 stating that there was non-compliance with Council's minimum habitable floor level requirement.

## **Reasons for the Decision**

After assessing the facts and the submissions of the parties, I have reached the following conclusions:

- The dwelling has been constructed in error at a level below that required by the adopted Strategic Plan for the Shire.
- The minimum habitable floor levels of the Strategic Plan are based on flood studies undertaken on behalf of the Shire.
- Having discovered the error made in the level of the dwelling, the applicant had the opportunity to rectify the problem before completion of the dwelling. The applicant chose to proceed with construction, while seeking to overcome the problem by proposing an alternative solution and without waiting for acceptance or rejection of the alternative solution by Council.
- The Council has a duty of care to existing and future owners to ensure that minimum habitable floor levels are achieved in order to minimise the risk of future flooding of the dwelling.

- Construction of a bund around the property could have consequential adverse drainage implications for adjacent properties.
- The proposed alternative of a bund would require the bund and its drainage to be maintained to a standard that would ensure flooding did not occur.
- The drainage of the bund would require the closing of a valve in the event of a storm and storm surge. As this requires human intervention, this would not be automatic if the owners of the property were to be absent at the time of this event.
- Any failure of the external drainage system could affect the operation of the drainage of the bund and attract liability to Council.
- The alternative solution contains no provision for the giving of any advice to potential future owners of the property with respect to the requirement for the continued maintenance of the proposed bund and its drainage system.
- Other than by placing a notation on Council's Rates Records of a similar nature to that in respect of the non-compliance with the minimum habitable floor level requirement of the Strategic Plan, Council would not be able to fulfil its duty of care to potential future owners of the property. The owners were hoping to avoid any notation which may adversely affect any future sale of the property. Failure on the part of Council to ensure potential future owners were forewarned of their responsibility for continued maintenance of the bund and its drainage system could be seen as a failure by Council in exercising its duty of care and hence attract liability to the Council.
- Notwithstanding that the proposed alternative solution might, if correctly constructed, maintained and operated, provide the owners with a mechanism for avoiding flooding of the dwelling, the fact remains that the dwelling has been incorrectly constructed at a level lower than that required and this needs to be recorded as being the result of the inspection. Rather than removing the need for Council to notate the Final Inspection Certificate with reference to non-compliance with the minimum habitable floor level requirement, the construction of the alternative solution would, in my view, require that Council expand the current notation to include a requirement for the continued maintenance of the proposal.
- The applicant failed to demonstrate how future owners would be protected without the need for any advice to be given to them regarding the continued requirement for maintenance of the bund and its drainage system, and without their acceptance of those requirements prior to purchase of the property.

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**G.S. Cornish**  
**Building and Development**  
**Tribunal Referee**  
**Date: 7 July 2004**



## **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:

The Registrar of Building and Development Tribunals  
Building Codes Queensland  
Department of Local Government and Planning  
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