



Building and Development Dispute Resolution Committees—Decision

Sustainable Planning Act 2009

Appeal Number:	34 - 14
Applicant:	Queensland Fire and Emergency Service (QFES)
Assessment Manager:	GMA Certification Group
Advice Agency:	QFES
Site Address:	6-8 Masters Street Newstead and described as Lot 2 on RP 200723 and Lot 120 on RP 9287 - the subject site

Appeal

The appeal is made pursuant to section 528 of the *Sustainable Planning Act 2009* (SPA) against the decision of the Assessment Manager to issue a Preliminary Approval for building work for construction of a carpark and unit building at the subject site (Application). The appeal was made on the basis that the Assessment Manager did not take into consideration the advice from the Queensland Fire and Emergency Services (QFES) regarding special fire services for a building having an effective height of more than 25 metres.

Date and time of hearing:	12 September 2014 at 11am
Place of hearing:	Level 16 Mineral House, 41 George Street Brisbane
Committee:	Peter Rourke – Chair Samantha Hall – Referee Ken Crase – Referee
Present:	David Brazel, QFES - Applicant's representative Steven McKee, QFES – Applicant's representative Geoffrey Mitchell, – Assessment Manager Troy Smyth, Architect, Ryall Smyth Architects Pty Ltd – Assessment Manager's representative

Decision:

The Building and Development Dispute Resolution Committee (Committee) in accordance with section 564 of the SPA **sets aside** the decision appealed against and directs the Assessment Manager to re-issue an amended Decision Notice reflecting the requirements of the BCA applicable to a building having an effective height greater than 25 metres.

The Committee has determined that the effective height of the building on the subject site is measured from RL 3.50 to RL 30.50. For the purposes of the Building Code of Australia (BCA), the “effective height” is 27 metres.

Background

The Building Code of Australia (BCA) defines “effective height” as:

“..the height to the floor of the top most storey (excluding the top most story if it contains only heating, ventilating, lift or other equipment, water tanks or similar units) from the floor of the lowest storey providing direct egress to a road or open space”.

The building on the subject site has a rise in storeys of 10 and consists of multiple classifications. Level 1 (ground level) has a Reduced Level (RL) of 3.50 metres (RL 3.5). Level 1 (upper) has a RL of 5.50 metres (RL 5.5). Level 10 has a RL of 30.50 metres. Neither the Applicant nor the Assessment Manager disputes that Level 10 is the top most storey for the purposes of determining the “effective height” of the building.

Both the Applicant and the Assessment Manager agreed that RL 3.5 and RL 5.5 are storeys for the purposes of the definition of “effective height”.

The building frontage is Masters Street, Newstead. Vehicular entry and access to the ground floor is available from RL 3.5. Pedestrian entry to the upper levels of the building is only available from RL 5.5 via stairs. There is no side or rear entry into the building.

This appeal relates to whether the “lowest storey” is RL 3.5 or RL 5.5, for the purposes of the definition of “effective height” in the BCA. No consideration has been given to the effectiveness or otherwise of the fire safety features that might be required in the building based on its “effective height”.

The “effective height” of the building is 27 metres if it is measured from RL 3.5 and 25 metres if it is measured from RL 5.5, both to the floor of level 10. When assessed against the deemed-to-satisfy requirements of the BCA, buildings with an “effective height” in excess of 25 metres are required to have more stringent fire safety measures, such as full sprinkler protection and stairwell pressurisation, than buildings with an “effective height” of 25 metres or less.

RL 3.5 consists of carparking, commercial premises, indoor communal areas and ancillary spaces such as lift foyers, pump rooms and sanitary facilities. From RL 3.5, internal entry to the upper levels is only available via the two lifts, which service all levels above and below RL 3.5. There is no direct connection, via internal stairs, between RL 3.5 and RL 5.5. Other by the lifts, persons who are on RL 3.5 who wish to gain entry to RL 5.5 and above, must exit RL 3.5 and enter the building via the stairs fronting Masters Street that lead to RL 5.5. There are numerous exits available on RL 3.5 depending upon where a person is located on that level. If located in the carpark, the exit would be via the vehicular driveway to Masters Street; if exiting the lifts or located within the indoor communal area, the exit would be via the foyer and the pedestrian entry; and if located within the commercial or outdoor communal areas, the exit would be directly onto Masters Street.

The Applicant is of the opinion that the “effective height” is measured from RL 3.5 (27 metres) while the Assessment Manager is of the opinion that the “effective height” is measured from RL 5.5 (25 metres).

The Assessment Manager issued a Decision Notice on 15 August 2014 which stated that the effective height, for the purposes of fire safety, was 25 metres.

The Applicant lodged an appeal against the Assessment Manager’s Decision Notice with the Committee’s Registrar on 28 August 2014.

A hearing for the appeal was held on Friday 12 September 2014. During the hearing, the Assessment Manager referred to the “Guide to the BCA” (the Guide), which provides a commentary to the BCA. The Guide states:

“Effective height measures the height of the building for safety purposes. Effective height is measured from the lowest storey providing direct egress to a road or open space (this will usually be the level at which the fire brigade would enter).....”

The difficulty in interpreting the meaning of “effective height” and applying it to the many forms a building can take is not always straightforward. This is evidenced by a survey undertaken by the Association of Accredited Certifiers on the interpretation of “effective height”. The survey was carried out following a 2012 decision of the New South Wales Supreme Court, which considered the meaning of “effective height” as defined in the BCA. That case is discussed below. The results of the survey indicated there was little consistency within the industry in applying the meaning of “effective height” to various building configurations.

Building certifiers are required by the *Building Act 1975* (BA) to assess development applications for building work against the building assessment provisions. These provisions include the BCA. It is not uncommon for a building certifier to refer to the Guide, the functional statements and the objectives of the BCA, none of which have legislative status under the BA, for assistance when applying the BCA.

The Assessment Manager is of the opinion that the keywords in the Guide commentary on “effective height” are, “for safety purposes” and the suggestion that the lowest storey having direct egress to a road or open space “will usually be the level at which the fire brigade will enter”. On that basis, the Assessment Manager believes RL 5.5 provides the safest means of egress and should therefore be considered to be the lowest storey providing direct egress to road or open space. This is because:

- There is no direct connection between RL 5.5 and RL 3.5 via interconnecting stairs. This is an important point because persons exiting the tower of the building in an emergency are forced to use the main exit stairs in the building, which discharge internally at RL 5.5 and then proceed through the foyer into the entry which connects to the Masters Street frontage by an external stair.
- No resident in the building travels more than 25 metres to a point of safety. This includes entry into the stair and to a point of egress at RL 5.5.
- The stairway discharging at RL 5.5 opens onto Masters Street, is fire-isolated, services the whole tower above that and is likely to be the entry point of the fire brigade.
- RL 3.5 has its own means of egress to the road or open space.
- The only level at which the fire brigade can enter and gain safe access to the whole building is at RL 5.5.

Of relevance to this appeal is a decision of the Supreme Court of New South Wales, namely ***The Owners – Strata Plan No 69312 v Rockdale City Council & Anor; Owners of SP 69312 v Allianz Aust Insurance NSWSC 1244*** (Supreme Court Case).

There are a lot of similarities between the building that was the subject of the Supreme Court Case and the building that is the subject of this appeal. In the Supreme Court Case, the similar question arose as to whether the “effective height” of the building was to be measured from a ground level floor which provided pedestrian access to the street via a flight of stairs at the entry to the building or a lower ground level floor which provided pedestrian access to the street via a car park driveway. The Court was asked to decide, amongst other things, the “effective height” of the specific building and in doing so, the Court considered the use of the word “egress” in the definition of “effective height” in the BCA and the weight to be given to the commentary in the Guide to the BCA with regard to the meaning of “effective height”. Both of these issues have significant impact on, and have been taken into consideration in, the Committee's decision in this appeal.

With regard to the use of the word “egress” in the BCA, building certifiers would more than likely associate that term with an “exit”. However, “exit” is defined in the BCA as a specific defined opening in the building, such as an “exit” doorway. The “exit” must be identified as such and it must be constructed to meet additional measures specified in the BCA that do not apply to non-exits. In general terms, the main entry/exit point in a carpark would not be an “exit”.

However, in the above mentioned Supreme Court case the Court decided that the literal meaning of “egress” in the BCA referred to "a point of exit, rather than an escape route" (in paragraph 74), which could include the main entry/exit point of a carpark. The Court also concluded that the existence of an internal stairway between the upper and lower ground levels was not essential to determining the lowest level of the building.

In its conclusion, the Supreme Court stated (in paragraph 112):

"That flows from construction of the words 'direct egress' as referring to a point of exit rather than a line of march from the top storey of the proposed Building and, to a lesser extent, from the internal connection, via stairs, between the Lower Ground Level and the Upper Ground Level on the Ground Floor. The existence of the internal stairway between the Upper and Lower Ground Levels reinforces, but is not essential to, characterisation of the vehicular entrance to, and exit from, the proposed Building (at RL 17.19) as a point of egress. That point was lower than the pedestrian entrance/exit at RL 18.19."

One significant difference between the building that was the subject of the Supreme Court case and the building on the subject site, is that there are no internal stairs connecting RL 3.5 and RL 5.5 in the building on the subject site, whereas there was an interconnecting stairway in the building that was the subject of the Court case.

However, the building on the subject site has a different point of connectivity between RL 3.5 and RL 5.5, being the lifts. In the Supreme Court case, the Court didn't consider the import of a lift because that building didn't have one that descended to the Lower Ground Level, however, a lift is still a point of egress, which connects the whole of the building.

With regard to the use of the Guide to assist in the interpretation of the meaning of “effective height”, the Court concluded that the text in the BCA is clear and capable of ready, reasonable application and subsequently ruled that the Guide was not relevant to a determination of the proper construction of the definition of "effective height" in the BCA.

Notwithstanding the Supreme Court case, the Committee considered the commentary on “Effective Height” in the Guide, which suggests that “*effective height*” measures the height of the building for safety purposes and that the lowest storey providing direct egress to a road or open space will usually be the level at which the fire brigade would enter.

With regard to safety, the “safety” requirements of the BCA are numerous and include active and passive fire safety systems in the building and the fire separation requirements, not just the means of exiting a building in a fire emergency. Whether or not these features are to be provided in a building, is influenced significantly by the effective height of the building.

With regard to the level at which the fire brigade would enter, the Applicant advised that RL 3.5 would be the level emergency services would enter in an emergency situation. The Committee was also advised that the Fire Indicator Panel, which enables the emergency services to determine the location of a fire incident, will be located at RL 3.5. RL 3.5 is also approximately the same level as the Masters Street frontage where emergency vehicles would arrive and park. The Applicant advised that emergency personnel would not enter the building via the stairs at RL 5.5 because it is likely that the occupants of the building exiting in an emergency situation will block the stairs. Instead, under normal QFES operational procedures, the lifts would be used at RL3.5 to gain access to the upper levels.

In the Committee's opinion, the Applicant is best placed to determine the most appropriate level at which the fire brigade would enter.

Material Considered

The material considered in arriving at this decision comprises:

1. The Decision Notice issued by the Assessment Manager dated 15 August 2014
2. Form 10 – Appeal Notice', grounds for appeal and correspondence accompanying the appeal lodged with the Committees Registrar on 28 August 2014
3. Verbal representations and additional information provided by the parties at the hearing
4. The decision of the Supreme Court of New South Wales, namely *The Owners – Strata Plan No 69312 v Rockdale City Council & Anor; Owners of SP 69312 v Allianz Aust Insurance NSWSC 1244* (Supreme Court Case)
5. *Sustainable Planning Act 2009* (SPA)
6. *Building Act 1975* (BA)
7. Volume 1 of the 2014 edition of the Building Code of Australia (BCA)
8. The Guide to the BCA (the Guide)
9. The letter dated 18 April 2013, and accompanying survey results, from the Association of Accredited Certifiers on the interpretation of "Effective Height".

Findings of Fact

The Committee makes the following findings of fact:

- The building work the subject of the development application for a preliminary approval contains special fire services. As such, it must be referred the QFES as an Advice Agency. The Advice Agency response, dated 28 July 2014 was given to the Assessment Manager.
- The Assessment Manager issued a Decision Notice granting a Preliminary Approval for building work on 15 August 2014.
- Level 10 has a RL of 30.50 metres. Neither the Applicant nor the Assessment Manager disputes that Level 10 is the top most storey for the purposes of determining the "effective height" of the building.
- The Masters Street frontage of the building is the only location at which emergency vehicles can park in the event of an emergency.
- An appeal was lodged by the Applicant with the Committee's Registrar on 28 August 2014.

Reasons for the Decision

- The lowest level providing a direct "exit" from the building to a road or open space is RL 3.5.
- Level 10 has an RL of 30.5 metres and is the top most storey for the purposes of determining the "effective height" of the building.
- The distance between RL 30.5 and RL 3.5 is 27 metres when measured at a point at the external walls of the building.
- Normal operational procedures of the QFES would see officers enter the building at RL 3.5.

- The lack of an internal stairway connection between RL 3.5 and RL 5.5 is not a reason for measuring the “effective height” from RL 5.5. In any event, internal connectivity throughout the building is provided by way of the lifts.
- The NSW Supreme Court case determined that the word “egress”, where used in the definition of “Effective Height”, referred to "a point of exit rather than an escape route" (in paragraph 74). RL 3.5 provides a point of egress from the building, not just by way of the driveway to the carpark but also pedestrian egress via the foyer and pedestrian entry for persons leaving the building by way of the lifts or directly onto Masters Street from the communal spaces and the commercial space.
- The Committee is of the view that when applying the reasoning given by the NSW Supreme Court to the building the subject of this appeal, the Lower Ground Level is the point of egress for the purposes of the definition of "effective height" in the BCA.

Peter Rourke
Building and Development Committee Chair
Date: 30 September 2014

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:

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