



Development Tribunal – Decision Notice

Planning Act 2016 Section 255

Appeal number:	22-012
Appellant:	Queensland Fire and Emergency Services
Respondent (assessment manager):	Geoffrey Mitchell of GMA Certification Group
Co-respondent (applicant):	PFD Food Services Pty Ltd (ACN 006 972 381)
Site Address:	36-44 Redden Street, Portsmith in the state of Queensland and described as Lot 707 on SP 198018 (the subject site)

Appeal

Appeal under section 229(1)(a)(ii) and Item 1 of Table 3 of Schedule 1 of the *Planning Act 2016* (Qld) (**Planning Act**) by the building advisory agency against a development approval for building work for proposed alterations to an existing tenancy.

Date and time of hearing:	8 July 2022 At the subject site – 8.30am to 9.45am At the Queensland Fire and Emergency Service (QFES) office 10.10am to 10.55am
Place of hearing (site inspection):	The subject site, being 36-44 Redden Street, Portsmith; and QFES Office, being 56 Sheridan Place, Cairns
Tribunal:	Michael Moran — Chair Christopher Finch — Member
Present:	At the subject site: Darren Marsh (QFES) - Appellant Michael Beck (QFES) - Appellant Geoffrey Mitchell (GMA) - Respondent Jade Barr - PDF Food Services At the QFES Office: Darren Marsh (QFES) - Appellant Michael Beck (QFES) - Appellant Geoffrey Mitchell (GMA) - Respondent

Decision:

The Development Tribunal (**Tribunal**), in accordance with section 254(2)(d) of the *Planning Act 2016* (Qld):

- **sets aside** the decision of the Respondent (assessment manager) to issue the development approval dated 14 March 2022; and
- **orders** the Respondent (assessment manager) to **remake** the decision, having regard to A2.2(3) of the National Construction Code of Australia 2019 Amendment 1 (**BCA**), within 90 days of receiving this decision notice.

Background

1. The QFES (the Appellant) is appealing the Development Application Decision Notice issued by the building certifier, Mr Geoffrey Mitchell of GMA Certification Group, (who is the Respondent / assessment manager) on 14 March 2022 in relation to the subject site at 36-44 Redden Street, Portsmith in the State of Queensland, on the grounds that the Development Application Decision Notice does not consider the assessment advice provided by QFES.
2. The applicant for the development application is PFD Food Services, the tenant of the subject site (who is also the Co-respondent).
3. As part of the development application, on 19 November 2021, a request for assessment was submitted by Mr Mitchell to QFES to provide advice on Special Fire Services for a 'fit-out'.
4. This request for assessment was prepared by Mr Mitchell and stated:
 - (a) the subject site was a Class 7b building, of Type C construction;
 - (b) the development was to be assessed against BCA 2019 Amendment 1; and
 - (c) the application involved bringing the building back into compliance with the BCA.
5. On 10 March 2022, QFES provided Mr Mitchell with its assessment.
6. QFES' assessment advised that both the Fire Mains (including booster and/or pumps) and the Fire Detection and Alarm Systems (Detection System) were not suitable because:
 - (a) the locations of the internal hydrants did not meet QFES operational requirements;
 - (b) the Hydrant Booster System did not comply with the requirements of AS2419.1 2005; and
 - (c) the proposed Fire Detection and Alarm System did not comply with the NCC AS 1670.1 2018.
7. On 14 March 2022, Mr Mitchell issued the Development Application Decision Notice, which is the subject of this appeal.
8. The Development Application Decision Notice stated that the application was assessed in accordance with the building assessment provisions as prescribed in the *Building Act 1975* (Qld) (**Building Act**), including the National Construction Code (BCA) 2019.1.
9. Under the heading '*RELATED APPROVALS*', the Development Application Decision Notice stated:

...

2. *Comply with the attached report of the Queensland Fire and Emergency Service reference No. 21-05940. with the following notations*
 - 1 *Internal hydrants are to comply fully with AS2419.*
 - 2 *The Existing Hydrant Booster System is considered lawful existing construction under s68 of the Building Act it [sic] performance is not to be diminished with the additional hydrant loads.*
 - 3 *The FDCIE is lawful existing construction and under s68 of the Building Act can remain in it [sic] existing location...*
 - 4 *The existing ASE is to be decommissioned.*
10. The Development Application Decision Notice further stated, under the heading 'APPLICATION SPECIFIC CONDITIONS':
 9. *Existing building alteration / addition. This building approval has been assessed pursuant to s68 of The Building Act 1975*
11. On 24 March 2022, QFES filed a Form 10 Notice to Appeal, seeking to appeal the Development Application Decision Notice.
12. The grounds for appeal detailed in QFES' Notice to Appeal were as follows:
 1. *Existing FER requirements were not included with the submission.*
 2. *Nominated floor area and volumes remain questionable.*
 3. *Fire protection for storage of excessive quantities of combustible materials has not been addressed.*
 4. *The DN references s68 of the Building Act 1975 (BA75) relating to Hydrant and Detection despite QFES advice against BCA. The DN 'Standard Conditions' indicates all references in the approval to the BCA and associated Australian Standard in force on the date of application not BA75 s68.*
 5. *Approved documents for critical systems were not provided to QFES until after the DN was issued...*
13. On 8 July 2022, a site inspection was carried out by the Tribunal at the subject site, followed by the hearing at the QFES office.

Jurisdiction

14. Schedule 1 of the Planning Act governs the matters that may be appealed to a tribunal.¹
15. Section 1(5) of Schedule 1 of the Planning Act provides that Table 3 of Schedule 1 of the Planning Act states the matters that may be appealed only to the Tribunal.
16. Item 1 of Table 3 of Schedule 1 of the Planning Act states that an appeal may be made 'against giving a development approval for building work to the extent the building work required code assessment against the building assessment provisions' (being those outlined in section 30 of the *Building Act 1975* (Qld)).²
17. The appeal is to be made by a building advisory agency for the development application related to the approval, who in this case was the QFES. The Respondent to the appeal is to be the assessment manager, who in this case is Mr Mitchell, and the co-respondent is to be the applicant, who in this case is PFD Food Services.
18. The Tribunal is therefore satisfied it has jurisdiction to determine the appeal pursuant to section 229(1)(a)(ii) and Item 1 of Table 3 of Schedule 1 of the Planning Act.

¹ Section 229(1)(a) of the Planning Act.

² Schedule 2 of the Planning Act, definition of 'building assessment provisions'.

Decision framework

19. The appeal is a Planning Act appeal, commenced after 3 July 2017 under section 229 of the Planning Act. As such, the appeal is to be heard and determined under the Planning Act.
20. The onus rests on the appellant to establish that the appeal should be upheld.³
21. The Tribunal must hear and decide the appeal by way of a reconsideration of the evidence that was before the person who made the decision appealed against.⁴
22. The Tribunal may (but need not) consider other evidence presented by a party with leave of the Tribunal.⁵
23. The Planning Act provides the Tribunal with broad powers to inform itself in the way it considers appropriate when conducting a tribunal proceeding and may seek the views of any person.⁶
24. The Tribunal may consider other information that the Registrar asks a person to give to the Tribunal.⁷
25. The Tribunal is required to decide the appeal in one of the ways mentioned in section 254(2) of the Planning Act.

Material considered

26. The material considered in arriving at this decision comprises:
 - (a) Form 10 Notice of appeal, grounds for appeal and correspondence accompanying the appeal lodged with the Tribunals Registrar on 24 March 2022;
 - (b) Ignis Engineering Certificate dated 22 October 2019 - Kingspan Composite Material Compliance endorsed with GMA File Ref 20213286;
 - (c) CA Architects Pty Ltd Fire Safety Engineering Report 2000/Q101 R2 dated February 2000;
 - (d) Ferm Engineering Fire Safety Engineering Report for 34 Redden Street, dated 21 February 2008;
 - (e) DA Form 2 Development Application by PFD Food Services for the premises at 36-40 Redden Street, Portsmouth;
 - (f) Development Application decision notice of Geoffrey Mitchell dated 14 March 2022;
 - (g) Evidence of Suitability Report of Ferm Engineering File ref F21121 endorsed with GMA File Ref 20213286, dated 23 September 2021;
 - (h) Request for QFES Assessment signed by Geoffrey Mitchell dated 19 November 2021;
 - (i) QFES Assessment Advice dated 10 March 2022;

³ Section 253(2) of the Planning Act.

⁴ Section 253(4) of the Planning Act.

⁵ Section 253(5)(a) of the Planning Act.

⁶ Section 249 of the Planning Act.

⁷ Section 246(1) of the Planning Act.

- (j) QFES Inspection Advice Ref 21-5940 dated 31 March 2022;
- (k) Email from Michael Beck (Queensland Fire and Emergency Service) received 30 May 2022 and enclosures;
- (l) Email from Geoffrey Mitchell of GMA Certification Group dated 4 August 2022 at 4:15pm, including the following enclosures:
 - (i) GMA Certification Group Information Notice to QFES dated 4 April 2022;
 - (ii) Form 11 Certificate of Occupancy signed by Geoffrey Mitchell dated 26 April 2022;
- (m) Email from Geoffrey Mitchell of GMA Certification Group dated 4 August 2022 at 5:02pm which enclosed Ferm Engineering letter to GMA Certification group dated 4 April 2022;
- (n) Queensland Fire and Emergency Service Appeal Summary dated 4 August 2022;
- (o) Ferm Engineering Drawings:
 - (i) Drawing EEL-100
 - (ii) Drawing F-001
 - (iii) Drawing F-100
 - (iv) Drawing FA-100
 - (v) Drawing FH-100
- (p) Space Frame Drawings:
 - (i) Drawing 11369 100 B
 - (ii) Drawing 11369 101 B
 - (iii) Drawing 11369 200 E
 - (iv) Drawing 11369 201 F
 - (v) Drawing 11369 202 E
 - (vi) Drawing 11369 203 B
 - (vii) Drawing 11369 204 D
 - (viii) Drawing 11369 205 B
 - (ix) Drawing 11369 206 D
 - (x) Drawing 11369 208 B
 - (xi) Drawing 11369 300 A
 - (xii) Drawing 11369 301 A
 - (xiii) Drawing 11369 500 A
- (q) CMG Consulting Engineers Drawings:
 - (i) Ref LG.07 02 AMDT C
 - (ii) Ref LG.07 07 AMDT B
- (r) CA Architects Pty Ltd Drawings:
 - (i) WD04
 - (ii) WD05

(s) Email from Andrew Howe, National Building & Engineering Manager, PFD Foods dated 17 October 2023.

Findings of fact

27. The Tribunal makes the following findings of fact:

Building Code of Australia

28. Section 30 of the Building Act sets out the laws and documents to be considered in assessing a development application, which are known as building assessment provisions. These include Chapter 3 and 4 of the Building Act as well as the Building Code of Australia (**BCA**).
29. Building assessment work, being the assessment of a building development application, must comply with the building assessment provisions in force when the application was approved.⁸
30. The assessment of the building development application by Mr Mitchell therefore required an assessment of both the Building Act and the BCA.
31. Compliance with the BCA is achieved by complying with the governing requirements of the BCA and the *Performance Requirements*, where *Performance Requirements* are satisfied by either a *Performance Solution*, a *Deemed-to-Satisfy Solution* or a combination of both.⁹
32. A *Performance Solution* is achieved by demonstrating either compliance with all relevant *Performance Requirements*, or the solution is at least equivalent to the *Deemed-to-Satisfy* provisions.¹⁰
33. Where a *Performance Requirement* is proposed to be satisfied entirely by a *Performance Solution*, the following steps must be undertaken:
- (a) *Prepare a performance-based design brief in consultation with relevant stakeholders.*
 - (b) *Carry out analysis, using one or more of the Assessment Methods listed in (2), as proposed by the performance-based design brief.*
 - (c) *Evaluate results from (b) against the acceptance criteria in the performance-based design brief.*
 - (d) *Prepare a final report that includes—*
 - (i) *all Performance Requirements and/or Deemed-to-Satisfy Provisions identified through A2.2(3) or A2.4(3) as applicable; and*
 - (ii) *identification of all Assessment Methods used; and*
 - (iii) *details of steps (a) to (c); and*
 - (iv) *confirmation that the Performance Requirement has been met; and*
 - (v) *details of conditions or limitations, if any exist, regarding the Performance Solution.*¹¹

⁸ Section 36 of the Building Act.

⁹ Part A2.0 and A2.1 of the BCA.

¹⁰ Part A2.2(1) of the BCA.

34. Notwithstanding the above, section 68(3) (being a building assessment provision found in Part 4 of Chapter 4 of the Building Act)¹² provides that for alterations to an existing building or structure, an assessment manager must not approve the building development application unless they have decided the alterations do not unduly reduce:
- (a) the existing level of fire protection for persons accommodated in, or using, the building or structure;
 - (b) the existing level of resistance to fire of the building or structure;
 - (c) the existing safeguards against spread of fire to adjoining buildings or structures;
 - (d) the existing level of emergency egress from the building or structure.

Size of fire compartment

35. Section E of the BCA requires compliance with different fire mechanisms for fire protection, which are dependent upon (among other things) the size of a *fire compartment* within a building.
36. A *fire compartment* is defined under schedule 3 of the BCA to mean:
- (a) the total space of a building; or
 - (b) when referred to in—
 - (i) the Performance Requirements — any part of a building separated from the remainder by barriers to fire such as walls and/or floors having an appropriate resistance to the spread of fire with any openings adequately protected; or
 - (ii) the Deemed-to-Satisfy Provisions — any part of a building separated from the remainder by walls and/or floors each having an FRL not less than that required for a fire wall for that type of construction and where all openings in the separating construction are protected in accordance with the Deemed-to-Satisfy Provisions of the relevant Part.
37. Part C2.2 of the BCA sets out that any *fire compartment* in a class 5, 6, 7, 8 or 9 building must not exceed the maximum floor area or volume set out in Table C2.2.
38. 'Volume' is not defined in the BCA, however using its ordinary meaning, it is defined as the amount of space that is contained within an object or solid shape.¹³
39. It is not in dispute that the building the subject of this appeal is a Class 7b building of Type C Construction.¹⁴ Table C2.2 of the BCA therefore provides for the following maximum *fire compartment* sizes:
- (a) Max —2 000 m²
 - (b) Max volume—12 000 m³

¹¹ Part A2.2(4) of the BCA.

¹² Section 30 of the *Building Act 1975* (Qld).

¹³ Cambridge Dictionary, definition of "volume".

¹⁴ Request for QFES Assessment signed by Geoffrey Mitchell dated 19 November 2021; QFES Assessment Advice dated 10 March 2022; Development Application decision notice of Geoffrey Mitchell dated 14 March 2022.

40. The *fire compartment* relevant to this appeal is that shown in red in Ferm Engineering Drawing F-001 and labelled as "F04". This area comprises a freezer and anteroom which have been constructed within the existing building structure.
41. The freezer in fire compartment F04 has been constructed using cold room panels along the walls of the existing structure and as a suspended ceiling to create a 'freezer room' within the existing building structure.
42. Ferm Engineering identifies, and Mr Mitchell relies upon, fire compartment F04 having a volume of 11,871m³.¹⁵ However it is unclear how this measurement has been determined.
43. The relevant drawings provide the following measurements for fire compartment F04:
 - (a) Ferm Engineering Drawing F-001 lists a floor area of 1997m².
 - (b) Space Frame Drawing 204 D lists the height to the underside of the suspended freezer roof as 7.1m.
 - (c) Space Frame Drawing 200 E provides a fire compartment schedule which suggests the volume of compartment D (being F04) is 14,390m³.
 - (d) Ferm Engineering Drawing EEL-100 lists a volume of 12,564m³.
44. The above measurements suggest that while the floor area is below the maximum fire compartment size detailed in Table C2.2, the volume of the freezer compartment in F04 exceeds 12,000m³, and therefore exceeds the maximum fire compartment size provided for in Table C2.2 of the BCA.
45. This is notwithstanding it appears Mr Mitchell relied on the volume of fire compartment F04 calculated based on the height to the underside of the suspended freezer roof, and not to the roof of the building structure itself. Taking into consideration the height to the roof itself, the volume of fire compartment F04 would far exceed the limit of 12,000m³ in Table C2.2 of the BCA.
46. As the size of the fire compartment in fire compartment F04 exceeds that listed in Table C2.2 of the BCA, to demonstrate compliance with Sections C and E of the BCA, a *Performance Solution* was required and would need to consider the type of construction, occupancies of excessive hazard and the impact on fire services. It would not have been achievable by a *Deemed-to-Satisfy* solution as the volume exceeded Table C2.2.

QFES Advice

47. In its assessment of the referral for the building development approval by Mr Mitchell, QFES stated that it was evident from the design proposed that fire compartmentation had been provided to negate or reduce the requirement for fire protection systems in the building.¹⁶
48. In its assessment, QFES further stated:
 - (a) the drawings provided indicated that the fire detection and alarm system installed in the building were to be removed;
 - (b) the locations of the internal hydrants did not meet QFES operational requirements and did not comply with the requirements of AS2419.1 2205;

¹⁵ Ferm Engineering letter to GMA Certification group dated 4 April 2022 and Mr Mitchell's email of 4 August 2022.

¹⁶ QFES Assessment Advice dated 10 March 2022.

- (c) the cold room construction materials and refrigerants pose potential fire risk;
 - (d) that Clause E1.5 sprinklers should be considered to provide initial fire containment / suppression and allow for safer fire brigade intervention;
 - (e) firefighters are unlikely to enter a building with the potential fire load and constriction characteristics to access internal hydrants in the locations provided;
 - (f) the proposed Fire Detection and Alarm System did not comply with the NCC AS 1670.1 2018; and
 - (g) the following items were among those 'not suitable':
 - (i) location and suitability of booster connections and enclosures;
 - (ii) location and suitability of internal and roof hydrants and external hydrants;
 - (iii) location and operation of main fire indicator panel, sub-indicator panels, mimic panels, local alarm bells and directional signs.
49. In its inspection report dated 31 March 2022, QFES attached a notice which identified whether the referral agency aspects complied with the building development approval. This notice stated that:
- (a) QFES recommends that BCA Clause E1.10 should be considered;
 - (b) Fire Systems such as a (Sprinkler System and Suitable Fire Hydrant System) should be installed to reduce the risk of managing hazards associated with dire or hazardous material incidents within the facility;
 - (c) the Hydrant Booster System does not comply with the requirements of AS2419;
 - (d) the internal hydrants installed to provide hose coverage to the building are in locations considered not suitable for fire service operations; and
 - (e) compliance with the building development approval does not reference relevant Building Act sections or BCA edition.
50. While QFES is an advice agency, any assessment by QFES is not required to be adhered to when assessing a development application. However there remains a requirement to assess the building assessment provisions of the BCA.
51. Paragraph 5 of the Development Application Decision Notice states that the Fire Detection Control and Indicating Equipment (**FDCIE**) is lawful existing construction under section 68 of the Building Act and can remain in place.
52. The Development Application Decision Notice further states, at paragraph 9, that the building approval has been assessed pursuant to section 68 of the Building Act.
53. Mr Mitchell's Information Notice to QFES dated 4 April 2022 (**Notice of Reasons**) noted the general comments of QFES in its inspection report, and stated that QFES' comments had been considered.
54. However, Mr Mitchell's Notice of Reasons further stated:
- (a) As a general comment:

"In relation to the consideration of the application of E.10 I have...decided that the hazards presented do not require additional fire safety systems over and above that which has been supplied."

(b) In relation to the Hydrant Booster:

"Under s68 Building Act 1975 (BA) I do not require the booster assembly to be altered as I am satisfied that leaving the assembly in its current location there is no reduction in the existing level of fire safety in the building."

(c) In relation to the internal hydrants:

"Under s68 BA, I am satisfied there is no reduction in the existing level of fire safety in the building..."

(d) In relation to the fire detection and alarm systems:

"...assessment has been undertaken in accordance with s68 BA...I have required new installation to comply with NCC2019.1."

55. In assessing the development application, Mr Mitchell considered the application of section 68 of the Building Act. However, Mr Mitchell failed to consider the BCA, and in particular how compliance with the *Performance Requirements* in Section E of the BCA could be achieved by a *Performance Solution*.

Reasons for the decision

56. As required by the Building Act, assessment of a development application requires a consideration of building assessment provisions including both the Building Act and the BCA.¹⁷ Reliance cannot solely be placed on the provisions of the Building Act.

57. Mr Mitchell relied solely upon section 68 of the Building Act and stated in his Notice of Reasons that there was no reduction in the existing level of fire safety in the building. Mr Mitchell's approach is incorrect because it does not:

(a) consider the building assessment provisions of the BCA;

(b) align with the advice provided by QFES.

58. Section 68(3)(b) of the Building Act provides that the building development application must not be approved unless the alterations do not unduly reduce the existing level of resistance to fire of the building or structure.

59. In its assessment, QFES stated that:

(a) the building work proposed to be undertaken would reduce the level of fire protection in the building;

(b) the fire detection and alarm system installed in the building was to be removed, and the proposed Fire Detection and Alarm System did not comply with the BCA. This is confirmed at paragraph 5 of the Development Application Decision Notice, which states that the existing ASE is to be decommissioned.

60. As noted by QFES, the removal of the ASE and installation of the proposed Fire Detection and Alarm System would unduly reduce the existing level of resistance to fire of the building or structure and Mr Mitchell therefore should not have approved the application in accordance with section 68 of the Building Act.

¹⁷ Section 30 of the Building Act.

61. Further to this, and in light of the findings of fact above, fire compartment F04 at the subject site exceeds the maximum volume for a fire compartment detailed in Table C2.2 of the BCA, being above 12,000m³.
62. In order to demonstrate compliance with the *Performance Requirements* in the BCA, a *Performance Solution* was required and the steps outlined in Part A2.2(4) of the BCA were required to be undertaken.
63. Mr Mitchell's assessment failed to undertake the steps detailed in Part A2.2(4) of the BCA and failed to demonstrate any *Performance Solution* for fire compartment F04 to achieve compliance with Section E of the BCA.
64. In these circumstances, the development application the subject of this appeal required consideration of how the *Performance Solution* satisfies the *Performance Requirements* under Section E of the BCA and an assessment undertaken in line with the requirements of A2.2(3). An assessment of the development application required an evaluation of the efficacy of the hydrants, boosters and sprinklers within fire compartment F04.
65. The Development Application Decision Notice did not demonstrate that the building work meets the *Performance Requirements* of the BCA, and failed to properly consider the building assessment provisions of the BCA.
66. Accordingly, the Tribunal:
 - (a) considers that the appellant has satisfied the onus of establishing that the appeal should be upheld;
 - (b) sets aside the decision of Mr Mitchell to issue the development approval dated 14 March 2022; and
 - (c) orders Mr Mitchell to remake the decision, having regard to A2.2(3) of the BCA.

Michael Moran
Development Tribunal Chair

Date: 9 April 2024

Appeal rights

Schedule 1, Table 2, item 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.

The following link outlines the steps required to lodge an appeal with the Court.

<http://www.courts.qld.gov.au/courts/planning-and-environment-court/going-to-planning-and-environment-court/starting-proceedings-in-the-court>

Enquiries

All correspondence should be addressed to:

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