



Development Tribunal – Decision Notice

Planning Act 2016, section 255

Appeal Number:	32-18
Appellant:	Queensland Fire and Emergency Services (QFES)
Respondent:	Don Grehan – Pacific BCQ
Concurrence Agency: (if applicable)	N/A
Site Address:	9 Leo Alley Road Noosaville and described as Lot 251 on CP862399 – the subject site

Appeal

Appeal by Queensland Fire and Emergency Services (QFES) as an advice agency under Schedule 1, table 3, item 1 of the *Planning Act 2016* for not accepting QFES advice regarding installation of a fire hydrant booster assembly.

Date and time of hearing:	31 October 2018 at 2pm
Place of hearing:	Mineral House Meeting rooms, 41 George Street Brisbane
Tribunal:	James Dunstan – Chair Mark Anderson – Member Anne-Maree Ireland - Member
Present:	Chris White – Appellant Peter Kilfoyle – Appellant Ian Maddigan - Appellant Don Grehan – Respondent (Assessment Manager)

Decision:

The Development Tribunal (Tribunal), in accordance with section 254 of the *Planning Act 2016* (PA) **confirms** the assessment manager's decision to issue a development approval setting aside the referral agency recommendations for the installation of a hydrant booster assembly subject to the following conditions.

1. Annual testing of the street hydrants must be undertaken to ensure the minimum flow and pressure of 20L/s at 200kPa is maintained;
2. Where the pressure and flow is not maintained to the minimum requirements identified above, additional fire hydrant water supplies will need to be provided. Where this is required, a development approval and referral process will be required to be undertaken.

Background

A hearing was conducted at Mineral House, 41 George Street Brisbane at 2pm on 31 October 2018. During the hearing, there were two main issues to be reviewed by the tribunal

- Establishment of jurisdiction regarding the assessment manager decision dated 5 February 2018; and
- The assessment manager decision to not accept the Queensland Fire and Emergency Services (QFES) advice through the subsequent change decision issued 13 July 2018.

An application for certification of a building was made on 29 January 2018. The Queensland Fire and Emergency Services (QFES) was a referral agency for the application under Schedule 9, Table 1, Division 3 of the *Planning Regulation 2017*. The jurisdiction of this referral is as an advice agency. An application for a referral agency assessment was lodged to QFES on the 29/1/18, submission reference S00019196.

The assessment manager issued a decision notice dated 5 February 2018 for the works to commence. This decision was issued prior to the QFES referral agency assessment being provided, which was dated 22 February 2018.

Section 83(1)(d)(i) (**'section 83'**) of the *Building Act 1975* states that the Assessment Manager cannot give a decision on the application until the referral agency has given its referral agency response or the referral agency response period has ended.

The decision by the Assessment Manager dated 5 February 2018 predates the referral agency response of the QFES dated 22 February 2018 and the ending of the 15 business day referral agency response period.

Therefore the initial decision is in conflict with the provisions of the Building Act 1975 requirements for issuing a decision. Had the decision been issued after the advice agency response was provided, there would be no issue with it complying with the Regulations

The subsequent change decision is then brought into question as a change application cannot be made on a decision that is not in accordance with the legislation.

The Tribunal had concerns as to whether the decision constituted a valid decision such as to enliven the jurisdiction of the Tribunal (**'the jurisdiction issue'**).

On 29 October 2018, the Tribunal Registry at the request of the Tribunal Chair sent information to the parties by email and invited written submissions in respect of the jurisdiction issue.

A response was received by the private certifier who submitted that there was no issue as to the validity of the decision as section 83 is an offence provision and does not contain a provision that invalidates the decision of the building certifier.

The hearing proceeded on 31 October 2018 at which time the jurisdiction issue was discussed further. At the hearing, the Tribunal advised the parties that it considered the decision by the Assessment Manager did not constitute a valid approval given the non-compliance with section 83.

The Tribunal considered and raised with the parties, section 250 of the PA which provides:

250 Tribunal directions or orders

A tribunal may, at any time during tribunal proceedings, make any direction or order that the tribunal considers appropriate.

Examples of directions—

- *a direction to an applicant about how to make their development application comply with this Act*

- a direction to an assessment manager to assess a development application, even though the referral agency's response to the assessment manager was to refuse the application

The Tribunal proposed to the parties that it issue a direction under section 250 of the PA to the assessment manager to provide a new decision and that decision would be the subject of the Appeal. Both the Assessment Manager and the QFES agreed that such a direction was permitted by section 250 and was appropriate in the circumstances to avoid undue delay to the hearing and appeal process.

The Tribunal then issued a direction under section 250 that the assessment manager, issue a valid decision in accordance with section 83 of the *Building Act 1975*, being a decision that is issued after the referral agency advice has been given. It is considered that as there is no timeframe applicable to an advice agency response, the advice dated 22 February 2018 is the current, valid referral agency response

In accordance with the Tribunal's direction, the Assessment Manager made a new decision on 1 November 2018 and provided it to the Tribunal Registry on 2 November 2018 (which was then provided that same day to the parties and the Tribunal).

Further directions were made by the Tribunal allowing QFES 10 business days to provide any written submissions on the decision and the Assessment Manager 5 business days to provide any written submissions in response to the submission by QFES.

Following the establishment of jurisdiction and issuance of the direction to the assessment manager, the appeal was further heard through representations by both parties at the hearing, and through written submissions after the decision dated 1 November 2018 was provided by the assessment manager.

QFES lodged an appeal to the Tribunal Registry on 27 July 2018, appealing the assessment manager's decision to issue a development approval setting aside the advice that a fire hydrant booster assembly be installed to the site for a compartment exceeding 2000m².

The following representations were made at the hearing and by written submissions following the hearing regarding the fire hydrant booster assembly and subject site:

Appellant – QFES

- The assessment manager had issued the original approval before the referral agency advice had been provided;
- The assessment manager issued a decision prior to receiving the QFES advice;
- The assessment manager had failed in their obligation to provide a copy of the approval documentation to QFES until the date of the change approval and request for inspection booking;
- AS2419.1-2005 requires a hydrant system to meet local fire brigade requirements;
- AS2419.1-2005 requires installation of a booster to hydrant systems exceeding 2000m²;
- Section 22 of the *Planning Regulation 2017* requires the assessment manager to assess and apply QFES policies which are available on the QFES website;
- The certifier has breached the code of conduct requirements under part 7 – A certifier must when performing building certifying functions, apply all relevant building laws; regulations, safety standards and guidelines reasonably without favour;
- Request that the assessment manager identify legislation that allows them to set aside the referral agency response;
- Request the certifier confirm the construction of the building for fire rated construction under part C1 of the BCA.

Assessment Manager

- The application for approval is for a minor extension to the office only and does not apply to the entire building. The works are minor in nature;
- There are existing fire brigade approved drawings dated 16 January 1991, reference NB/A 53830 showing an area of 2390m² with no onsite hydrants being required;
- There is an existing lawful approval for the building under Noosa Council file 1143/90 issued 21 February 1991;
- The existing building has a lawful certificate of classification issued 13 February 2002 for the approval reference 1143/90;
- The existing building can be assessed under sections 61 and 68 of the *Building Act 1975* as minor works not impacting or reduce the general safety and structural standards;
- Assessment of the existing building/structure is not relevant to the advice agency response provided by QFES regarding the fire hydrant booster being required;
- The building is provided with sufficient fire hydrant coverage from the street hydrants;
- The street hydrants can provide the required flow and pressures under AS2419.1-2005;
- A previous decision of the former Building and Development Dispute Resolution Committee (QFES vs All Construction Approvals), reference 35-12 provided support to the position that street hydrants were sufficient without a booster assembly;
- Section 83 of the *Building Act 1975* is an offence provision and is not reason to consider the original approval not a valid decision.

Jurisdiction

The Development Tribunal has determined jurisdiction to hear the appeal in accordance with Schedule 1, Table 3, Item 1 of the PA.

Decision framework

It is noted that

- The onus rests on the appellant to establish that the appeal should be upheld (s253(2) of the PA);
- The tribunal is required to hear and decide the appeal by way of a reconsideration of the evidence that was before the person who made the decision appealed against (s253(4) of the PA);
- The tribunal may nevertheless (but need not) consider other evidence present by a party with leave of the tribunal or any information provided under s246 of the PA (pursuant to which the registrar may require information for tribunal proceedings);
- The tribunal is required to decide the appeal in one of the ways mentioned in s254(2) of the PA.

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 Tribunals Registrar on 27 July 2018.
2. The *Planning Act 2016 (PA)*;
3. The *Planning Regulation 2017 (PR)*;
4. The *Building Act 1975 (BA)*;
5. The *Building Regulation 2006 (BR)*;

6. Common Planning Terms, Published by the Department of State Development, Manufacturing, Infrastructure and Planning (DSDMIP);
7. The explanatory notes to the Planning Bill 2015;
8. The Decision Notice issued by Pacific BCQ dated 5 February 2018;
9. The Change Decision Notice issued by Pacific BCQ dated 13 July 2018;
10. The Decision Notice issued by Pacific BCQ dated 2 November 2018;
11. The Referral Agency response issued by QFES dated 22 February 2018;
12. The amended Referral Agency response issued by QFES dated 22 February 2018;
13. Certificate of Classification issued by Noosa Council dated 13 February 2002;
14. Hydraulic services drawings by Ian Bradford Plumbing Consultants ref# 15081, Sheets 1 and 6 dated 08 September 2015;
15. Architectural drawings for Noosa Engineering and Crane Hire Sheets A0.00, A1.01, A1.02, A1.10-A1.12, A2.01, A2.10 & A2.11 Revision F dated 09 April 2016;
16. AS2419.1-2005 Fire Hydrant Installations, System design, installation and commissioning
17. The Building Code of Australia, Volume 1, Amendment 1, 2016;
18. Queensland Fire and Emergency Services guideline FFE 01 regarding hydrant booster systems for compartments exceeding 2000m²;
19. Code of Conduct for building certifiers effective 14 November 2013;
20. Verbal submissions from all parties at the hearing;
21. Previous Building and Development Dispute Resolution Committee Appeal Decision 35-12;
22. Email correspondence dated 30 October 2018 regarding jurisdiction from Don Grehan;
23. Email submission dated 15 November 2018 provided by Peter Kilfoyle;
24. Email submission dated 5 December 2018 provided by Don Grehan;

Findings of Fact

Jurisdiction of hearing and direction

The Tribunal determined that the Assessment Manager's decision of 5 February 2018 was not a valid decision given that it was issued contrary to section 83 of the *Building Act 1975*.

The Tribunal considered that it could issue a direction under section 250 of the PA for the Assessment Manager to issue a new decision to comply with the requirements of the *Building Act 1975*. The change required is administrative only and is a decision date change. This is a minor, administrative correction to make the decision compliant with the requirements of the legislation and within the powers outlined under section 250.

A valid decision was issued by the Assessment Manager on 1 November 2018. This is the decision which is being appealed.

Consideration of Code of Conduct

QFES raised the building certifier's code of conduct. Although this is given weight under legislation, a breach of the code of conduct is a regulatory matter for the Queensland Building

and Construction Commission and is not within the jurisdiction of the Tribunal to consider or apply.

Application of Referral Agency Response and application of QFES policies

The PA, section 54(2) defines a referral agency as follows:

A referral agency, for a development application, is—

(a) the person prescribed by regulation as a referral agency for applications of that type; or

(b) if that person's functions have been devolved or delegated to another person—the other person; or

(c) if the Minister has decided that a person is a referral agency under section 48(7)—that person.

It then further defines the terms Advice Agency and Concurrence Agency

Advice agency means a referral agency that only has power to give advice.

Concurrence agency means a referral agency that is not an advice agency.

The DSDMIP further explains the term “advice agency” as follows:

An advice agency is a referral agency that only has the power to give advice. Unlike other referral agencies, an advice agency cannot direct the assessment manager to carry forward certain conditions on a development approval or refuse an application.

Schedule 9, Division 3, Table 1 of the PR, requires that QFES are a referral agency for fire safety systems generally. Subsection 3 of the table regarding limitations on referral agency's powers states “Referral agency may give advice only”.

Therefore, as per the limitations imposed in the Regulation, QFES can only give advice, and cannot direct an assessment manager to carry forward conditions.

QFES requires under their internal policies and guidelines that fire hydrant booster connections be provided for compartments exceeding 2000m². QFES provided in a submission that the assessment manager must give consideration to their policies.

Section 22 of the PR, applies only to the referral agency regarding application of referral agency policies, and does not apply to an assessment manager.

Therefore, as QFES has powers as an advice agency only, and section 22(2)(b) applies only to the referral agency assessment, the assessment manager has no obligation to give the same consideration in their assessment.

Assessment of Fire Hydrant and Booster requirements

The approval granted by the assessment manager is for a small extension to the office located to the south of the existing factory. The site is fronted on two sides by two roads Sanders Street and Leo Alley Road. The extension is approximately 130m² and the total floor area is approximately 2430m².

As shown on the hydraulic drawings, there are 2 street hydrants available to service the site and full building coverage is demonstrated from these hydrants. It is understood that adequate flow and pressure is available for both hydrants to operate simultaneously as feed hydrants (10l/s @ 200kPa). It is noted that at the time of this decision no flow and pressure tests have been provided. It is the responsibility of the owner and assessment manager to obtain testing to certify that the hydrants can provide the required flow and pressures.

QFES issued a referral agency response dated 22 February 2018 documenting the fire hydrant system as non-compliant stating:

“The street hydrant(s) nominated do not provide sufficient coverage in accordance with the requirements of AS2419.

The Building Code of Australia (Part E1.3) requires fire hydrant system design must meet the operational requirements of the attending fire service. QFES requires boosted onsite hydrants where a single street hydrant doesn't cover a fire compartment over 2000m² in size.”

The Building Code of Australia, Volume 1, Clause E1.3 provides the deemed to satisfy requirements for protection of buildings by Fire Hydrants.

Clause E1.3 (a) states:

- (a) *A fire hydrant system must be provided to serve a building –*
 - i. *having a total floor area greater than 500m²; and*
 - ii. *where a fire brigade is available to attend a building fire.*

The subject site is deemed to require hydrants as it exceeds 500m² and there is a brigade available to attend a fire.

Clause E1.3 (b) states:

- (b) *The fire hydrant system –*
 - i. *Must be installed in accordance with AS2419.1, except a class 8 electricity network substation need not comply with clause 4.2....*

Therefore the subject building is required to have a fire hydrant system installed complying with AS2419.1-2005.

The scope AS2419.1-2005 is to set out minimum standards for hydrant systems to protect buildings. Section 1.1 states *“This standard also applies to street fire hydrants used in lieu of onsite fire hydrants or to supplement the coverage afforded by street fire hydrants”*.

The objective is to provide minimum requirements to allow the fire service to minimize fire spread and augment efficient extinguishment. Clause 1.2 states

The objective of this Standard is to specify minimum requirements for the design, installation and commissioning of fire hydrant systems which—

- (a) will augment the efficient extinguishment of fire within the boundaries of the site;*
- (b) can be utilized to minimize fire spread within or between one property or building and another;*
- (c) can be used by trained firefighting personnel; and*
- (d) are compatible with the local fire brigade's firefighting equipment.*

Assessing the requirements applicable to this building under the standard, the following applies for this building:

An extract from clause 2.1.1 states: *“Where street fire hydrants provide coverage, flow rates and residual pressures in accordance with Sections 2, 3 and 4, they may be used to provide total or partial coverage provided a fire brigade booster assembly is not incorporated in the system”*.

Assessing the site specific criteria for required system performance under Section 2.3, the minimum system performance requirements for the building. The subject building is a mixed class 5 and class 8 exceeding 500m² but less than 5000m² unsprinklered, table 2.1 and 2.2 requirements are as follows:

Table 2.1 – Minimum 2 Fire hydrants operating simultaneously

Table 2.2 – Minimum 10L/s at 200kPa per hydrant operating (Total 20L/s)

Providing the street water main can support the required flow and pressure, as it is sourced from a town main, there is no requirement for additional onsite water storage or supply required under section 4 of the standard.

Clause 2.1.2 regarding a booster assembly states “*Where a fire brigade booster assembly is required, it shall comply with the requirements of Section 7*”.

Section 3 of the standard provides the requirements for location and other provisions for the hydrant system.

This clause nominates connections need to be compatible with local brigade equipment, but only the connections. In addition to this, an extract from the forward statement provides “*fire brigade equipment and firefighting procedures may vary between and within states and should be considered in the fire hydrant system design*”.

Clause 3.2.2.1 provides the requirements for external fire hydrants in general. It provides two distinctly separate terms in this provision, *External on site fire hydrants* and *Street fire hydrants*.

The clause states: “

Street fire hydrants may be considered as external (feed) fire hydrants to provide total or partial coverage provided they comply with the requirements of this Standard for flow, pressure and location, with either a single or double outlet fire hydrant being acceptable in this case.

Street fire hydrants may not be used to provide coverage where a fire brigade booster assembly is incorporated in the system.

When measuring the length of laid hose from a fire brigade pumping appliance, the appliance shall, for calculation purposes, not be located closer than 10 m to the building it is protecting”.

The clause requires when measuring distances from a street hydrant, an appliance is not located closer than 10m to the building.

Under clause 3.2.2.2, coverage is then measured using a maximum permitted hose length from the appliance of 60m for hose plus and additional 10m of hose stream with a minimum 1m of hose extending into any served room.

Section 4 of the standard provides for acceptable sources of water. As per clause 4.1.1, a town water main is considered an acceptable source of water. Providing the water main can supply the required minimum flow and pressures determined under clause 2.3.1, no additional water supply or storage is required.

The requirements for a fire brigade booster assembly are documented under Section 7 of the standard.

Clause 7.2 outlines when a booster assembly is required. It states:

“*A fire brigade booster assembly shall be fitted to each fire hydrant system where—*

- (a) internal fire hydrants are installed;*
- (b) external onsite fire hydrants are installed more than 20 m from a fire brigade pumping appliance hardstand;*
- (c) more than 6 external onsite above ground fire hydrants are installed;*
- (d) a pumpset is installed;*
- (e) onsite storage tanks are installed; or*

(f) more than one external on site fire hydrant is required to serve a building where the floor area of any fire compartment is greater than 2000 m².”

As per 7.2(f), it states specifically where more than one external on site fire hydrant is required to serve a building with a floor area of any fire compartment greater than 2000m². The critical term in this instance is on site. A street hydrant is not considered to be an onsite hydrant, as it is located outside the property boundary within the road reserve.

As there are no on site hydrants installed to the building, there is no requirement under section 7 to provide a booster assembly.

The hydraulic drawings by Ian Bradford Plumbing Consultants ref# 15081, Sheets 1 and 6 dated 08 September 2015, demonstrate that the building is covered adequately by 2 street hydrants without requiring any additional onsite hydrants to provide coverage, and the minimum distance under clause 3.2.2.1 of 10m between the building and appliances is achieved.

It is noted that no flow and pressure tests were submitted to the Tribunal to establish that the street hydrants satisfy the performance requirements of the standard. The assessment manager is responsible for ensuring the requirements of the BCA and AS2419.1-2005 for flow/pressure and coverage are satisfied through testing of the street hydrant system.

QFES made representations that the standard requires a fire hydrant system to meet all policies and procedures adopted by the brigade.

The standard does not specifically prescribe that a fire hydrant system must satisfy all attending brigade requirements. It implies under clause 2.1.1 that a system complying with the standard is deemed to satisfy the requirements of the brigade. It states: *“Fire hydrant systems designed in accordance with this Standard shall be compatible with the equipment and procedures employed by the attending fire brigade when fighting a fire in one location in a building or complex”*.

This is followed by Clause 3.1 which states: *This Section provides requirements for the location of fire hydrants and other provisions.*

NOTE: For information on fire hydrants in accessways within private properties, see Appendix B.

Fire hydrant valves shall be in accordance with AS 2419.2 and have 65 mm nominal diameter hose connections compatible with local fire brigade equipment.

The only mandatory provision regarding local brigade operations noted is that the connections need to be compatible (e.g. in Queensland fittings are QRT, NSW they are Stortz).

Reasons for the Decision

Section 83 of the BA contains restrictions on the granting of building development approvals and is expressed in the terms that an approval must not be granted by a private certifier until the relevant matter or matters in section 83 have been satisfied.

The assessment manager issued a decision before receiving the referral agency had given its response and before the period for the giving of the response had expired.

Given that the requirements of section 83 had not been satisfied the Tribunal considered that the decision by the private certifier was not consistent with the BA and not a valid decision.

The Tribunal considered the application of section 250 of the PA, which provides a power to the Tribunal to issue directions. The section also provides two examples of such a direction. The explanatory notes to the Planning Bill 2015 go no further than the examples in the Act.

The condition to use the power is that the Tribunal considers that the direction is 'appropriate'. The Tribunal decided the direction to the Assessment Manager to issue a new decision in consideration of the referral agency response 'appropriate' because:

- a. the direction allowed for the consideration of the referral agency response and time period to be complied with, and thus the restriction in section 83 was complied with;
- b. the direction resulted in a valid decision, which became the subject of the appeal where the real issue in dispute between the parties could be determined;
- c. the direction was consistent with the examples in section 250 of the *PA*, given that:
 - i. like example 1, the direction was made to correct an administrative error to make their development application comply with the act; and
 - ii. like example 2, it was a direction to an Assessment Manager to assess an application;
 - iii. whilst in this case the referral agency response was advice to the assessment manager rather than the refusal of the application as in example 2, it is the referral agency's response that is the relevant issue in respect of the Tribunal's direction;
 - iv. both examples appear to be designed to address assessment process irregularities and the Tribunal's direction in this matter relates to such an issue;
 - v. in a similar vein to example 1, it is a direction that achieves compliance with an Act (albeit the *Building Act 1975* as opposed to the *PA*).
- d. the parties were afforded an opportunity to comment on the use of section 250 in the circumstances and both parties expressed a desire for the Tribunal to proceed in this way providing procedural fairness to all.

Additionally, in the Tribunal's view, the QFES referral agency response was still effective and there is no requirement for the Assessment Manager to issue a decision following the referral agency response within a specified timeframe.

As such, the Assessment Manager could issue a new decision, which would be a valid decision upon which the Tribunal could then consider the issue in dispute between the parties.

It has been determined that the building is required to be protected by 2 hydrants flowing simultaneously with a combined minimum flow and pressure of 20L/s at 200kPa.

The requirements of the standard regarding incorporation of a booster system, requested by the referral agency, specifically applies to onsite fire hydrant systems with regards to the installation of a booster system. The provisions regarding street hydrants specifically prohibit the installation of a booster system.

As the subject building has been demonstrated to be provided with compliant fire hydrant coverage from the street hydrants, which are not located onsite, it has been determined there is no requirement to install a booster system, nor is there a requirement to install additional onsite fire hydrants.

Although the Referral Agency response issued by QFES stated that a booster system was required, the assessment is advice only, and the assessment manager is able to set aside the advice when satisfied the works comply with the requirements of the relevant standards.

As there is no requirement under AS2419.1-2005 for a booster to be provided for hydrants that are not located onsite, The Development Tribunal (Tribunal), in accordance with section 254 of the *PA* **confirms** the assessment manager's decision to issue a development approval setting aside the referral agency recommendations for the installation of a hydrant booster assembly subject to the following conditions.

1. Annual testing of the street hydrants must be undertaken to ensure the minimum flow and pressure of 20L/s at 200kPa is maintained;

2. Where the pressure and flow is not maintained to the minimum requirements identified above, additional fire hydrant water supplies will need to be provided. Where this is required, a development approval and referral process will be required to be undertaken.

James Dunstan
Development Tribunal Chair
Date: 16 January 2019

Appeal Rights

Schedule 1, Table 2 (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:

The Registrar of Development Tribunals
Department of Housing and Public Works
GPO Box 2457
Brisbane QLD 4001

Telephone (07) 1800 804 833 Facsimile (07) 3237 1248

Email: registrar@hpw.qld.gov.au