



Building and Development Tribunals – Decision

Integrated Planning Act 1997

Appeal Number:	3–08–054
Applicant:	David N Johns & Sharon D Johns
Assessment Manager:	Trevor Maltby for and on behalf of Whitsunday Regional Council (formally Bowen Shire Council)
Concurrence Agency: (if applicable)	n/a
Site Address:	70–72 Flemington Road, Bowen and described as Lot 5 on SP189767, Parish of Pring County of Herbert– the subject site

Appeal

Appeal under section 4.2.9 of the *Integrated Planning Act 1997* (IPA) against the decision of the assessment manager to approve with conditions a development application for building work. The condition in dispute being the requirement that the minimum floor height that habitable rooms must satisfy is to be at least 6.1 metres above the Australian Height Datum (AHD).

Date of hearing:	11.15 am – Friday, 22 August 2008
Place of hearing:	The subject site
Tribunal:	Peter Nelson – Chair Martin Clark – Member
Present:	David N Johns & Sharon D Johns – Applicant David Battese – Whitsunday Regional Council (Council) representative Trevor Maltby – Assessment Manager, Private Building Certifier Christopher O’Keefe – Lot 3 neighbour James Maloney – Lot 4 neighbour Jan Johns – Lot 6 neighbour Mark & Debbi Betzel – Lot 7 neighbour

Decision:

The Tribunal, in accordance with section 4.2.34(2)(b) of the IPA **changes** the decision by replacing the first condition on Development Application Decision Notice (Development Permit – Building Work) for Development Application No. BLD08\0530 issued on 22 July 2008 with respect to the subject site with the following condition:–

- **The floor height for habitable rooms is to be a minimum of 5.45 AHD. Builder is to supply Form 16 on Compliant Floor Height.**

Background

The applicants have plans to construct a residence on the subject site and submitted a Development Application for Building Work to the Council (No. BLD08\0530). The application and relevant plans were assessed by a Private Building Certifier employed by Council and received Building Approval with conditions, namely Development Application Decision Notice (Development Permit – Building Work) for Development Application no. BLD08\0530 issued on 22 July 2008.

The first condition (of the 13 detailed in dot-point form on the Decision Notice) relates to the flood floor height for habitable rooms. The condition specifies that:-

“The floor height for habitable rooms is to be 6.1 AHD. Builder is to supply Form 16 on Compliant Floor Height”.

This condition was imposed by the assessment manager in reliance upon a Development Approval (DA 04/384) issued by Council (by the now amalgamated Bowen Shire Council). Condition 7 of the Development Approval provides that “Minimum floor heights apply to all habitable rooms within the development”. The condition goes on to list the heights for lots 1 to 9 within the development. Lot 5 (the subject site) is required to maintain a minimum height of 6.10 metres AHD.

The applicants submit that such a floor level would result in the residence being raised 1.4 metres off the ground level. They consider this to be a most undesirable and expensive exercise. Further, they consider that the floor level should be lowered to a more reasonable height as there is no record showing that this land has ever been affected by flood water.

Council submits that the required floor level of 6.1 metres AHD is the minimum level identified by it as being 300 mm above the Q100 flood level. Council states that the level has been established as a result of various flood studies including a Queensland Water Resources Commission report undertaken subsequent to the 1980 Don River Flooding. Council also submits that the Bowen Shire Planning Scheme 2006, which commenced on 1 June 2006, requires buildings for residential purposes to be immune from a flood event of at least 1% annual exceedence probability (Q100).

However, Council also state in their submissions that they have commissioned Connell Wagner (a consulting company) as part of its disaster management program to undertake a storm surge assessment of the Bowen area, review the Q100 flood profile for the Bowen area and undertake a review of the Don River flood model. Council expects this work to be completed sometime late in 2008 or early 2009.

Material Considered

The material considered in arriving at this decision comprises:

1. Form 10 – Notice of Appeal received on 12 August 2008, including grounds for appeal and accompanying documentation.
2. A plan of site levels of the subject site and the surrounding properties.
3. A copy of proposed Building Plans.
4. A copy of Minute 768 of Council relating to the approval of the subdivision.
5. A copy of Decision Notice DA04/384 relating to original subdivision.
6. A copy of the Development Application made by Pioneer Surveys Pty Ltd relating to original subdivision.
7. A copy of correspondence from John Finlay – CEO of the Council.
8. An unsigned letter on Whitsunday Regional Council letterhead stating Council’s response to the appeal.
9. The IPA.
10. The *Building Act 1975*.
11. The *Building Regulation 2006*.
12. The Building Code of Australia.

Findings of Fact

The Tribunal makes the following findings of fact:

1. The subject site is within the jurisdiction of Council, formerly controlled by Bowen Shire Council prior to recent council amalgamations.
2. The AHD floor level of 6.1 metres is currently under review by Council.
3. Neighbours and other older residents attest that they have never seen flood water over the subject site.
4. The property backs onto Flemington Race Club (horse racing), and evidence was given by the applicant that was agreed to by Council's representative that Council intends to construct a Water Treatment Plant to the north-west of the racing track, with the settlement pond set inside the race track.
5. Verbal evidence by Council representatives given at the hearing pointed out that Council was not satisfied that the nominated AHD level of 6.1 was accurate and that a further study has been commissioned to set new and more accurate levels. They also stated that Council had no option at this time than to set the AHD at 6.1 as this was the level set in their current regulations and they had no power to alter this level at this time.
6. Verbal evidence of the applicants and the neighbours given at the hearing stating that flood water had not been seen on this site in living memory, despite Bowen having had several major floods in the last 50 years.

Reasons for the Decision

The Tribunal makes its decision for the following reasons:

1. At the hearing Council advised that it intended to construct a Water Treatment Plant with the settling pond at the same height level as the proposed residence. In view of the Council's intention, the Tribunal considers that this is evidence that Council would have to be confident that the area was not subject to flooding. According to statements that the local Lazer operator had sighted the levels between the two properties (they share a common boundary), that the pad levels were the same.
2. Those in attendance at the Tribunal hearing provided verbal evidence that flood water has not been known to affect this property in living memory. Some of these people had lived in the vicinity for 50 years.
3. Several surrounding residences are set at a level similar to that proposed by the applicants. This was evidence by laser levels taken by the local tradesman who does the lazering of paddocks etc in the Bowen district. These homes were not affected by the recent flooding of the Bowen area. This evidence was given by all the neighbours at the hearing.
4. It was not known why the present AHD level was set at 6.1 metres for this area. Council's representative could only advise that the levels were under review because they were considered to be incorrect.
5. One of the factors acknowledged by Council was that the local levee bank has been damaged by vehicles and will be repaired in the near future. This will further protect the subject site from potential flood waters.
6. The applicant has agreed to accept full responsibility should any flood damage occur in the future and will put this in writing to Council to protect Council from Litigation by the Applicant. Any future owner would be made aware of the potential flooding by notes that are to be added to Council's records, property documents and the assessment manager's records.

7. The applicant felt that an AHD of 5.45 was a more acceptable level than Council's requirement of lifting the residence 1200 mm off the natural ground level. The applicant said he would be happy to lift the residence 600 mm above natural ground level. This then set the floor level at 5.45 AHD and the applicant was confident that this would ensure that there would be no flooding to habitable rooms at this level.
8. Interviews with members of the local community reveals that they consider that the proposed review of flood levels has been ongoing for many years and that the timeframe set by Council may be subject to further extension.
9. The property backs onto Flemington Race Club (horse racing), and evidence was given by the Applicant and was agreed to by Council's representative that Council intends to construct a Water Treatment Plant to the north-west of the racing track, with the settlement pond set inside the race track. To do this Council must be confident that this area is above the currently designated flood level.

Peter Nelson
Building and Development Tribunal Chair
Date: 2 October 2008

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 Infrastructure and Planning
PO Box 15009
CITY EAST QLD 4002
Telephone (07) 3237 0403 Facsimile (07) 3237 1248