



Development Tribunal – Decision Notice

Planning Act 2016

Appeal Number: 19-020
Appellant: Affordable Housing Company Pty Ltd
Assessment Manager: Luke Owen-Jones of EarthCert
Site Address: 228 Mains Road, Sunnybank described as Lot 3 on SP 289127

Appeal:

The appeal relates to a decision of the Building Certifier for the development to issue a Form 61 'Non-compliance Notice' dated 16 April 2019 under section 33 of the *Building Regulation 2006*. The Form 61 asserts that the building failed to comply with the final inspection requirements because of certain non-compliant waterproofing and that the Queensland Building and Construction Commission issued a 'direction' to the effect that the waterproofing was non-compliant.

Date and time of hearing: Tuesday 3 September 2019 at 10am.
Place of hearing: 149 Shrapnel road, Cannon Hill, Brisbane.
Tribunal: Mr Chris Harris– Chair
Mr William Watson - Referee
Present: Mr Brennan Brooks - Appellant
Mr Dale Jones - QBCC Licensee Waterproofing
Mr Luke Owen-Jones – Building Certifier

Decision:

The Development Tribunal (Tribunal), in accordance with section 254 of the *Planning Act 2016*, sets aside the decision to issue a Form 61 dated 16 April 2019 and orders the Building Certifier to remake the decision on or before 23 October 2019.

Background:

1. In 2018 the Building Certifier, Mr Luke Owen-Jones of EarthCert, issued a development permit for a new dwelling to be constructed on 228 Mains road, Sunnybank. The dwelling was classified under the National Construction Code (NCC) as a 1b as it was to be utilised as rooming accommodation under Council's planning scheme. The builder, Affordable Housing Company Ltd, undertook the construction from that date into 2019.
2. On the 11 September 2018, an inspector from the Queensland Building and Construction Commission (QBCC) visited the construction site and noted that the waterproofing to the base of the balcony doors that open onto the deck at first floor level were, in his opinion, non compliant with the NCC. The NCC section 3.8.1.3 External above ground membranes, states that 'waterproofing membranes for external above ground use must comply with AS 4654 parts 1 and 2'.
3. The QBCC inspector on the 12 September issued a notice to the builder, Affordable Housing Company Ltd, advising the builder of the defective work and requesting that the builder formally advise the QBCC when the work, subject of the notice, had been rectified. The inspector required photographic evidence and certificates from the waterproofing licensee confirming that the waterproofing has been installed in accordance with AS 4654.2. The specific areas of non-compliance were set out in the notice and related to:
 - The waterproofing/flashing has not been installed in accordance with Figure 2.8 from AS 4654.2-2012. (waterproofing under the door and to the waterstop)
 - The waterstop angle has not been installed to the rear of the aluminium joinery and 'returned' onto the adjoining timber frame
4. The final paragraph stated that if the non-compliant work was not completed to a satisfactory standard the Commission might issue a 'Direction to Rectify' against the company's license number. In October 2018 the QBCC licensed waterproofing contractor issued a Form 16 to the builder and Building Certifier, certifying that the installation of the waterproofing had been installed to the Balcony Deck floor area and in section 5 referenced option 1 in the standard.
5. In late November 2018, the QBCC inspector sent an email to the Building Certifier advising him that the matters relating to the improvement notice had not been addressed and that the commission is not satisfied that the work, the subject of the improvement notice, had been rectified and is in compliance with the AS4654.2. The email stated that the certificate (Form 16) issued by the waterproofing licensee did not address or reflect compliance with AS4654.2 under section 5 on the Form16.
6. The correspondence also requested that the building certifier issue a Form 61 (non-compliance notice) as referenced under section 33 of the *Building Regulation 2006* (BR) and that should he accept the Form 16 in its current format it would be referred to the QBCC's Certification Division to commence audit proceedings against him.
7. In April 2019, the Building Certifier issued a Form 61 to the builder indicating that at Final stage the reason for the non-compliance notice was that there had been a Direction from the QBCC regarding Non-compliant waterproofing.
8. On the 8 May 2019, the registry received an appeal by the builder against the Form 61 on the basis that the waterproofing to the external deck is in accordance with AS 4654.2 and that there is a mis-understanding of the requirements of the standard.

AS 4654-Waterproofing membranes for external above ground use

9. In considering the appellants position, the tribunal first considered the NCC and the requirements of this standard. Part 1 of the standard deals with the materials to be used and part 2 relates to the design and installation. Part 2 Design and installation is the most relevant in this instance.
10. This standard is a little unusual as in section 2.1 General, at the commencement of the document it states the following:

“Membrane systems shall be designed and installed as appropriate for their intended application.” The note to this statement says; “The details illustrated in the figures of this section are typical acceptable methods and are not to be interpreted as precluding the use of other methods.”
11. This statement in effect makes it clear that none of the illustrations are mandatory installation methods. They are typical examples and if the installation does not look like one of these illustrations it does not necessarily make the waterproofing method used non compliant. This appears to be a sensible approach, which allows for advancements in Door and Window design through new technology, higher steps to balconies and alternative protective cladding materials.
12. There are some mandatory requirements, which need to be addressed. Fillets are required where there is a membrane change from horizontal to vertical. The membrane also needs over flashing or cover flashing and details of how the over flashing should be installed is provided. The membrane needs to be anchored along the top or bottom, depending on the type of membrane used. It is also noted that the upward termination height of the membrane is also referenced under section 2.8.1.1 Height which states that where the membrane termination is to prevent water entry the finished height of the membrane above the finished surface level shall be sufficient to prevent water, including wind driven, flowing over the top of the membrane. The note to this requirement refers to an appendix, which has a table showing termination heights of membranes depending upon the various wind classifications. The slightly unusual part is this table is informative only. The preface to the standard states that an informative appendix is only for information and guidance.
13. Section 2.8.3 Doors and windows onto external waterproofed areas also has two mandatory requirements:
 - (a) Sub-sill flashing shall be included as part of the membrane system.
 - (b) Where the internal and external finished floor levels do not allow an upturn, the membranes shall be fixed under the sill and terminate in the stormwater system.
14. Both of these requirements again reference illustrations of how this can be achieved, however if (a) is mandatory as it has been written, it is strange that figure 2.8 option 3 referred to by the note for this requirement, shows a design without a sub-sill being installed.

Summary re AS 4654

15. In summary the standard has only a small number of mandatory requirements depending upon the method to be used. It appears to be open to a more performance based approach and clearly allows for alternative designs and installations that may well achieve the desired outcome.

Jurisdiction:

1. The tribunal initially had reservations regarding the jurisdiction of the Development Tribunals to hear this appeal. The tribunal's concerns related to the definition of 'assessable building work' in schedule 4 of the BR.
2. The regime for the inspection of building work is contained in part 6 of the BR and applies only for 'assessable building work' – see for example the use of that expression in each of sections 24 to 35 inclusive of the BR as well as in the heading of part 6 itself.
3. The expression 'assessable building work' is defined in schedule 4 of the BR as follows:

assessable building work means building work that is not assessable development.

4. The particular development in this case was undoubtedly assessable development. Therefore it would seem to follow that part 6 of the BR does not apply and accordingly there was no obligation on the builder to request inspections. This outcome is quite irrational and inconsistent with the legislative scheme as well as being at odds with accepted practice in the building industry for many years.
5. It would appear clear that an error has been made in the drafting of the definition of 'assessable building work' in that the definition should, in the tribunal's opinion, undoubtedly have read: "... means building work that is not accepted development."
6. In the Tribunal's view, there is ample case law authority for departing from the literal meaning of the provision in this instance and applying the obviously intended meaning as mentioned above.
7. The following is a quote from the judgment of Fraser JA in the case of *Smith v Ash* [2010] QCA 112 at paragraph 34:

[34] In *Mills v Meeking* [1990] HCA 6; (1990) 169 CLR 214 at 242 – 243, McHugh J said:

"A court cannot depart from the literal meaning of a statutory provision because that meaning produces anomalies or injustices if no real doubt as to the intention of Parliament arises: *Cooper Brookes (Wollongong) Pty. Ltd. v. Federal Commissioner of Taxation* (1981) 147 CLR 297 at pp 305, 320; *Stock v. Frank Jones (Tipton) Ltd.* [1978] 1 WLR 231 at pp 234-235, 237-238; [1978] 1 All ER 948, at pp 951- 952, 954. But, when the literal meaning of a provision gives rise to an absurdity, injustice or anomaly, a real doubt will frequently arise as to whether Parliament intended the literal meaning to prevail. In such a case, a court may be entitled to disregard the literal meaning. In *Cooper Brookes (Wollongong) Pty. Ltd* ... Gibbs C.J. pointed out:

"There are cases where the result of giving words their ordinary meaning may be so irrational that the court is forced to the conclusion that the draftsman has made a

mistake, and the canons of construction are not so rigid as to prevent a realistic solution in such a case ...”

But this does not mean that a court is bound by the literal or grammatical meaning of a statutory provision unless that meaning produces an irrational result. This was made plain by Mason and Wilson JJ. in *Cooper Brookes (Wollongong) Pty. Ltd* ... where their Honours said:

“On the other hand, when the judge labels the operation of the statute as 'absurd', 'extraordinary', 'capricious', 'irrational' or 'obscure' he assigns a ground for concluding that the legislature could not have intended such an operation and that an alternative interpretation must be preferred. But the propriety of departing from the literal interpretation is not confined to situations described by these labels. It extends to any situation in which for good reason the operation of the statute on a literal reading does not conform to the legislative intent as ascertained from the provisions of the statute, including the policy which may be discerned from those provisions.”

8. The case of *Smith v Ash* also refers to other relevant Queensland Supreme Court cases, namely:

Ravenscroft v Nominal Defendant [2007] QCA 435; [2008] 2 Qd R 32 at 45-51 [32]-[50]; *St Vincent de Paul Society Queensland v Ozcare Ltd* [2011] 1 Qd R 47; *Witheyman v Simpson* [2011] 1 Qd R 170 at 187-191 [38]-[51].

9. Accordingly, having put aside the concern about the definition of ‘assessable building work’ as mentioned above, the tribunal’s jurisdiction for this appeal arises under the *Planning Act 2016*, section 229 and schedule 1, section 1, table 3, item 2 ‘Inspection of building work’.

Decision Framework:

1. The onus rests on the appellant to establish that the appeal should be upheld (s. 253(2) of the PA),
2. 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 (s. 253(4) of the PA),
3. the tribunal may nevertheless (but need not) consider other evidence presented by a party with leave of the tribunal or any information provided under s.246 of the PA (pursuant to which the registrar may require information for tribunal proceedings), and
4. the tribunal is required to decide the appeal in one of the ways mentioned in s.254(2) of the PA.

Material Considered:

The written 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 8 May 2019.
2. Verbal representations at the hearing
3. *Planning Act 2016 (PA)*
4. Building Act 1974
5. *Building Regulation 2006*
6. AS 4654.1 and 2 - 2012 Waterproofing membranes for external above-ground use.
7. National Construction Code Series, Volume 2, 2016 (NCC)
8. QBCC Act 1991
9. QBCC regulation 2018
10. Correspondence between the certifier and QBCC inspector
11. Improvement notice, certificates and written submission provided by the QBCC inspector

Reasons for Decision:

1. The Tribunal notes that:
 - a. The BR, section 33, provides for the issuing of a Noncompliance notice.
 - b. The NCC references AS4654 as the complying Deemed to Satisfy document for the installation of external above ground waterproofing membranes.
 - c. The illustrations within AS4654.2 are not mandatory and are typical examples.
2. In April 2019 the Building Certifier issued a Form 61 to the builder indicating that at Final stage the reason for the non-compliance notice was that there had been a Direction from the QBCC regarding non-compliant waterproofing. The tribunal found that a Direction was not issued to the builder in this instance. The QBCC inspector issued an improvement notice to the builder stating that if he did not bring the work into conformity the Commission may issue a "Direction to Rectify against the Companies license number.
3. The inspection undertaken by the QBCC inspector was not at the request of the Building Certifier. Section 17 of the BR is a provision allowing building certifiers to appoint competent persons to perform both design/specification help and inspection help. Section 22(2) states that "A competent person can only give inspection help if the building certifier has already decided the person is a competent person (inspections) for the work."

4. The QBCC inspector stated that the non-compliance related to the fact that the builder and waterproofing contractor did not comply with figure 2.8 Option 2 of AS4654.2.
5. However as stated in the standard, these illustrations are only typical examples and are not mandatory installation methods. For instance, although shown in the examples, there is no mention of a waterstop angle as a mandatory requirement nor is it mentioned in the definitions.
6. Section 49(2) of the BR states that “A building certifier may, in performing functions under the Act for assessable building work, accept and, without further checking, rely on a QBCC licensee certificate given under section 43 if the certificate relates to the work.”. The certifier received such certificate in October 2018, some weeks after the improvement notice was issued to the builder.
7. In light of the conflicting opinions, it is the tribunal’s view that the Building Certifier needs to revisit the site and inspect the work to determine how the waterproofing has been undertaken and either reissue the Form 61 stating what specific mandatory requirements of the NCC are outstanding, or accept the Form 16 from the waterproofing licensee.

Chris Harris
Development Tribunal Chair
Date: 20 September 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.

Enquiries

All correspondence should be addressed to:

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