



Development Tribunal – Decision Notice

Planning Act 2016

Appeal number:	21-055
Appellant:	Queensland Fire and Emergency Services (QFES)
Respondent (assessment manager):	Brien Wilkins
Co-respondent (applicant):	Woolworths Group Ltd
Site address:	124 High Street, Stanthorpe and described as Lot 1 on RP174498 and Lot 2 on RP169990 – the subject site

Appeal

Appeal by Queensland Fire and Emergency Service (QFES) as an advice agency under schedule 1, table 3, item 1 of the *Planning Act 2016* (PA) against the decision of the assessment manager to issue a building development approval for the subject site.

Date and time of hearing:	26 April 2022, 1pm
Place of hearing:	HQ North, 540 Wickham Street, Fortitude Valley
Tribunal:	Samuel le Noble – Chair James Dunstan – Member Kelly Alcorn – Member (via Teams)
Present:	Mark Power – Appellant Steven Horvath – Appellant Denis Stunden – Appellant (via Teams) Brien Wilkins – Respondent Christine Stewart – Fire system designer for the respondent Dirk van der Walt – Fire engineer for the respondent (via Teams)

Decision

The Development Tribunal (Tribunal), in accordance with section 254(2)(c) of the *Planning Act 2016* (PA) upholds the Appeal and replaces the decision of the assessment manager not to incorporate fast response sprinklers with the decision to accept and act on the referral agency's assessment advice.¹

¹ At time of publishing this decision, in an effort to work with QFES Mr Wilkins had produced a document titled 'BP-9702 amended decision notice' incorporating QFES assessment advice.

Background

1. The building development approval granted on the subject site by the assessment manager is for a Class 6 tenancy. The alterations involve the refurbishment of internal floor areas of the Woolworths tenancy.
2. The Woolworths tenancy is located on the corner of High Street and Lock Street, Stanthorpe Qld 4380, described as Lot 1 on RP174498 and Lot 2 on RP169990 (subject site), and is within a building that also houses other tenancies.
3. The subject site was originally constructed circa 1980, is Class 6 and has a rise in storeys of two.
4. Mr Brien Wilkins was engaged by Woolworths Group Limited ('Woolworths') to issue a building development approval pursuant to the provisions of the PA and the *Building Act 1975* (BA). Subsequently, Mr Wilkins issued Decision Notice BP-9702 dated 27 August 2021.
5. The appeal against the decision of the assessment manager was brought on the ground that the decision did not take into consideration the fire engineering report by Omnii dated 28 May 2021, revision B ('Omnii report Revision B') and the fire engineering due diligence assessment prepared by Sotera dated 24 August 2021, revision 1-1.
6. The non-compliance the subject of this appeal was outlined in the QFES assessment advice letter as the failure to incorporate 'fast response sprinklers' which were specified as a requirement for fire sprinkler systems in the Omnii report revision B.
7. An updated version of the Omnii fire engineering report dated 8 October 2021, Revision C (superseding Revision B) ('Omnii report Revision C') was provided to the Tribunal on 25 November 2021 by Mr Wilkins. This updated report deleted the requirement for fast response sprinklers to be provided in the building.
8. On 1 December 2021, the Tribunal directed the parties to make submissions on whether the Tribunal should admit the Omnii report Revision C into evidence under section 253(5)(a) of the PA.

Appellant's submissions on evidence

9. On 3 December 2021, the appellant submitted that it supported the outcomes of the Omnii report revision C. The appellant also relevantly stated in their submission the following:

This document was created after all other fire engineering reports (FER) relative to this building and at the time of making this submission to the Tribunal, is the current FER in force over the building.

This document was not the document that QFES provided its advice on to Mr Wilkins and Woolworths. Their assessment was not judged against the Omnii Revision C, as it was not in existence at the time of their submission.

Mr Wilkins' assertion that this document supports his original decision can not be substantiated when the document is examined.

10. The appellant raised no objection to the proposed admission of the Omnii report revision C into evidence.

Assessment manager's submissions on evidence

11. Mr Wilkins raised no objection to the admission of Omnii report revision C into evidence.
12. In an email to the Registrar dated 22 December 2021, the assessment manager provided a copy of an earlier building development approval dated 28 May 2021 issued by Integrated Building Certification ('IBC'), which, in the assessment manager's submission, supported his decision dated 27 August 2021.
13. The approval issued by IBC included the Woolworths tenancy, and also referenced the fire engineering report issued by Omnii, revision B dated 28 May 2021.
14. The assessment manager claims he previously discussed potential code compliance issues relating to the approval issued by IBC with Mr Knox of QFES.
15. Mr Wilkins stated that Mr Knox subsequently advised him that if he was unhappy with the information that underpinned QFES's assessment then he would have to issue an application for assessment for the Woolworths tenancy fitout.

Co-respondent's submissions on evidence

16. After having sought and received an extension of time to provide its submission, on 28 January 2022 the co-respondent advised it did not oppose the entering of the Omnii report revision C into evidence.

Alleged late filing of appeal documents

17. Mr Wilkins asserted that QFES had filed the required documents with the registrar outside of the appeal period, which is prescribed as ten (10) business days from the date the decision notice is given.²
18. Mr Wilkins was engaged by Wendy Eales (Woolworths) as a private building certifier in a letter dated 27 August 2021 to the Chief Executive Officer of Southern Downs Regional Council.
19. Mr Wilkins issued a decision notice (for a building development application pursuant to the BA) to Wendy Eales on 27 August 2021, which included special fire services.
20. Mr Wilkins claimed the decision notice dated 27 August 2021 should be taken to have been given to QFES on 6 September 2021 for QFES assessment. Mr Wilkins relied on the following:
 - a) A two-page covering letter from Mr Wilkins dated 6 September 2021, addressed to QFES and annotated 'emailed 5/9/2021'. The body of the letter lists among its attachments 'Decision Notice, BP-9702'. Mr Wilkins provided the Tribunal's registry with a copy of this letter.
 - b) An email attaching the letter dated 6 September 2021 from Mr Wilkins' email address to the individual email address of Steven Horvath of QFES on 5 September 2021. Mr Wilkins provided a screenshot of this email to the Tribunal's registry.
21. QFES maintained that the decision notice was not effectively given to the QFES prior to 10 September 2021. QFES relied on the following:
 - a) Mr Horvath was on leave during the relevant time.

² The appeal period is defined in the *Planning Act 2016*, s229(3)(a) as ten (10) business days after a decision notice for the decision is given to the building advisory agency.

- b) An automatic 'Out of Office reply' was active on Mr Horvath's individual email account when Mr Wilkins sent the email on 5 September 2021, triggering an automatic reply email with the words 'I am on annual leave, please contact Athol Knox...'. In support of this assertion, QFES provided a copy of an 'out of office reply' received by Mr Stunden from Mr Horvath's email address on 6 September 2021.
 - c) Mr Knox of QFES sent an email to Mr Wilkins on 6 September 2021 requesting information for the assessment of the application, in particular a copy of the DA Form 2, and making no reference to Mr Wilkins' email to Mr Horvath on 5 September 2021. In support of this QFES provided a copy of Mr Knox's email of 6 September 2021.
 - d) QFES provided advice to Mr Wilkins at 11:59am on 10 September 2021.
 - e) Mr Wilkins sent an email to Athol Knox of QFES on 10 September 2021 at 2:01:36pm attaching, among other documents, the decision notice. In support of this, QFES provided a screenshot of an email from Mr Knox to Denis Stunden and Steven Horvath of 2:13pm that day, forwarding Mr Wilkins' email of 2:01:36pm.
22. QFES submitted further that prior to 10 September 2022, in any event, the decision notice dated 27 August 2021 could not have taken effect as a decision for the purposes of s229(3)(a) of the PA, because that preceded the assessment advice and letter issued by the QFES.
23. There was no evidence available to the Tribunal that the email that Mr Wilkins sent to the individual email address of Mr Horvath on 5 September 2021 came to the attention of any individual at QFES at any time prior to 10 September 2021.
24. On this basis the Tribunal considers that for the purpose of determining the commencement of the 10 business day appeal period under section 229(3)(a) of the PA, the decision notice can be taken to have been given to QFES on 10 September 2021 under cover of Mr Wilkins' email of 2:01:36pm.

Jurisdiction

25. Schedule 1 of the PA states the matters that may be appealed to the Tribunal.
26. Section 1(5) of Schedule 1 of the PA provides that Table 3 states the matters that may be appealed only to a tribunal.
27. Under item 1 of Table 3 of Schedule 1 of the PA, 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.
28. The appeal is to be made by the building advisory agency for the development application related to the approval, which in this case was QFES, and the respondent to the appeal is the assessment manager, who in this case was Mr Wilkins. The co-respondent is the applicant for the development application, which in this case is Woolworths.
29. In circumstances where the Tribunal has determined that the Decision Notice was given to the building advisory agency on 10 September 2022, the appeal was to be started on or before 24 September 2021.
30. As the appeal was started with lodgement of the notice of appeal on 21 September 2021, the Tribunal is satisfied that it has the jurisdiction to hear this appeal.³

³ Council of the City of Gold Coast v Sedgman Consulting Pty Ltd [2017] QPEC 18, [30-32]

Materials considered

The material considered in arriving at this decision comprises:

31. 'Form 10 – Appeal Notice', grounds for appeal and correspondence accompanying the appeal lodged with the Tribunals Registrar on 21 September 2021.
32. Omnii Fire Engineering Report reference 3134101 dated 28 May 2021 (revision B)
33. Omnii Fire Engineering Report reference 3134101 dated 8 October 2021 (revision C)
34. Sotera Due Diligence Report reference A21127 dated 24 August 2021 (revision 1-1)
35. BW Consulting Decision Notice reference BP-9702 dated 27 August 2021
36. Letter of notice of engagement as private building certifier reference BP-9702 dated 27 August 2021
37. QFES Assessment advice letter reference 21-04579 dated 10 September 2021
38. Building Act 1975 (BA)
39. Building Regulation 2006 (BR)
40. Planning Act 2016 (PA)
41. Planning Regulation 2017 (PR)
42. National Construction Code Series, Building Code of Australia, Volume 1, 2019
43. Woolworths 'Submission to the Development Tribunal Appeal No. 21-055 – Stanthorpe Plaza, 124 High Street, Stanthorpe Qld 4380'
44. QFES Information request letter dated 6 September 2021
45. QFES submission to the Tribunal titled 'To Appeals tribunal BWilkins' dated 3 December 2021
46. Document titles 'Stanthorpe Plaza BWC Typical Support Docs' received by the registrar on 6 October 2021
47. Email correspondence from the appellant and respondent received by the registrar
48. Verbal submissions from all parties at the hearing

Findings of fact

The Tribunal makes the following findings of fact:

49. The appellant stated in the notice of appeal that the grounds for appeal are as follows:

The Assessment Manager has failed to observe QFES advice in relation to Development Application. Assessment Manager has allowed work to commence prior to providing decision notice BP-9702. Assessment Manager has not taken into consideration an existing Fire Engineering Report (FER) on this site. (Project #3134101 Revision B by OMNII).

The Assessment Manager has informed the Advice Agency that his work did not require Referral Agency advice, in spite of being referred. The scope of works submitted for referral advice included a new additional monitored sprinkler valve, connect into existing sprinkler main pipework to separate the large tenancy from the mall area and removal of fast response sprinkler heads installed to comply with the existing FER.

The Referral Agency has no issue with a proposed additional monitored sprinkler valve. However removal of fast response sprinkler heads from his clients tenancy, reduces the safety to occupants and the structure and is not consistent with the FER sitting over the whole building which has been accepted to justify extended travel distances and non inclusion of smoke hazard management as per DTS requirements within the building.

The Assessment Manager has recognised the existence of the FER, however has not provided reference to it in his documentation.

The Assessment Manager has provided a "Due Diligence Report" (Revision 1-1 by SOTERA) with his application which states "Any existing performance solutions and associated performance systems shall remain applicable to the subject building." The Assessment Manager has not taken this into account.

QFES advice provided – 10/09/2021 - Written notification of Decision Notice – 10/09/2021 - Date of Decision Notice sought to be appealed – 27/08/2021.

50. By letter dated 27 August 2021 Mr Wilkins notified Southern Downs Regional Council that he had been engaged by the co-respondent as a private building certifier.
51. Mr Wilkins issued a decision notice (for a building development application pursuant to the BA) to Wendy Eales (ref: BP9702) dated 27 August 2021 which included special fire services.
52. Athol Knox of QFES received an application for assessment and on 6 September sent a request for information, a development assessment form 2, to the assessment manager.⁴
53. The assessment manager complied with the request for information on 7 September 2021 by providing a copy of development assessment form 2 to Mr Knox.
54. On 10 September 2021, Mr Wilkin's decision notice dated 27 August 2021 came to the attention of QFES when Mr Wilkins emailed it to Athol Knox.⁵
55. QFES lodged the appeal with Registrar on 21 September 2021.
56. In making his decision the assessment manager asserts that he relied on an assessment strategy utilising section 61, 68 and 81 of the BA.⁶
57. On 10 September 2021, QFES sent an assessment advice letter to the assessment manager advising a 'not suitable' outcome. Relevantly, QFES advised as follows.

Important Note to Applicant/Certifier

QFES understand and have no objection to the use of the transitional provisions for this building work.

However Section 68 (3)(a)&(d) speaks about the existing level of fire safety within the building. Given that the previous building work pre dates your application QFES believe that any building work in conflict with the OMNII Fire Engineering Report, is in fact reducing the existing level of fire safety of the building.

In light of this decision and given that the chronological order of this building work is such that the previous building approval and subsequent Decision Notice pre date your application, and from your documentation it is identified that the existing Fire Engineering Report has not been considered, QFES have no option but to find your application not suitable.

Hydrants, Hose reels and Occupant Warning have had referral advice issued as part of a previous building approval.

[...]

⁴ Above n3

⁵ Above n3

⁶ Decision Notice BP-9702 dated 27 August 2021

QFES are in receipt of a Decision Notice for building work previously approved at this site which indicates that fast response sprinklers are to be installed throughout the entire building. This Decision Notice references a Fire Engineering Report which has been accepted by all stakeholders.

It would appear from your documentation that the existing Fire Engineering Report has not been considered and that the fast response sprinklers are not to be installed throughout the Woolworths tenancy. QFES see that the installation of fast response sprinklers supports the extended travel distances that exist within this building as per the performance solution as referenced in the current Fire Engineering Report. Therefore QFES have no option but to consider your application not suitable.

QFES have no objection to the second sprinkler valve set as proposed

58. QFES lodged an appeal with the Tribunal on 21 September 2021.
59. Decision Notice BP-9702 did not include the requirement to install fast-response sprinklers in the Woolworths tenancy, and did not include reference to the Omnii report revision B.⁷

Decision framework

60. The Decision Notice BP-9702 was issued by the Respondent on 27 August 2021. At that time the PA was in force.
61. The Appellant filed a Form 10 – Notice of Appeal / Application for Declaration on or about 21 September 2021.
62. The appeal is a PA appeal, commenced after 3 July 2017 under section 229 of the PA. As such, the appeal is to be heard and determined under the PA.
63. The QFES as the appellant in the appeal generally has the onus of establishing that the appeal should be upheld.⁸
64. The Tribunal may nevertheless (but need not), consider other evidence presented by a party to the appeal with leave of the Tribunal or any information provided under section 246 of the PA.⁹
65. 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, which in this case was the assessment manager.¹⁰
66. The Tribunal is required to decide the appeal in one of the following ways set out in section 254(2) of the PA:
 - (a) *confirming the decision; or*
 - (b) *changing the decision; or*
 - (c) *replacing the decision with another decision; or*
 - (d) *setting the decision aside and ordering the person who made the decision to remake the decision by a stated time; or*
 - (e) *for a deemed refusal of an application:*

⁷ This was not in dispute by the parties at the hearing.

⁸ Section 253(2) of the PA.

⁹ Section 253(5) of the PA.

¹⁰ Section 253(4) of the PA.

- (i) *ordering the entity responsible for deciding the application to decide the application by a stated time and, if the entity does not comply with the order, deciding the application; or*
- (ii) *deciding the application.*

Reasons for the decision

The issue of the fast-response sprinklers

67. Decision notice BP-9702 dated 27 August 2021 applied sections 61, 68 and 86 of the BA and in relying upon s68, Brien Wilkins commissioned a fire engineering due diligence assessment prepared by Sotera.

68. The fire engineering due diligence assessment part of Decision Notice BP-9702 relevantly states the following:

The proposed works are thus proposed to not be (sic) assessed against the latest BCA DtS provisions and instead be assessed against the 'Transitional Provisions' of the Queensland Building Act 1975 (i.e. Section 68 and Section 112) [2], such that the proposed works shall demonstrate it does not unduly reduce the existing level of safety for occupants, structural stability, spread of fire to adjoining buildings and egress.

69. Section 68 of the BA provides:

The assessment manager must not approve the application unless the building certifier has decided the alterations do not unduly reduce the following–

- (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.*

70. The fire engineering due diligence report also relevantly states the following:

Any existing performance solutions and associated performance systems shall remain applicable to the subject building.

71. Whilst the introduction of the Omnii report revision C dated 8 October 2021 supports the removal of fast-response sprinklers, at the time the Decision Notice was issued by Mr Wilkins, the QFES assert in their written submission that Decision Notice BP-9702 was in conflict with revision B of the report, therefore reducing the existing level of fire safety.

72. At the time Decision Notice BP-9702 was issued, the Omnii report revision B was in existence, which required fast-response sprinklers throughout the building.

73. The fire engineering due diligence assessment prepared by Sotera dated 24 August 2021 revision 1-1 and commissioned by the assessment manager for the building development approval, stated all works should comply with existing performance solutions.

74. The Tribunal agrees the reports described in paragraphs 72 and 73 above constitute the evidence that was before the assessment manager when deciding to issue Decision Notice BP-9702.

75. Decision Notice BP-9702 and the application submitted by Mr Wilkins to QFES failed to include fast-response sprinklers.
76. The Tribunal in accordance with section 254(2)(c) of the PA upholds the Appeal and replaces the decision of the assessment manager not to incorporate fast response sprinklers with the decision to accept and act on the referral agency's assessment advice.¹¹

Samuel le Noble

Development Tribunal Chair
Date: 16 December 2022

Appeal rights

Schedule 1, Table 2, item 1 of the PA 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 Energy and Public Works
GPO Box 2457
Brisbane QLD 4001

Telephone 1800 804 833

Email: registrar@epw.qld.gov.au

¹¹ At time of publishing this decision, in an effort to work with QFES Mr Wilkins had produced a document titled 'BP-9702 amended decision notice' incorporating QFES assessment advice.