Development Approval Process Seminar

Institute of Public Works Engineering Australasia

Sarah Hausler
Senior Associate

Patrick O’Brien
Lawyer

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Program

- Decision rules and making defensible decisions
- Requirements for lawful conditions, the scope of lawful conditions and enforcing conditions
- Legal rules about interpretation of development approvals and drafting tips and tricks
- Staged development applications, and challenges for development assessment and conditions
- The sanctity of development approvals, and consequences when something goes wrong
Decision Rules and Making Defensible Decisions
Times they are a changin’ – SPA to PA

- *Planning Act 2016* (Qld) commenced on 4 July 2017
- Ongoing cases continued under *Sustainable Planning Act 2009* (Qld)
- Planning Act cases starting to work through now

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Planning Act 2016

Current as at 9 May 2018
Sustainable Planning Act v Planning Act

Sustainable Planning Act s 326:

(1) The assessment manager’s decision must not conflict with a relevant instrument unless—

(a) the conflict is necessary to ensure the decision complies with a State planning regulatory provision; or

(b) there are sufficient grounds to justify the decision, despite the conflict...

Planning Act s 45:

(5) An impact assessment is an assessment that—

(a) must be carried out—

(i) against the assessment benchmarks in a categorising instrument for the development; and

(ii) having regard to any matters prescribed by regulation for this subparagraph; and

(b) may be carried out against, or having regard to, any other relevant matter, other than a person’s personal circumstances, financial or otherwise.
How to exercise the new discretion – two approaches

■ The ‘rigid’ approach
  □ Planning scheme is the embodiment of public interest;
  □ Creates public confidence in fairness of planning;
  □ Allows predictable results;

■ The ‘flexible’ approach
  □ Planning is ‘performance based’ anyway
  □ Planning schemes do not envisage a single outcome;
  □ ‘public interest’ cannot be forecast with scientific precision;
  □ Planning schemes can date, or be overtaken by events;
  □ It is for proponents to dream up potential development and assessment managers need to be able to respond
Limits on discretion

- Is bound by the process set out in the Act

- Discretion must be performed in a way that is consistent with promoting 'ecological sustainability – the balance of:
  - Protection of natural systems and ecological processes;
  - Economic development; and
  - Maintenance of the cultural, economic, physical and social wellbeing of people and communities

- Implied limitations arising from the purpose, scope and subject matter of the Planning Act; and

- Ultimately the discretion is to be exercised having regard to the actual words of the planning scheme and good town planning practice and principle
Case Study – Jackson and Smout

Jackson

Smout
Decision rules:

- *must* approve if the application complies with all of the assessment benchmarks

- *may* approve the application even if the development does not comply with some of the assessment benchmarks

- *may*, to the extent the development does not comply with some or all of the assessment benchmarks, decide to refuse the application *only if compliance can not be achieved by imposing development conditions.*
Requirements for lawful conditions, the scope of lawful conditions and enforcing conditions
Conditions generally

- Have not changed with the Planning Act – fairly consistent position through the legislation

- Condition must be either:

  □ (a) “relevant to, but not an unreasonable imposition on, the development of the use of premises as a consequence of the development; or

  □ (b) be reasonably required in relation to the development or the use of premises as a consequence of the development.”
Lawful conditions

- Proper (planning) purpose

- Finality (but further approvals may be required)

- Interpretation
  - Only have regard to the documents expressly incorporated – generally no extrinsic material unless the approval clearly incorporates it
  - Any ambiguity is construed in favour of the approval holder or land owner
  - Approval is to be read without excessive regard to technical words or phrases – read it like communication between lay people
Interpretation of conditions

Three key rules:

square Only have regard to the documents expressly incorporated – generally no extrinsic material unless the approval clearly incorporates it;

square Any ambiguity is construed in favour of the approval holder or land owner; and

square Approval is to be read without excessive regard to technical words or phrases – read it like communication between lay people.
Enforcement of conditions

- Conditions run with the land – can bind subsequent owners and occupiers

- Non-compliance with an approval is an offence (max penalty $587,457)

- An enforcement order can compel compliance, or remedy non-compliance (including compensation)

- Anyone can bring enforcement proceedings – not just a council

Lest it be said that the Act operates unduly harshly by exposing a successor in title to a lot to a penalty merely by his or her acquiring land which happens to be bound by the terms of a development approval, a successor in title could not be said to have failed to comply with a condition of a development approval where he or she has had no opportunity to comply with it. It is “failure to comply”, rather than bare non-compliance, which gives rise to a development offence the commission of which may lead to the making of an enforcement order...

Drafting conditions

- Be explicit about what is required
- Consider what, when and how
- How will others understand what is being required
- Case studies
Staged development applications

- Sizing stages to avoid thresholds
  - Planning scheme land requirements
  - Referral agency triggers, e.g. DTMR 200 dwelling trigger

- Locating stages to manage development costs

- Case studies
The sanctity of development approvals, and consequences when something goes wrong
‘Void’ or ‘voidable’?

Void:

- Decision was ‘never made’ and was invalid from the start
- All consequences of the decision are wound back to when it was purportedly made
- No discretion if decision was void
- Lack jurisdiction to make the decision
- E.g. – a council assesses a development application for land outside its local government area

Voidable:

- Decision was made, but was made incorrectly
- Decision is not set aside until a court orders, and is only from date of order
- Some discretion to decide whether to set the decision aside or not
- E.g. – considered an irrelevant consideration in making the decision, or missed a referral agency
Why do we care?

- Legislation cannot prevent judicial review (enshrined in the Constitution, and held to apply to State courts)

- Can apply to areas outside the narrow planning appeal scope:
  - Notice to call in a development application;
  - Decision making process of the Minister;
  - Other administrative decisions
Practical tips to avoid jurisdictional error

- Understand with precision the language of the statute giving rise to the decision
- Does the decision maker have appropriate delegated authority?
- Is there a need to afford procedural fairness, and if so, has it been afforded?
- Does the decision maker need to be satisfied of ‘jurisdictional facts’ (prerequisites) for the decision?
Contact

Sarah Hausler
Senior Associate
T 07 3233 8563
E shausler@mccullough.com.au

Patrick O’Brien
Lawyer
T 07 3233 8529
E pobrien@mccullough.com.au

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