How should I decide?
Development assessment and conditions

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Abstract:
The power to impose conditions on a development approval is a critical tool for developers, assessment managers, referral agencies and the community. Conditions can be the difference between an approval and a refusal; between a profitable development and a non-viable development; and between a great community outcome and a blight. The law about conditions of a development approval is well developed and has not substantially changed (other than for infrastructure conditions) in decades. However, this does not mean that imposing and implementing effective conditions is easy. The role of conditions in securing approval or refusal of a development application is now even more important under the Planning Act 2016.

The rules for deciding code and impact assessable development applications have changed substantially with the commencement of the Planning Act 2016. For code assessments, it’s a return to the presumption in favour of approval, with some new tweaks that puts discretion and conditions in the spotlight. For impact assessment, it is a move away from a rigid analysis of conflicts with individual assessment benchmarks and grounds supporting the development, to a more holistic and flexible application of planning documents and discretion.

The transition period for development applications lodged under the now repealed Sustainable Planning Act 2009 is coming to an end. Most development applications before Councils are now assessable under Planning Act 2016, and the Planning and Environment Court is now deciding cases under Planning Act 2016, providing guidance about the application of the new development assessment rules.

This presentation will provide a practical overview of the law about conditions of approval and provide insights about imposing conditions under the Planning Act 2016. The presentation will provide examples through case law and direct experience.

Keywords: Development assessment, conditions, planning
Introduction

1.1 Conditions are an important aspect of the development process. They will often be aimed at minimising the negative effects of the development on the community. Conditions can be the difference between an approval and a refusal; or between a profitable development and a non-viable development.

1.2 Conditions attach to the land so they must be able to be understood and carried out by a subsequent owner. An unlawful condition cannot be remedied by the applicant’s consent. Well drafted conditions may avoid time consuming and costly negotiations and appeals.

1.3 The nature and scope of the conditions of a development approval should be considered in light of the particular facts and circumstances of the development proposal which is being assessed. There is no ‘one size fits all’ conditions package for development. Whilst ‘standard’ conditions undoubtedly improve efficiency and clarity in conditions packages, assessing officers should consider how each condition applies to the particular proposal.

1.4 The rules for deciding code and impact assessable development applications have changed substantially with the commencement of the Planning Act 2016. For code assessments, it’s a return to the presumption in favour of approval, with some new tweaks that puts discretion and conditions in the spotlight. For impact assessment, it is a move away from a rigid analysis of conflicts with individual assessment benchmarks and grounds supporting the development, to a more holistic and flexible application of planning documents and discretion.

1.5 This paper provides an overview of the law about conditions of approval. The legislative provisions will be outlined and analysed in the context of established rules set out in cases.

2 Decision Rules and making defensible decisions

Times they are a changin’ – SPA to PA

2.1 By now, there should be no-one left unaware that planning in Queensland has undergone major changes in the last few years. The replacement of the Sustainable Planning Act 2009 (Qld) (Sustainable Planning Act) with the Planning Act 2016 (Qld) (Planning Act) and the associated Planning and Environment Court Act 2016 (Qld) (Court Act) has shifted the planning landscape from the mechanical, two step conflict and grounds assessment to an open, outcome oriented ‘other relevant matter’ assessment.

2.2 Due to the transitional provisions of the Planning Act preserving the relevancy of the Sustainable Planning Act for ongoing appeals, authority on the differences between the Planning Act and the Sustainable Planning Act took a few years to filter through the judicial system. As of early 2019, Planning Act cases are now at the judgment stage.

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1 Hammercall Pty Ltd v Gold Coast City Council & Anor [2004] QPELR 122.
2 Planning Act 2016 (Qld) s 311.
2.3 This section of the paper analyses the differences in the planning framework and assessment process between the Sustainable Planning Act and the Planning Act.

**The legislative framework**

2.4 The legislative framework for the assessment of planning applications and appeals under the Sustainable Planning Act are familiar to all in the planning space.

2.5 Section 314 of the Sustainable Planning Act identifies the instruments against which an impact assessable application was assessed. Section 324 sets out, for decisions generally, that:

> ‘(1) In deciding the application, the assessment manager must—
> (a) approve all or part of the application; or
> (b) approve all or part of the application subject to conditions decided by the assessment manager; or
> (c) refuse the application.’

2.6 In actually deciding an application, the assessment manager’s decision was constrained by section 326, which relevantly stated:

> ‘(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 …’

2.7 Section 326 of the Sustainable Planning Act was the legislative embodiment of the ‘conflicts and grounds’ test.

2.8 The Planning Act creates the same framework as the Sustainable Planning Act, as an assessment manager must:

> ‘To the extent the application involves development that requires impact assessment, and subject to section 62, the assessment manager, after carrying out the assessment, must decide—
> (a) to approve all or part of the application; or
> (b) to approve all or part of the application, but impose development conditions on the approval; or
(c) to refuse the application.\(^3\)

2.9 However, it is here that the Planning Act departs from its predecessor. Section 45 of the Planning Act provides that:

‘(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.

Examples of another relevant matter—

- a planning need
- the current relevance of the assessment benchmarks in the light of changed circumstances
- whether assessment benchmarks or other prescribed matters were based on material errors\(^4\)

2.10 The Planning Act dispenses with the ‘conflict and grounds’ test in favour of the incredibly broad ‘any other relevant matter’ test. The explanatory memorandum for the Planning Act confirms that this change was deliberate:

‘The form of the assessment and decision rules under the [Planning Act] is designed to address difficulties that arose in administering the [Sustainable Planning Act], due to the so-called ‘two part test’ for both code and impact assessment. Under that test, an assessment manager’s decision could ‘conflict’ with a relevant instrument if there were ‘sufficient grounds to justify the decision, despite the conflict’. In practice, as a result of judicial authority in several cases, this test resulted in a time consuming and unproductive enumeration of supporting and conflicting ‘grounds’, instead of the intended assessment of the merits of the proposal based on established policy, and other relevant considerations to reach a balanced decision in the public interest.

\(^3\) Planning Act 2016 (Qld) s 60(3).
\(^4\) Planning Act 2016 (Qld) s 45(5).
The assessment and decision rules for both code assessment and impact assessment under the [Planning Act] dispense with the ‘two part test’.

**Code assessment under the [Planning Act]** is a bounded assessment, requiring assessment ‘inside the box’ – in other words only against, and having regard to, the prescribed matters. Subject to the obligation to approve complying development and test whether conditions could be imposed to achieve compliance however, the assessment and decision rules for code assessment allow for weighing and balancing of any conflicting or competing prescribed matters for assessment in reaching a decision.

**Impact assessment under the [Planning Act]** is an ‘unbounded’ assessment, meaning relevant matters other than those prescribed can also be taken into account, and weighing and balancing ‘inside the box’ as well as with factors ‘outside the box’ can take place in reaching a decision.\(^5\)

2.11 Other relevant matters could include:

(a) a planning need;

(b) the current relevance of the assessment benchmarks in light of changes circumstances; or

(c) material error.\(^6\)

2.12 As with the Sustainable Planning Act, personal circumstances (including financial circumstances) are carved out, ensuring that relevant matters are only **public** relevant matters.

**The new approach**

2.13 At first blush, it may appear that the sufficient grounds test and the other relevant matter test are the same test, worded differently. Both appear to require an assessment against the relevant planning benchmarks, and some consideration to matters outside the planning benchmarks. However, recent judicial authority has made it abundantly clear that the process of, and reasoning behind, the new test in fact prescribes different assessment and decision rules to those applying under the Sustainable Planning Act.\(^7\)

2.14 Prior to the commencement of the Planning Act, an assessment manager decision could not ‘conflict with a relevant instrument’, subject to the limited carve out of there being sufficient grounds to overcome the conflict. Section 60(3) of the Planning Act contains no such restriction on the decision of an assessment manager. There is no requirement\(^8\) that an

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\(^5\) Explanatory Memorandum, Planning Bill 2015 (Qld), 74.
\(^6\) Explanatory Memorandum, Planning Bill 2015 (Qld), 54.
\(^7\) *Ashvan Investments Unit Trust v Brisbane City Council & Ors* [2019] QPEC 16.
\(^8\) Subject to section 62 of the Planning Act 2016 (Qld) in relation to referral agency responses.
assessment manager reject a development application if it conflicts with a planning instrument. In fact, as articulated by his Honour Judge Williamson QC:

‘[t]he provision does not require an application to be approved, or refused, in any particular circumstances, let alone a circumstance where non-compliance is established with an adopted statutory planning control.’

2.15 His Honour goes on in Ashvan Investment Unit Trust v Brisbane City Council\(^9\) to emphasise that the absence of an express provision of the kind found in section 326 of the Sustainable Planning Act, ‘is not, in my view, without significance’.\(^11\) His Honour also contrasts the provisions of the Planning Act relating to code assessment, which do expressly bind a decision maker to approve a code assessable application if it complies with the relevant assessment benchmarks.\(^12\)

The relevance of planning schemes

2.16 Dispensing with the two part test of the Sustainable Planning Act means that non-compliance with planning benchmarks no longer has primacy in the assessment of an application or the exercise of a planning discretion.\(^13\) So what function do planning benchmarks have at all?

2.17 Firstly, and obviously, planning schemes serve to categorise development as either accepted or assessable, and the level of assessment. Given that code assessable development that complies with benchmarks must be approved,\(^14\) planning schemes serve as a constraint on the circumstances in which an assessment manager can exercise discretion.

2.18 In an impact assessable application, the existence of a non-compliance with an assessment benchmark is a clearly relevant fact or circumstance in the exercise of the planning discretion conferred by section 60(3) of the Planning Act.\(^15\) The exercise of the discretion is not unbounded from the planning scheme – the discretion is necessarily tethered to the planning scheme as the embodiment of the public interest,\(^16\) in which the discretion must fundamentally be exercised.\(^17\) It is for the assessment manager to determine how, and in what way, non-compliance with an adopted statutory planning scheme informs the discretion conferred upon the assessment maker by the Planning Act.\(^18\)

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\(^9\) Ashvan Investments Unit Trust v Brisbane City Council & Ors [2019] QPEC 16, [43].
\(^10\) Ashvan Investments Unit Trust v Brisbane City Council & Ors [2019] QPEC 16.
\(^11\) Ashvan Investments Unit Trust v Brisbane City Council & Ors [2019] QPEC 16, [44].
\(^12\) Planning Act 2016 (Qld) s 60(2). See also Klinkert v Brisbane City Council [2018] QPELR 941 and Brisbane City Council v Klinkert [2019] QCA 040.
\(^13\) Ashvan Investments Unit Trust v Brisbane City Council & Ors [2019] QPEC 16, [51].
\(^14\) Planning Act 2016 (Qld) s 60(2). See also Klinkert v Brisbane City Council [2018] QPELR 941 and Brisbane City Council v Klinkert [2019] QCA 040.
\(^15\) Ashvan Investments Unit Trust v Brisbane City Council & Ors [2019] QPEC 16, [53].
\(^16\) Bell v Brisbane City Council & Ors [2018] QCA 84, [67].
\(^17\) As opposed to personal circumstances carved out by section 45(5)(b) of the Planning Act 2016 (Qld).
\(^18\) Ashvan Investments Unit Trust v Brisbane City Council & Ors [2019] QPEC 16, [53].
How to exercise the discretion

2.19 In Ashvan, Williamson DCJ notes that the abandonment of the conflict and grounds test in favour of a more open discretion highlights a tension between:

(a) the need for the rigid application of planning documents on the one hand; and

(b) the adoption of a flexible approach to the application of planning documents in an exercise of the discretion.

2.20 The rationale for both viewpoints is clear. In favour of a rigid approach, the court has made it clear that the planning scheme is the embodiment of the public interest, and so the rigid interpretation of a planning scheme is an alluring way to be exercising discretion in the public interest. It is, as his Honour opines (borrowing from his Honour McMurdo JA in Bell v Brisbane City Council), ‘not for the assessment manager, nor this Court on appeal, to gainsay the expression of what constitutes the public interest in a planning sense’. A rigid approach also has the benefit of building confidence in the planning system by reducing (or reducing the appearance of) ad hoc or arbitrary decisions.

2.21 However, Williamson DCJ equally emphasises in Ashvan that it is clear that modern planning schemes are complex instruments that are expressed in performance based outcomes. Planning schemes do not envisage a single development option or design, nor do they prohibit development. Instead, as his Honour emphasises, planning schemes are intended to:

‘guide development in a city or region in a way that achieves the will of the community (in land use terms) as determined by the elected officials at a particular point in time. The will of the community, in land use terms, cannot be forecast with scientific precision. The land use needs of a city, or region, are dynamic. The statutory assessment and decision making framework under the [Planning Act] enables considerations of this kind to inform the exercise of the discretion to reach a balanced decision in the public interest about an impact assessable application.’

2.22 While the discretion is extremely wide, it is subject to three critical constraints:

(a) it must be based on the assessment carried out under section 45 of the Planning Act;

(b) the decision making function must be performed in a way that is consistent with the goal set out in section 5 of the Planning Act to advance the purpose of the act, which is to achieve ecological sustainability through a balance of:

19 Bell v Brisbane City Council & Ors [2018] QCA 84, [67].
20 Ashvan Investments Unit Trust v Brisbane City Council & Ors [2019] QPEC 16, [57].
21 Ashvan Investments Unit Trust v Brisbane City Council & Ors [2019] QPEC 16, [59].
22 Ashvan Investments Unit Trust v Brisbane City Council & Ors [2019] QPEC 16, [59].
(i) the protection of ecological processes and natural systems at a local, regional, State and wider levels;  
(ii) economic development; and  
(iii) the maintenance of the cultural, economic, physical and social wellbeing of people and communities,\(^{23}\) and  
(c) the discretion is subject to any implied limitation arising from the purpose, scope and subject matter of the Planning Act.\(^{24}\)

2.23 Ultimately, the discretion is to be exercised having regard to the actual words in the planning scheme and proper town planning practice and principle.\(^{25}\)

3 Code assessable applications

3.1 Contrary to impact assessable applications, for which the discretion to decide has been greatly expanded, discretion in code assessable applications has been constrained under the Planning Act. There is not a clear presumption of approval, and no ability to refuse a compliant development.

3.2 A code assessable development can only be carried out against the assessment benchmarks, and the matters prescribed by regulation.\(^{26}\) No scope for considering other relevant matters exists.

3.3 This is broadly consistent with the previous position under the Sustainable Planning Act, which provided a bounded form of development assessment. However, under Sustainable Planning Act, the conflict and grounds test applied to code assessable applications.

3.4 Under the Planning Act, to the extent an application involves code assessable development, the assessment manager:

(a) must decide to approve the application to the extent the development complies with all of the assessment benchmarks for the development; and  
(b) may decide to approve the application even if the development does not comply with some of the assessment benchmarks; and  
(c) may, to the extent the development does not comply with some or all of the assessment benchmarks, decide to refuse the application \textit{only if compliance cannot be achieved by imposing development conditions}.\(^{27}\)

\(^{23}\) Planning Act 2016 (Qld) s 3(2).  
\(^{24}\) Smout v Brisbane City Council [2019] QPEC 10, [51].  
\(^{25}\) Smout v Brisbane City Council [2019] QPEC 10, [54].  
\(^{26}\) Planning Act 2016 (Qld) s 45(3).  
\(^{27}\) Planning Act 2016 (Qld) s 60(2).
3.5 The statutory instruments against which the development must be assessed are those in effect when the application was properly made, but in some circumstances weight may be given to amended documents. Judge Williamson considered these circumstances in *Klinkert v Brisbane City Council*²⁹ (Klinkert).

3.6 In *Klinkert*, Williamson DCJ was presented with a situation in which a proposed development complied with the assessment criteria in force when the development application was properly made, but did not comply with changed assessment benchmarks which came into force after the application was made, but before it was decided. His Honour concluded that he was bound (must) approve an application if it complied with the benchmarks, and it did comply with the benchmarks when it was made. Accordingly, he had no ability to consider the amended benchmarks.

3.7 Judge Williamson’s decision was upheld on appeal.³⁰

**Must approve**

3.8 A code assessable application that complies with all of the assessment benchmarks must be approved.

3.9 This is a clear shift back to the position under the *Integrated Planning Act 1997* (Qld). The assessment benchmark will ordinarily be the whole of the relevant code, rather than a particular acceptable outcome, so consideration may be given to the performance outcomes and the purpose statements in the relevant assessment benchmark to determine whether the development application is compliant.

**May approve**

3.10 If a development application does not comply with some of the assessment benchmarks, the assessment manager may decide to approve the application. The *Planning Act 2016* (Qld) provides examples where the decision resolves a conflict between the benchmarks, or between benchmarks and a referral agency response.

3.11 The *Acts Interpretation Act 1954* (Qld), section 14D addresses the use of examples in legislation as follows:

> ‘If an Act includes an example of the operation of a provision—

> (a) the example is not exhaustive; and

> (b) the example does not limit, but may extend, the meaning of the provision; and

²⁸ *Planning Act 2016* (Qld) s 45(6).
²⁹ *Klinkert v Brisbane City Council* [2018] QPEC 30.
³⁰ *Brisbane City Council v Klinkert* [2019] QCA 40.
(c) the example and the provision are to be read in the context of each other and the other provisions of the Act, but, if the example and the provision so read are inconsistent, the provision prevails.’

3.12 The plain words of section 60(2)(b) are much broader than the examples provided. The section appears to give authority for an approval to be given despite a non-compliance with the benchmarks. This provision is not easily interpreted and applied in cases where non-compliances with assessment benchmarks cannot be overcome by lawful conditions.

3.13 A key limiting factor in the ability of assessment managers to approve applications where there is non-compliance with assessment benchmarks is the scope of code assessment itself, as defined under section 45(3) of the Planning Act, for example:

(a) an approval that was based on matters outside the assessment benchmarks and matters prescribed by regulation would be at risk of being unlawful as a result of exceeding the scope of code assessment;

(b) an approval that was not justified by the assessment benchmarks and matters prescribed by regulation would be at risk of being unlawful on the basis that it was so unreasonable that no reasonable assessment manager would make that decision.

Can only refuse if compliance cannot be achieved by imposing development conditions

3.14 While conditions are discussed in detail below, it is worth highlighting that section 60(2)(d) of the Planning Act permits refusal of a code assessable application only to the extent compliance with the assessment benchmarks cannot be achieved by imposing development conditions.

3.15 To date, we have not seen large amounts of judicial consideration of this section under PA.31

3.16 There are Planning and Environment Court cases under the Integrated Planning Act 1997 (Qld) that may inform the application of this provision. Those cases addressed the situation where a particular conditions was critical to approval of an application, and the legitimacy of the position that in the absence of a particular condition the development application ought to be refused.32

3.17 In some situations, particularly ‘all or nothing’ situations cannot possibly result in compliance, and are obviously inappropriate. In Delta Contractors (Aust) Pty Ltd v Brisbane City Council33 both parties, and the Planning and Environment Court, agreed that with respect to the partial demolition of a character dwelling, if the demolition did not comply

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31 See, for example, the limited comments in Planning Place Pty Ltd v Brisbane City Council [2018] QPEC 62.
32 Property 4 Retail Pty Ltd v Hervey Bay City Council & Anor [2006] QPEC 110; Waterfront v Hervey Bay City Council [2008] QPEC 017.
with some or all of the assessment benchmarks, it was not possible to envisage conditions that could be imposed to make the development comply.  \[34\]

3.18 However, as discussed below, the imposition of a potentially onerous condition, even so onerous as to make a development non-feasible, is not necessarily an impediment to an assessment manager approving subject to that condition.

3.19 The case of *Mackay Resource Developments Pty Ltd v Mackay Regional Council & Ors* [2013] QPEC 57 and [2015] QPEC 32 is also relevant as it provides a useful reminder that a condition will not be unlawful on the basis of being an unreasonable imposition on the development even where there would be a substantial cost to implement the condition, potentially making the proposed development unviable.

3.20 Councils may be presented with a situation where no information request was issued, or no information or incomplete information was provided in response to an information request, and it is likely that the further information would enable demonstration of compliance with a benchmark.

3.21 A question will arise about whether it would be lawful for Council to refuse the development application on the basis that, in the absence of necessary information, it does not comply with an assessment benchmark. Consideration should be given to whether a condition to provide the information could lawfully be imposed, particularly where:

(a) the future assessment of that information may offend the finality and certainty principle; \[35\] and

(b) arguably, is may be an unreasonable imposition on the development, or not reasonably required, particularly if the Applicant has chosen to opt-out of the information request stage.

3.22 Whether it is possible to draft lawful conditions to achieve compliance with an assessment benchmark will depend on the particular circumstances of the application.

\[34\] *Delta Contractors (Aust) Pty Ltd v Brisbane City Council* [2019] QPELR 1, [22]. Various other aspects of the development could also not be conditioned to comply – see [52], [61], [71], [77], [82], [87] and [94].

4 Requirements for lawful conditions

Conditions generally

4.1 The power to impose conditions on a development approval is a critical tool for assessment managers.

4.2 Generally, the lawfulness of conditions will be governed by specific provisions of the key legislation, primarily the Planning Act 2016 (Qld) (Planning Act) but also other legislation. 36

4.3 Conditions will often be aimed at minimising the negative effects of the development on the community. Conditions can be the difference between an approval and a refusal; or between a profitable development and a non-viable development.

4.4 Conditions attach to the land so they must be able to be understood and carried out by a subsequent owner. An unlawful condition cannot be remedied by the applicant’s consent. 37 Well drafted conditions may avoid time consuming and costly negotiations and appeals.

4.5 The nature and scope of the conditions of a development approval should be considered in light of the particular facts and circumstances of the development proposal which is being assessed. There is no ‘one size fits all’ conditions package for development. Whilst ‘standard’ conditions undoubtedly improve efficiency and clarity in conditions packages, assessing officers should consider how each condition applies to the particular proposal.

4.6 Even before addressing the legal tests associated with conditions it is helpful for an assessing officer to have regard to some first principle questions that inform the purpose of why conditions ought to be imposed in the first place.

4.7 Such questions may relate to things like:

(i) If this development was approved with no conditions, how good or bad would that be for the community?

(ii) If I impose this condition, will our Development Compliance Team be able to enforce it if there is a breach?

(iii) Is it easier and more appropriate to refuse this development and draft grounds for refusal than impose conditions of approval that may not be reasonable and relevant?

(iv) What is the mischief this condition of approval seeks to address?”

36 For example, in relation to the imposition of ‘environmental offsets’ conditions, reference would need to be made to section 14 of the Environmental Offsets Act 2014 (Qld).

37 Hammercall Pty Ltd v Gold Coast City Council & Anor [2004] QPELR 112.
4.8 There are no doubt many other questions to ask that will permeate throughout a development assessment process. The concept of ‘purpose’ should be the guiding light. A condition which has a sound purpose may still not be lawful but it is a useful starting point.

**Relevant and reasonable test**

4.9 Front and centre of any discussion about lawful conditions is the ‘relevant and reasonable’ test. In broad terms, the ‘relevant and reasonable’ test has been with us in a number of different iterations under superseded legislation. As a result, there is a substantial body of case law relating to the lawfulness of conditions.

4.10 Section 60 of the Planning Act permits the imposition of development conditions upon both code and impact assessable development approvals. The potential scope of development conditions is set out in section 65 of that Act, which mandates that a development condition imposed on a development approval must be:

‘(a) relevant to, but not an unreasonable imposition on, the development or 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.’

4.11 Similar wording appeared in the repealed Sustainable Planning Act 2009 (Qld) (SPA), and the repealed Integrated Planning Act 1997 (Qld).

4.12 There is of course no requirement for an assessment manager to impose every condition which may be relevant and reasonable.

4.13 Importantly, the elements of section 65 of the Planning Act are alternatives; a lawful condition need only satisfy one of the two limbs. The application of section 65 will largely depend on the facts and circumstances of each case. The nature of the provision is such that there is no ‘one size fits all’ standard to apply to all development applications.

4.14 In respect of the first limb, the leading authority explains:

‘It may well be that a condition which is in no proper sense of the word ‘required’ by a subdivision is nevertheless relevant in the way indicated by the High Court as falling within the proper standards in local development or in some other legitimate sense. For example, a condition relating to the layout of the subdivisional roads may not be able to be supported as ‘required’ – reasonably or otherwise – by the subdivision in question, but may be defensible as reasonably imposed in the interests of the rational development of the area in which the subdivision is located.’

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38 Sustainable Planning Act 2009 (Qld) s 345.
39 Integrated Planning Act 1997 (Qld) s 3.5.30.
40 Intrapac Parkridge Pty Ltd v Logan City Council [2015] QPELR 49, [24].
41 Proctor v Brisbane City Council (1993) 81 LGERA 398 at 404.
4.15 In respect of the second limb, the leading authority states:

‘The statutory test that has to be applied by the local authority in deciding whether to attach conditions to its approval in a case such as the present is whether the conditions are reasonably required by the subdivision. This means that the local authority, in deciding whether a condition is reasonably required by the subdivision, is entitled to take into account the fact of the subdivision and the changes that the subdivision is likely to produce – for example, in a case such as the present, the increased use of the road and of the bridge – and to impose such conditions as appear to be reasonably required in those circumstances.’

4.16 In *Wootton v Woongarra Shire Council*, the relevant Council sought to impose a condition requiring a monetary contribution to infrastructure in circumstances where the existing infrastructure had sufficient capacity to cope with the proposed development and no augmentation work would be required. In finding that such condition was not lawful, the Court of Appeal stated:

‘The question must be whether there is a relevant nexus between the use of the land and the conditions sought to be imposed, that nexus being that the proposed use creates such a change in existing affairs that the condition is a reasonable response to it.’

4.17 In *Grabb v Maroochy Shire Council* imposed a condition that required the grant of a lease to Council to protect the subject land from agricultural spray from the adjoining agricultural land until such time as there was a change of use of the adjoining land. The adjoining land was subsequently sold to a developer and the agricultural use had been abandoned. As a result, the Court allowed a change to the subject condition on the basis that it was no longer ‘reasonably required’.

**Conditions that can and cannot be imposed**

4.18 A development condition may, for example:

(a) limit how long a lawful use may continue or works remain in place;

(b) state that development must not start until other development permits have been given, or other development had been substantially started or completed;

(c) require compliance with an infrastructure agreement that attaches to land and binds the owner and the owner’s successors in title;

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43 (1985) 56 LGRA 301.
44 Wootton v Woongarra Shire Council (1985) 56 LGRA 301 at 303.
45 [2005] QPEC 044.
(d) require development, or part of a development, to be completed within a stated period; or

(e) require the payment of security under an agreement about development conditions.46

4.19 Section 66 of the Planning Act contains restrictions on development conditions, which must not:

(a) require a person other than the applicant carry out works for the development;

(b) require a person to enter into an infrastructure agreement;

(c) other than through the infrastructure charges and conditions regime, requiring a monetary payment for the establishment, operating or maintenance costs of, works to be carried out for, or land to be given for, infrastructure of the imposition of a condition by a State infrastructure provider;

(d) require an access restriction strip;

(e) limit the period of a development approval has effect for a use or works forming part of a network of infrastructure, other than State-owned or State–controlled transport infrastructure; or

(f) relate to water infrastructure about a matter for which the South-East Queensland Water (Distribution and Retail Restructuring) Act 2009 (Qld) requires a water approval.

4.20 A condition about trunk or non-trunk infrastructure can only be imposed if it complies with the detailed requirements in Chapter 4 of the Planning Act for infrastructure conditions. These matters will not be addressed in this paper as it is a whole topic in its own right.

4.21 Additionally, a development condition must not be inconsistent with a development condition of an earlier development approval in effect for the development unless:

(a) the same person agrees to the conditions;

(b) the applicant agrees in writing to the later condition applying; and

(c) the owner of the land agrees in writing.47

4.22 This rule only applies where the approvals relate to the same ‘development’ as defined by the legislation.48

46 Planning Act 2016 (Qld) s 65(2).
47 Planning Act 2016 (Qld) s 66(2).
Proper purpose

4.23 The conditions of an approval must be for a proper purpose, and not for any ulterior purpose. In the planning context, the position can be summarised as:

‘A planning purpose is one that implements a planning policy whose scope is ascertained by reference to the legislation that confers planning functions on the authority, not by reference to some preconceived general notion of what constitutes planning.’

4.24 A condition that complies with the planning authority’s laws and policies will not necessarily guarantee that the condition is lawful, as the condition must still meet the relevant and reasonable test.

4.25 A planning purpose is one that implements a planning policy whose scope is ascertained by reference to the legislation that confers planning functions, on the relevant authority and this includes assessment by reference to the planning scheme.

4.26 It is not the function of the planning authority to fix issues that existed before the proposed development and which will not be affected or worsened by the proposed development. In Sumvista Pty Ltd v Redland Shire Council the Court refused to impose a condition to redress the flow of stormwater over adjoining land which would be perpetuated by the proposed development but not worsened.

4.27 Similarly, a planning authority cannot seek to protect land that is not threatened by the development the subject of the application by the imposition of conditions. Where the subject development does not affect natural values, and a development application would be required in order to do so, the imposition of a condition that seeks to protect and manage the natural values land has been found to be premature.

Finality

4.28 Generally a condition must be final, otherwise it is at risk of being found to be unlawful for reasons of uncertainty. The assessing authority is under a duty to decide an application with finality and may not postpone an element of its necessary decision or delegate its power to decide that element to some other person or body.

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51 Intrapac Parkridge Pty Ltd v Logan City Council [2015] QPELR 49, [24]; Sincere International Group Pty Ltd v Council of City of Gold Coast [2019] QPELR 247. See also Western Australian Planning Commission v Temwood Holdings Pty Ltd (2004) 221 CLR 30, [70] and [93].

52 Sumvista Pty Ltd v Redland Shire Council [2005] QPELR.


54 Mt Marrow Blue Metal Quarries Pty Ltd v Moreton Shire Council (1994) 85 LGERA 408.
The application of this principle has changed over time as a result of the number of approvals required for a development. In particular, the use of the former compliance assessment process under the repealed SPA envisaged that some elements of the development will not be dealt with in the development approval but instead during the compliance assessment stage. It is now quite common to see conditions that require detailed plans for particular elements of the development to be submitted for Council approval e.g. landscaping or building design. Indeed, section 65(2)(b) of the Planning Act expressly allows this to occur.

However, the test remains that the assessing authority must not defer a decision on material matters for a later date. The leading case is McBain v Clifton Shire Council\(^\text{55}\) which concerned a condition of approval for a piggery. The offending condition required that a base level of 20,000 pigs be only increased in staged increments to a maximum of 80,000 pigs. Each stage was to be subject to the written approval of the local government, relying on the advice of a Monitoring Review Committee that pig stock numbers represented a sustainable operation in accordance with an environmental management plan. The condition was held to offend the finality principle as it postponed a key element of the development for a later day.

By contrast, a condition that required an easement and building restriction line to ensure that residences were not affected by noise from a quarry was held to be valid as the condition included specific, objective noise levels.\(^\text{56}\)

**Restrictions on complete redesigns**

From time to time, a Council may receive a development application with proposal plans that are not suitable in their present form but, by the use of the expertise of the Council development assessment officers, the proposal could be redesigned to be acceptable.

The cases indicate that some caution needs to be exercised before embarking upon a redesign exercise, even though a potential better development application may be achieved if that exercise was undertaken.

In the case of Wingate Properties Pty Ltd v Brisbane City Council,\(^\text{57}\) Brabazon QC DCJ held as follows:

‘It is not the function of this Court (or indeed any planning authority) to refuse an application because it considers the proposed use is not the best possible use of the site. It is not the function of the Court to redesign a proposal. Its function is to pass judgment on that which is proposed. In this case, the issue is whether or not the current proposal has been shown to be acceptable. The fact that some alternative proposal may be thought to be even more acceptable is by the way. If the current proposal is acceptable, then that is enough.’

\(^{55}\) (1995) 89 LGERA 372.

\(^{56}\) Mt Marrow Blue Metal Quarries Pty Ltd v Moreton Shire Council (1994) 85 LGERA 408.

\(^{57}\) [2001] QPELR 272 at 276.
4.35 The reference to the current proposal being acceptable may involve the imposition of reasonable and relevant conditions in accordance with the Planning Act. However, the case does serve to highlight that there are limits upon the conditions that may be imposed in that such conditions should not redesign a proposal.

4.36 From time to time, development conditions do require some amendments to proposal plans and other reports, but care should be taken in imposing conditions of this nature that they do not stray into the territory of what might be described as a redesign of the proposal required to be assessed by Council. This authority also highlights the need for Councils to make effective use of information request powers prior to the decision stage when the potential need to impose development conditions in a lawful fashion is invoked.

**Ambiguity**

4.37 It is relevant for Council and government officers to be aware of the consequences of drafting a condition which is ambiguous. In a nutshell, the case law demonstrates an interpretation which favours a developer over Council in those circumstances.⁵⁸

4.38 In *Ryde Municipal Council v Royal Ryde Homes*,⁵⁹ Else-Mitchell J stated at page 323 in the context of interpretation of a town planning consent:

‘I therefore think it is sound to say that the legal qualities a consent possesses, or which flow from a consent, are so important care should be taken to ensure that consents are framed in clear terms and conditions are specified with certainty. Any lack of clarity or certainty is the responsibility of the council and it must take the consequences of any failure to specify accurately or in detail what is consented to as well as any conditions to which consent is subject.’

4.39 In *Mariner Construction Pty Ltd v Maroochy Shire Council*, His Honour Senior Judge Skoien stated at page 336:

‘If a condition is imposed which is to restrict the operation of a permit (and in this case very severely and in a surprising way) it should be expressed clearly. That allows the permittee, if unhappy with the condition, to appeal to this court ... but if the condition is so obscurely worded, the permittee may honestly interpret it in a way which is not restrictive and fail to exercise one’s right of appeal.’

4.40 These authorities highlight the need for clarity in the drafting of development approval conditions and demonstrate the approach the Courts are likely to take in the event of any ambiguity.

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Refusal

4.41 There may be cases where but for the imposition of a particular condition, a development application ought to be refused. A difficulty arises where that condition is said to be unlawful. The Court has recognised that a Council may adopt a position in an appeal that a particular condition is so important that without it, the application should be refused.

4.42 For officers struggling to draft a lawful condition, it may be useful to consider whether the application ought to be refused. For developers instituting a conditions appeal, it may be relevant to consider the planning authority’s attitude to the development without the inclusion of a particular condition (although an unlawful condition cannot be made lawful by the consent of the developer).

4.43 The fact that a condition is onerous, and may make the development unfeasible does not, without more, cause the condition to be unlawful.

Prematurity

4.44 In the case of The Corporation of the Trustees of the Roman Catholic Archdiocese of Brisbane v Gold Coast City Council, the Court considered an approach by the Council to impose a condition that required dedication of a large area of land which was recognised under its planning scheme for its environmental values. The Council argued that the likely consequences of the present reconfiguration dictated that the question of dedication be addressed in the reconfiguration of lot application because, without doing so, it may increase the pressure to develop the vegetated wetland area.

4.45 Whilst the Court was convinced of the ecological values of the proposed area for the dedication and its recognition in the relevant planning instruments, the Court found that the imposition of that type of condition in a reconfiguration application was an unreasonable condition on the basis that it was premature. It was significant to the Court that all that was proposed in that particular case was a reconfiguration of a lot and that Council was not precluded at a later stage in the assessment of a development application for a material change of use to ensure the preservation and advancement of the ecological value of the vegetated land.

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60 Waterfront v Hervey Bay City Council [2008] QPELR 523; Property 4 Retail Pty Ltd v Hervey Bay City Council [2006] QPEC 110.
61 Mackay Resource Developments Pty Ltd v Mackay Regional Council & Ors [2013] QPEC 057.
63 The Corporation of the Trustees of the Roman Catholic Archdiocese of Brisbane v Gold Coast City Council [2010] QPELR 521 at 531.
Legal rules about interpretation of development approvals, and drafting tips and tricks

Interpretation of approvals

5.1 In *Hawkins and Izzard v Permarig Pty Ltd & Brisbane City Council (No. 1)*64 Brabazon QC DCJ helpfully set out some key principles for the interpretation of conditions:

(a) in interpreting conditions, reference may be had to the documents which are expressly incorporated into the condition but it is generally not possible to go outside the approval document in considering its meaning. As the development approval is a public document, they should be self-contained for ease of future reference;

(b) any lack of clarity is to be construed in favour of the holder of the approval or to place the least burden on the land owner (if different); and

(c) conditions should be read without excessive regard to any technical words or phrases (like an Act of parliament), but instead as communication between lay people. They are also not to be interpreted like contracts.

5.2 The exclusion of extrinsic material should be particularly borne in mind when drafting conditions. For example, using terms defined in a planning scheme is convenient, but unless the approval expressly states that those words adopt the same meaning as the planning scheme, the meaning of the words are not necessarily the same.

Approvals run with the land and enforcement issues

6.1 There is no doubt that conditions of a development approach attach to the land to which they relate and bind the owner, the owner’s successors in title, and any occupier of the land.65

**High Court in Pike v Tighe**66

6.2 Whilst approvals have run with the land for many years, the application of the law has been sufficiently controversial that it resulted in a High Court decision last year.

6.3 The case of *Pike v Tighe* considered whether a development approval for a reconfiguration of a lot attached to land after the land had been subdivided.

6.4 Townsville City Council approved a development application to subdivide an existing Lot into two residential Lots.

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64 *Hawkins and Izzard v Permarig Pty Ltd & Brisbane City Council (No. 1)* [2001] QPELR 414.
65 *Planning Act 2016* (Qld) s 73.
6.5 The approval was subject to an easement being created over Lot 1 to allow for access, and services and utilities for Lot 2. The easement that was executed provided for access but not for services. Council endorsed the survey plan enabling registration of the new survey plan and easement.

6.6 The Tighes became the owners of Lot 1 and the Pikes became the owners of Lot 2. Mr Tighe purchased Lot 1 in reliance on a statement from the agent that Lot 2 could only be used for grazing because the easement was for access only, and had no rights to utility services.

6.7 Without an easement authorising services to Lot 2, the Pikes were unable to build a house on Lot 2 (being the purpose for which they purchased the land).

6.8 In the Court of Appeal, the Court held that the conditions of the development approval bound only the owner of, and any successors in title to, the original lot, and it did not attach to the Lots created by the reconfiguration. This finding was overturned by the High Court.

6.9 The High Court held that by section 245(1) of SPA the development approval expressly attaches to ‘the land the subject of the application to which the approval relates’. The natural and ordinary meaning of this language is that it attaches to all of the land that is subject to the application for the development approval.

6.10 Therefore, owners of subdivided lots will be considered successors in title to the owners of the original lot, and are bound by the original conditions.

6.11 In considering the SPA provision, the High Court in *Pike v Tighe*[^67] held that a successor in title to the ownership of a parcel of land created by the reconfiguration of a larger parcel was bound to comply with a condition of the approval for reconfiguration that should have been, but was not, satisfied by the original owner prior to completion of the reconfiguration.^[68]

**Sunshine Coast Regional Council v Recora Pty Ltd & Golder Associates Pty Ltd (2012) 191 LGERA 1**

6.12 This case is authority that subsequent owners will be bound by unsatisfied conditions attached to the land.

6.13 Recora had entered into a contract to purchase land. At the time of the completion of the contract, the infrastructure contributions remain unpaid. A search undertaken with the Council on behalf of Recora was not sufficient to bring that fact to its notice. Council contacted Recora about the outstanding charges in January 2011.

6.14 Recora argued that they had not committed a development offence as the original conditions were ‘incapable’ of being complied with, as they required action to be taken before Recora owned the land.

6.15 The Court held on page 4 that Recora was still bound by the unsatisfied condition:

‘Each condition imposes an obligation on the applicant (and as a matter of law on their successor in title; in this case Recora), to pay an amount calculated by reference to the Planning Scheme Policy applicable at the time of payment. The condition sets a deadline to pay which had passed by the time Recora assumed the benefit of the approval. The failure to pay in a timely way does not discharge the responsibility to pay the contributions nor does it sever the condition from the approval.’

Occupier

6.16 The meaning of ‘occupier’ was considered in Sunshine Coast Regional Council v Sugarbag Road Pty Ltd & BMD Constructions Pty Ltd.69

6.17 The term ‘occupier’ was held to only included persons that have rights over the implementation of the development approval itself.

6.18 Therefore, whilst BMD was the ‘occupier’ for many purposes (e.g. for the purpose of exercising rights and being subjected to obligations under legislation dealing with workplace health and safety), it was not an occupier within the ambit of section 245 of SPA.

6.19 In coming to this conclusion, the Court examined the contract between the two parties. The contract indicated that the possession was solely for the purpose of conferring on BMD a right to ‘use and control’ the land as was necessary to enable them ‘to execute the work’ under the Contract.

6.20 Where a contractor is engaged to carry out operational work required by a development approval, and who has no separate rights in relation to that approval, they will not be occupier for the purposes of section 73 of the Planning Act.

Enforcement of approvals and conditions

6.21 Non-compliance with a development approval (which includes non-compliance with a condition of an approval) is a development offence under the Planning Act,70 the maximum penalty for which is (currently) $600,525.

6.22 In addition to a monetary penalty, the Planning and Environment Court is also empowered to make an enforcement order in response to a development offence, which can compel a person to refrain from committing the development offence, or remedy the development offence in a stated way (including paying compensation).71 Generally, the exercise of the discretion is in favour of remedying the development offence, rather than punitively punishing offenders.

69 [2011] QPELR 139.
70 Planning Act 2016 (Qld) s 164.
71 Planning Act 2016 (Qld) s 180.
6.23 Any person has standing to bring a proceeding alleging a development offence, not just an assessment manager.\(^{72}\)

6.24 On the question of enforcing conditions, the High Court in Pike v Tighe softened the apparently harsh legislative provisions by noting:

‘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 ...’\(^{73}\)

6.25 The fact that conditions bind a successor in title is relevant to the fact that conditions must be clear, and any ambiguity is interpreted in favour of the developer/land owner.

7 Conclusion

7.1 Development approvals are public documents that have an impact well beyond the date of the decision notice. Well drafted conditions may lessen the likelihood of triggering a negotiated decision notice process or conditions appeal and may deliver more certainty in the achievement of desired planning outcomes and compliance.

7.2 Assessment managers should be familiar with the scope of their power to impose conditions in the context of the legal rules and relevant policy documents.

7.3 Developers should seek to clarify any ambiguity in conditions of approval in order to avoid delay and disputes as the development progresses.

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\(^{72}\) See, for example, Caravan Parks Association of Queensland Limited v Rockhampton Regional Council & Anor [2018] QPEC 52.

\(^{73}\) Pike v Tighe (2018) 229 LGERA 303, [44].