

Conditions

An assessment manager's decision to impose conditions upon a development approval must be based upon its assessment of the development, according to law. In other words, the conditions should arise from the assessment of the application (code/impact) and should be informed by the assessment benchmarks, application material, etc.

Within that context, the conditions power is then constrained by legal principles and the Planning Act 2016 (the Planning Act), most relevantly, by s65(1):

65 PERMITTED DEVELOPMENT CONDITIONS

- (1) A development condition imposed on a development approval must—
 - (a) be relevant to, but not be 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.

In addition to s65(1):

- Section 65(2) states what a development condition may do (for example, limit how long a lawful use may continue); and
- Section 66 lists out what a condition must not do (ie prohibited conditions).

As to whether a condition is “relevant to” the development, guidance may be had from Proctor¹:

It may well be that a condition which is in no proper sense of the word “required” by a subdivision is nevertheless relevant...as falling within the proper limits of a local authority's functions under the Act, as imposed to maintain proper standards in local development or in

some other legitimate sense. For example, a condition relating to the layout of the sub-divisional 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.

A condition will only be ‘relevant’ if it is for a proper planning purpose. A proper planning purpose is one which is within the legal and assessment framework that applies to the development. There must be a connection between the condition and the development.

Whether a condition is an ‘unreasonable imposition’ is a question of fact and degree in the circumstances of the development and the assessment framework. Considering whether a condition is an unreasonable imposition:

...focuses attention on the development or potential use of the subject land as a consequence of the development and the reasonableness of the proposed condition in light of the development or the potential use.²

A condition is ‘reasonably required in relation to’ a development if it is reasonably necessary to address a consequence of the development:

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.³

Even if a condition is lawful, through compliance with the tests in s65(1), the relevant authority retains a discretion as to whether to impose the condition. Not every lawful condition must be imposed:

There is, of course, no requirement for an assessment manager or, on appeal, the court to impose each and every condition which might pass one of the above tests. There is a relatively broad residual discretion as to what lawful conditions to impose on the approval at hand. That discretion, while broad, must be exercised for a proper planning purpose and not for any ulterior purpose. 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. In the case of the SPA, the assessment manager's decision, including a decision to approve subject to conditions, must be based on the assessment of the application under Div 2 of Pt 5. That includes assessment by reference to the planning scheme.⁴



INFRASTRUCTURE CONDITIONS

The Act makes specific provision for conditions about 'trunk infrastructure' and 'non-trunk' infrastructure. The rules for Councils and the State differ. Infrastructure conditions can be complex and often expensive to comply with. We recommend seeking advice as necessary.

OTHER RULES FOR DRAFTING CONDITIONS

- A condition cannot modify a development, such that it results in a different development than was applied for by the applicant.
- An unlawful condition cannot be made lawful because it is accepted by the applicant.
- A condition cannot require an indemnity to be granted to the authority.
- A condition cannot create an unlawful fetter on the future exercise of the Council's discretion.
- A condition may prevent a use commencing until certain criteria are satisfied.
- A condition may be used to establish a trial period to determine how the use will operate, if objective criteria are used.
- A condition may be used to limit the type of use which is approved.
- A condition should be drafted to reflect whether it is to have a continuing effect after the approved development is completed or is to expire once the approved development is completed.
- A condition should not require onerous supervision by the relevant authorities (e.g. Council).

¹ *Proctor v Brisbane City Council* [1994] QPELR 309

² *Bryant v Caloundra City Council* [2006] QPELR 335

³ *Cardwell Shire Council v King Ranch Australia Pty Ltd* (1984) 54 LGRA 110 at 113

⁴ *Intrapac Parkridge Pty Ltd v Logan City Council* [2015] QPELR 49; [2014] QPEC 48 at [24] and subsequently adopted in *Sincere* in the context of the Planning Act

All references to legislation are references to the Planning Act 2016 as at 13 October 2021.

This is general advice only. Specific advice should be sought in each instance.

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