Drafting and Negotiating Conditions for Approval

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Introduction

Conditions are the community price a developer must pay for a planning approval. The purpose of conditions on a development approval is to ensure that the development permitted has the minimal possible adverse impact on the community, including for example, amenity, traffic and the environment. It is extremely rare to have an unconditional approval, therefore understanding how to construct lawful, well drafted conditions is important.

This paper will consider the drafting of conditions from a legal perspective. First, the paper will consider what the Courts have said about the statutory tests under the Integrated Planning Act 1997 (IPA) for a lawful condition. Secondly, the paper will consider what rules the Courts have established to determine whether a condition is lawful - the common law tests.

Statutory Tests

The IPA continues with, but qualifies the ‘relevant or reasonably required’ test established under the now repealed Local Government (Planning & Environment) Act 1990. Section 3.5.30 of the IPA sets out the current test as follows:

Conditions must be relevant or reasonable

(1) A condition must—
   (a) be relevant to, but not an unreasonable imposition on, the development or use of premises as a consequence of the development; or
   (b) be reasonably required in respect of the development or use of premises as a consequence of the development.

(2) Subsection (1) applies despite the laws that are administered by, and the policies that are reasonably identifiable as policies applied by, an assessment manager or concurrence agency.

Therefore putting the statutory test at its simplest, a lawful condition must satisfy either the first limb and “be relevant, but not unreasonable” or the second limb and “be reasonably required”.

Relevance test

In relation to the test of “relevance” in the first limb, the Courts have said:

“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 subdivisional roads..may be defensible as reasonably imposed in the interests of the rational development of the area in which the subdivision is located.”

In Proctor –v- Brisbane City Council an appellant submitter wanted to impose a condition on an adjoining subdivision which provided road access from the appellant’s land, through the subdivision land to Settlement Road. There were other possible means of access from the appellant’s land to Settlement Road. The Court accepted that even if such a condition could not be said to be reasonably...
required by the proposed subdivision it may still satisfy the relevance test for a lawful condition (e.g. in the interests of rational development). However, in the end the Court found that the proposed condition was neither reasonably required nor relevant and therefore it would be unlawful to impose such a condition.

It should be noted that under the IPA there is a qualification on the test of “relevance”. That is, even if the condition is relevant, it must not be an unreasonable imposition on the development. In *Delfin Property Group Pty Ltd –v- Thuringowa City Council*⁴ the Court was required to determine whether a condition requiring the construction of an open drain to its ultimate profile and capacity was lawful on a subdivision approval. After hearing the expert evidence, the Court accepted the development would have a very minor adverse effect on flooding. Consequently the Court held that even if the condition could be argued to be relevant, it would be an unreasonable imposition on the development. A similar approach was adopted in *Neilson –v- Gold Coast City Council*⁵ where the Court said it would be an unreasonable imposition to require an applicant whose development only contributed 9-12% of the demand for an upgraded roundabout to pay the total costs for the upgrade.

**Reasonably required test**

In relation to the test of “reasonably required” in the second limb, the Courts have said:

> “...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…and to impose such conditions as appear to be reasonably required in those circumstances...”.⁶

In *Cardwell Shire Council –v- King Ranch Australia Pty Limited* an appeal was lodged to the High Court of Australia. In this case King Ranch Australia Pty Limited applied to the Council for a subdivision approval. In granting the subdivision approval the Council imposed conditions requiring a contribution towards replacement of a bridge on an access road and an extension of the existing sealed surface of that road (even though the bridge and road were also used by the public). In the earlier Courts it was found that the traffic on the road and wear and tear on the bridge would be increased by the subdivision of the land. The High Court held that when taking into account the subdivision and changes that it was likely to produce the conditions were lawful as there was a connection between the effect of the subdivision and the conditions.

**Conditions that cannot be imposed**

The IPA identifies certain conditions that cannot be imposed. Section 3.5.32 states that a condition must not:

1. be inconsistent with a condition of an earlier development approval still in effect for the development; or
2. for infrastructure to which Chapter 5, Part 1 applies, require a monetary payment for the establishment, operating and maintenance costs of the infrastructure or for works to be carried out for the infrastructure; or
3. state that works required to be carried out for a development must be undertaken by an entity other than the applicant; or
4. require an access restriction strip; or
5. limit the time a development approval has effect for a use or work forming part of a network of community infrastructure (other than State owned or State controlled transport infrastructure).

However, the IPA states that the following are exceptions to the above prohibitions:

1. a condition requiring monetary payment or works in relation to State owned or State controlled transport infrastructure, railways and public transport infrastructure (section 3.5.32);
2. an infrastructure agreement with a public sector entity about supplying/funding infrastructure or refunding payments made towards the cost of supplying or funding infrastructure (section 5.1.33);

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⁵ [2005] QPELR 452.
3. a condition requiring monetary contribution, land or works towards the cost of supplying infrastructure under a local planning policy/planning scheme policy or a provision of a planning scheme (section 6.1.31).

Common Law Tests - 8 Rules of Thumb

Rule 1 – A condition must be for a legitimate planning purpose.

A condition must be for a planning purpose and not an ulterior purpose.

In Meriton Apartments Pty Ltd v Minister for Urban Affairs & Planning the Council sought to impose conditions requiring a contribution towards affordable housing. The Court held that the affordable housing provisions could be characterised as relating essentially to a social purpose, namely the provision of housing for a particular group within the community. Such purpose is not related to the physical development of town planning or of the environment, but instead is directed to benefit those persons who would be eligible for affordable housing. The Court said the fact that the challenged provisions may be for a laudable purpose is irrelevant and cannot validate an excessive use of power. The Court held that the conditions were unlawful as they were not for a planning purpose but instead were for a social purpose.

A similar situation occurred in Building Owners and Managers Association of Australia v Sydney City Council, the Council required developers to contribute 2% of development costs to a Public Housing Trust Fund to subsidise low-income housing. The Council refused to release building plans until the contribution was paid, despite claiming the contribution was ‘voluntary’. The Court held that the purpose for imposing the condition was an ulterior purpose, and as such the condition was invalid.

In Coglan and Ors. v Council of the Shire of Burnett; Malvern Development Co. Pty. Ltd. v Council of the Shire of Burnett the Council imposed a condition on a subdivision approval which required the dedication of land at no cost to Council for community purposes (e.g. Scout and Guide hall, a Country Women’s Association rest room and a Rural Fires Board shed). The Local Government (Planning & Environment) Act 1990 (PEA) allowed land to be dedicated for park purposes but did not authorise land to be dedicated for general public purposes. Consequently the Court held that the Council was unlawfully seeking to use the park provisions in the PEA for an ulterior purpose (i.e. to obtain land for public purposes) and the condition was held to be invalid.

Rule 2 – A condition must be final, in that it must not defer an important aspect of the approval for future consideration.

A local authority is bound to dispose of an application fully and finally, and it may not defer its decision on an essential matter, or delegate its power to some other person or body for determination. In Mison and Ors v Randwick Municipal Council, the Council approved a two storey dwelling house and garage subject to several conditions, one of which was that the overall height of the dwelling house be reduced to the satisfaction of the Council’s Chief Town Planner. The height of the building was of importance to the appellants and the Council was aware of this. The result of the condition was to leave unknown what the height of the building would turn out to be. The Court held that the building height was an essential element of the development and could not be deferred for further judgment. Consequently the condition was unlawful.

In McBain v Clifton Shire Council the applicant applied for a piggery of 80,000 pigs. The Council conditioned a maximum stock number of 20,000 pigs, but deferred decisions on the potential incremental increase in the stock over time to 80,000 pigs, based upon advice from a ‘Monitoring Review Committee’. The condition was held to offend the finality principle as there was no certainty if, or when, the Committee would approve subsequent expansion of the facility beyond 20,000 pigs.

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In *Carter v Redland Shire Council*\(^{13}\) a condition was imposed on a multi-unit dwelling approval requiring the details of the colour and materials of construction of the proposed building to be provided and approved by the Council or its delegated officer. The colour and construction of the proposed building was an important issue for the submitter appellant as the appellant owned a nearby historic building. The Court held that it was impossible to say what colour and materials might be approved. Consequently the Court held that the condition (and the approval) lacked finality and was void and of no effect.

**Rule 3 – A condition must not be vague or uncertain**

A condition cannot be unclear or require a third party to undertake an action. In *Fairfield City Council v Holroyd City Council*\(^{14}\) Fairfield Council sought declarations that the approval of a doctor’s surgery granted by Holroyd Council was invalid. The basis was that, among other things, it included conditions requiring the applicant to request the NSW State Government to undertake improvements at the Yennora railway station (e.g. lighting, ticket vending machines and staffing levels) which were uncertain and were incapable of enforcement. That is, they were expressed in the broadest terms and were dependent upon the co-operation of a third party. The Court held that the conditions were vague and uncertain and therefore invalid.

**Rule 4 – A condition must not require onerous supervision by the relevant authorities.**

A condition must not require onerous supervision by the relevant authority. This is because a problem can arise in policing the condition, “a problem rendered more difficult where the individual breaches, although cumulatively important, are of minor significance. The gathering of satisfactory evidence of breaches may occupy the time and energies of Council’s servants to an extent to which the Council cannot afford, especially where it is necessary to make inspections at inconvenient times or in a remote part of the Council’s area. In such a situation there is a strong temptation upon a Council to turn a blind eye to the breaches”\(^{15}\).

A good example of this rule occurred in *Westfield Management Ltd v Pine Rivers Shire Council & Anor*\(^{16}\) where a condition was imposed on a development approval for a shop stating that “the use shall be limited to a total of 6% of the floor area of the existing premises for the sale of food and groceries...”. In the submitter appeal the Court held that the condition would require constant supervision and that there would inevitably be difficulties with staff members, many of whom were casuals, understanding this restriction. Therefore the Court held that the difficulties in enforcing the condition and the uncertain scope of the expression ‘groceries’ meant that the condition would impose an unreasonable burden on the Council and be unworkable. The Court held that the condition was unlawful and as it went to the heart of the approval, the approval should also be overturned.

Another example is *Quinn v Beaudesert Shire Council*\(^{17}\) which was an applicant appeal against a refusal by the Council of a proposed forklift service and repair business from his shed. During the course of the appeal it became apparent that one of the major issues was noise. As a result the appellant proposed a condition which would require the use to operate between 8am to 4pm Monday to Friday and also require the appellant to position his truck in front of the roller door of the shed. The Court held that such a condition would be impracticable and would require the Council to police it. Consequently it was a condition of the type the Court would not impose.

**Rule 5 – A condition cannot modify a development, such that it results in a different development than was applied for by the applicant.**

*Barakat Properties Pty Ltd v Pine Rivers Shire Council & Winn*\(^{18}\) is a good example of this rule. In that case, Council imposed a condition on a combined rezoning and subdivision approval requiring a new access road to be provided. The issue was whether the condition resulted in a change to the proposed development after the advertising period to such a degree that it would require the application to be re-advertised. The Court held that the minor change test which limited an applicant’s ability to modify a development application also applied to the scope of the Council’s power in deciding

\(^{13}\) [1999] QPELR 88.
\(^{14}\) (1999) 103 LGERA 205.
\(^{15}\) The Law of Land Development in New South Wales, The Law Book Co 1967, Wilcox at 399-400.
\(^{16}\) [2005] QPELR 534.
\(^{17}\) [2005] QPELR 36
to impose a condition on an approval. That is, a condition could only modify the proposed
development so long as it satisfied the minor change test. The Court held that the condition requiring
a new access would result in a materially different proposal and as such was unlawful.

This rule has also been taken a step further in that legal challenges have been brought on the basis
that a part refusal has resulted in different development to that applied for and therefore the decision is
unlawful. In Grant –v- Pine Rivers Shire Council\(^{18}\) a preliminary legal issue was raised that the
Council’s approval of a neighbourhood centre and refusal of the child care centre aspect resulted in a
different development. That is, the Council’s decision had changed the application. Ultimately this
legal challenge was unsuccessful, but it does show that there will be attempts to apply this rule to
broader scenarios.

**Rule 6 – An unlawful condition cannot be made lawful because it is accepted by the applicant.**

This is a situation which occasionally arises where the Council and applicant agree to the imposition of
a condition. The Courts have held that despite any agreement which is reached the condition must
still satisfy the relevant legal tests.

In Hammercall Pty Ltd –v- Gold Coast City Council & Anor\(^{20}\) there was a dispute about a condition
requiring a dedication for road purposes of a corridor some 100 metres wide running across the land
to facilitate the realignment and/or widening of Old Coach Road. The Court determined that in the
past agreement in relation to the land dedication had been reached. However the Court went on to
say that the mere agreement of parties did not make a ‘manifestly unreasonable’ condition
permissible.

**Rule 7– A condition cannot require an indemnity.**

In the past some Council’s attempted to impose a condition requiring an applicant to provide an
indemnity where certain impacts were difficult to accurately determine. In response to this approach
the Courts have held that a Council cannot seek an indemnity against liability in exchange for the
granting of a development permit.

In Galandon Pty Ltd v Narrabri Shire Council\(^{21}\), an applicant proposed to develop a new motel on flood
prone land. The Council imposed a condition on the approval that the floor level be constructed half a
metre above the 1 in 100 years flood level. This would require the applicant to undertake extensive
land filling. As this would have involved a significant expense on the applicant, the Council agreed to
propose an alternative condition whereby the applicant would provide a charge in registrable form
providing an indemnity to the Council in respect of claims due to flooding. The Court held that a
condition requiring an indemnity was unreasonable and therefore unlawful.

Similarly in Hutchinson 3G Australia Pty Limited v Waverley Council\(^{22}\), the Council sought to impose a
condition on a development approval for a mobile phone tower which would indemnify the Council
against any legal liability arising from health risks associated with electric magnetic radiation. The
Court held that the indemnity condition was invalid.

**Rule 8 – A condition can only require the preservation of land for future major road infrastructure if the infrastructure is recognised in the planning scheme in a definite way.**

A condition can only require the preservation of land for future major road infrastructure if that
infrastructure is planned with some degree of certainty.

In Northern Beaches Developments Pty Ltd –v- Mackay City Council and Anor\(^{23}\) there were two
condition appeals involving applications for rezoning for residential subdivision. Each of the
applications had been approved subject to a condition requiring the appellant to make provision for a
future north/south sub-arterial road. The appellant opposed these conditions. The Council’s draft
strategic plan which was about to be gazetted (and which was given considerable weight) included the
sub-arterial road as an integral part of the overall road network plan. The Court held that the

\(^{18}\) [2006] QPELR 112.
\(^{21}\) (1983) 51 LGRA 5.
\(^{22}\) [2002] NSWLEC 151.
conditions were lawful because the sub-arterial road was clearly indicated on the draft strategic plan map and could not in any way be said to be indefinite.

The Court took a different view in *Australian Retirement Homes Limited –v- Pine Rivers Shire Council*. This was a deemed refusal appeal in which the status of a proposed bypass road was one of the major issues. The Council argued that the proposal should be refused because it would inappropriately interfere with planning for a major road. Prior to the appeal the bypass had been indicated as affecting the southern portion of the site and would not impact on the proposal. However during the appeal a new alignment of the bypass was identified as bisecting the site, which would affect the proposal. The appellant argued that the alignment of the bypass should be ignored as it was too uncertain to warrant refusal of an otherwise meritorious application. The appellant argued that there was no formal document adopted by any level of government showing the bypass alignment bisecting the site. The Court held that there was not sufficient certainty in the bypass alignment which bisected the site and consequently the proposal should be approved.

**Conclusion**

Drafting lawful conditions is one of the most fundamental and most important tasks undertaken by an assessment manager. As a result it is critical that this task is done well, because if it isn’t it will lead to disputes – which can be seen in the amount of planning and environment appeals about conditions. Therefore it is important that any conditions which are drafted satisfy both the statutory tests and common law tests mentioned in this paper.