HOW TO prepare conditions that work for applicants, assessment managers and referral agencies

A practical Approach

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Introduction

Thank you for the opportunity to present to you this evening.

My goal tonight is to investigate the process of drafting conditions for development approvals that are lawful and will work for the applicant/developer, assessment managers and referral agencies. I intend to approach this matter from a practical perspective. That is not to say that I will ignore the legal requirements associated with drafting conditions, however will defer the detailed discussion to our co-presenter.

In preparing for this paper, I have spoken to a good number of my development assessment peers, many from within the development assessment branch of Brisbane City Council. I would like to acknowledge their wise guidance and recommendations. I do however place a caveat on this presentation that the views and opinions expressed are mine and are not necessary those of my employer, the Brisbane City Council.

Before looking at the process of drafting conditions, I would like to step back a bit and think about the reason why we have and need conditions attached to a development approval. Understanding the reason why we have conditions, that is, what are drafted conditions seeking to achieve, should then mean that we draft better conditions.

I will then talk about the different components that go into making a condition, before moving on to discuss the structure of a conditions package. I intend to touch on the language and tone used in drafting conditions before concluding with a couple of recommendations to keep in the back of your mind next time you are required to draft a condition.
What is the purpose of conditions?

Why do we need conditions?

What do conditions add to a development approval?

Meurling, in Planning & Development Queensland (Fogg, Meurling et al. 2001) suggests ‘Conditions are the community price a developer must pay for a development approval’.

Is there any direction from the Act? (Sustainable Planning Act 2009)

s243 Development Permits states:

> A development permit authorises assessable development to take place-
> (a) to the extent stated in the permit; and
> (b) subject to-
>   (i) the conditions of the permit; and
>   (ii) …

s244 Development approval includes conditions

> A development approval includes any conditions-
> (a) imposed by the assessment manger; and
> (b) that a concurrence agency has given in response under section 285 or 290, or an amended response under section 290; and
> © that the Minister has directed the assessment manager to attach to the approval under section 419; and
> (d) that under another Act must be imposed on the development approval.

Turning to s 324 Decision generally, subsection (1) states

> In deciding the application, the assessment manager must –
> (a) approve all or part of the application; or
> (b) approve all of part of the application subject to conditions decided by the assessment manager; or
> (c) refuse the application.
So the Act empowers the assessment manager (and others such as concurrence agencies and the Minister) to attach conditions to an approval.

Sections 344 through 349 detail the requirements/ constraints of conditions, but the Act does not detail the purpose of conditions. Interestingly there is very little explanation in either the Integrated Planning Bill 1997 - Explanatory Notes (Queensland 1997) or Sustainable Planning Bill 2009 - Explanatory Notes (Queensland 2009).

To try and better understand why conditions are attached to an approval, I took a straw poll from a number of senior planning professionals: Some of the responses received from my question: ‘in one or two words explain the purpose of conditions’ are:

- to ensure compliance with the planning scheme;
- to mitigate risk;
- to define in more detail what is shown on the approved proposal plans;
- to keep the bastards honest (obviously an assessment manager channelling the late Don Chip)
- to provide a mechanism for checking compliance with the approvals
- to lock in things that can’t be shown on the plans
- to minimise risk to Council
- to define the outcome
- to ensure what is on the ground is consistent with the approval
- to tie the developer to what was approved

Netherway (Netherway 2009) suggests conditions form part of a mutually accepted contract between the approving authority and the applicant/ owner/ successors setting out the actions required to execute the approval.
From these responses, I have concluded that the purpose of conditions is to aid in defining and clarifying the development approval and for providing certainty.

Defining

Well drafted conditions help to put a boundary around what development is approved. A condition such as ‘Carry out the approval generally in accordance with the approved plans’ – attaches the plans to the approval. The plans provide the visual representation of the approval.

Other conditions may define the maximum height of the approved development. May define what works external to the site are required for the approved development to operate efficiently. May define what additional permits are required before the development can commence.

Clarifying

Conditions can clarify, by putting into words, elements shown on the approved drawings. Take for example an approval for a high rise mixed use building, which may have a number of levels for basement car parking. Car parking spaces, manoeuvring areas and servicing bays are shown on the approved plans for each basement level. It may be difficult and certainly cumbersome to have to read all of the plans and count all the spaces and areas each time to ascertain the total number of parking spaces and how each is to be allocated to each approved use. There may be a need to separate different service areas to different uses, which may not always be clearly detailed on the approved plans.

A condition attached to the approval can be used to clarify the total number of car parking spaces to be provided for each of the approved uses, detail how tenant parking and visitor parking is to be separated and or managed and clarify how the servicing arrangements are to operate.

Certainty

A development approval, that is well defined, is properly bounded and presented with clarity, provides certainty to all involved.
The assessment manager (and concurrent agencies where applicable) have certainty to what they have approved. Having assessed the development proposal with consideration to all criteria within their legislative scope, the approval with conditions provides a clear expectation of any impacts from the completed development.

The applicant/developer is provided with certainty. The conditions define what is expected to be delivered to demonstrate compliance with the approval. By knowing this, the developer can finalise cost feasibilities and move forward with the expectation that there are no nasty surprises.

Compliance with all the requirements in the conditions provides the developer certainty that the development has been delivered/ finalised in accordance with the approval.

Finally, conditions can provide certainty to the community. The community can have confidence that the development proposal has been assessed and is approved so as to comply with the planning scheme requirements (and/or concurrence agency requirements where applicable).

**Structure of conditions**

When drafting conditions, Netherway suggests that the basic ingredients of a condition should provide answers to the questions of who; what; when; and how (Netherway 2009).

Who – Who is responsible for carrying out the required actions within the conditions.

What – What is it that must be undertaken i.e. what actions, works etc.

When – When must the actions, works, etc., be undertaken and completed.

How – How are the actions, works etc., to be undertaken i.e. to what standard
To achieve this and for ease of using the condition within a larger condition package, I suggest that each condition should contain the following elements:-

- Number
- Title
- Body
- Timing
- Justification
- Proof of fulfilment

**Number**
Give each condition a unique identifier. While this does not enhance the condition in isolation, it is rare that approvals are issued with only one condition. So, being able to refer to a particular condition within a conditions package by its individual number provides for easier communication.

**Title**
Give each condition a relevant title that relates to the action required in the body of the condition. As above, whilst this does not necessarily add to the action requirements of the condition, it aids in communication and working within a larger conditions package.

**Body**
This is the guts of the condition. It should answer the ‘who’, ‘what’ and to some extent the ‘how’ questions outlined above.

By their nature, conditions in the most part require something to happen to fulfil the approval. That is, ‘carry out the reconfiguration of a lot in accordance with the approved plan of subdivision’; ‘construct a concrete footpath’, ‘submit an earthworks plan’, etc. The body details the actions required to complete the approval. As such, a positive, doing tone and language should be used.
Referring back to the straw poll responses above, in particular ‘to ensure compliance with the planning scheme’, the assessment manager, in drafting a condition should only have regard to the matters within their legislative scope. For clarification, refer to the ‘Assessment Process’, Part 5 Division 2 Chapter 6 of the SPA, see sections 311 through 317 (2009).

So the actions required in a condition must be able to be tied back to a legitimate planning purpose (Leong 2009). A condition that requires a dwelling to be constructed to a maximum height of 8.5 metres above the ground line can do so because the planning scheme sets the maximum height for that type of dwellings as 8.5 metres above the ground line.

A condition that requires the construction of a 9.0 metre wide driveway for a commercial land use can do so (in Brisbane) because the code that addresses vehicle ingress and egress references the Council’s standard requirements and plans, for which a 9.0 metre wide driveway is the accepted Council standard.

Timing
The condition must be clear on when the actions are required to be complied with. The condition must answer the ‘when’ question posed above (Netherway 2009). As conditions may relate to the construction phase of a development or to the ongoing operation of the use after construction; and in some cases both, for the purpose of clarity and certainty, it is important to be specific about the timing.

For example, if a section of new road is required to be constructed and delivered to the Local Authority as part of a subdivision, then it is reasonable for a condition that requires the detailed plans for such a road be submitted to the Council’s engineer for compliance with the Council’s standards to be assessed and approved before construction commences on that piece of road. It is reasonable also that the road construction be completed and accepted by the Council’s engineers as completed to the required standard, before Council seals the plan of survey, that paths the way for the creation of title.
It appears logical when you write it down, but if the actions, in the required order were not specifically set out in the condition, where is the certainty to either the Local Authority or the developer.

I reviewed a number of conditions packages in preparation of this paper. I note that in an approval by Ipswich, the timing for the conditions was contained in the body of the condition. In this extract, from a condition relating to fencing, the timing is very specific and I think easily meets the purpose tests of clarity and certainty.

12 Fencing -

(a) The developer must construct a fence for all approved lots adjoining the XXXXXXX (lots 29 - 41) with the following design criteria:

(i) an overall height of 1800mm

(ii) a solid element from ground level to a maximum height of 1500mm, and a panel of minimum 50% transparency between the top of the solid fence element and the overall maximum height of 1800mm

(b) No fencing is to be provided between the common boundary between the park within Stage 1- of the development and the XXXXXX.

(c) Details of the proposed fencing must be submitted to Council for the approval of the assessment manager in conjunction with the operational works application.

(d) The fences required by (a) above, are to be constructed by the developer prior to the signing of the relevant plan of subdivision.

(e) Future owners and occupiers of such properties must maintain such fencing as per the requirements of Condition 12 (aXj)-(ij) to the satisfaction of the assessment manager.

In an approval from Moreton, the timing requirement was contain within the body of only one condition, but as I understand, implied for all conditions. Whilst,
when reading the package as a whole, it was fairly obvious what is required, it could be considered confusing if you were reviewing the conditions one at a time.

*Part of condition 5*

_All works required shall be completed to the satisfaction of the Manager, Development planning prior to the commencement of the use, unless otherwise specified by conditions of this permit or by resolution of the Council._

In Brisbane, the file management package used by the DA branch, separates the timing of the condition from the body of the condition, displaying the timing to the right of the page. A number of standard timing phrases, such as ‘prior to commencement of use’; ‘prior to commencement of site works’; prior to endorsement of survey plan’ are used. Thus each condition, or in some instances where conditions have multi parts – each part, has its own timing.

Personally, I believe this makes it very easy to identify what actions are required to take place at what time. By using the standard timings though, the emphasis is on the assessment manager to properly consider the desired outcome from the condition at the time of drafting. The Brisbane set out clearly meets the clarity test and aids in providing certainty.

In finishing the section on timing of conditions, it is important to ensure when drafting a condition that it meets the common law test of ‘finality’. Netherway states that the condition must clearly establish when responsibility ends (Netherway 2009). Leong advises that a local authority (and I presume a referral agency also) must dispose of an application fully and finally and is not able to defer its decision on an essential matter or delegate its powers to another person or body (Leong 2009).

**Guidelines**

Guidelines provide an explanation and justification why the condition is required. It details what the condition intends to achieve. It may identify the rational or legislative basis to which the condition is linked.
The inclusion of guidelines may be considered as an optional element of a condition. In deed, the conditions packages from Ipswich and Moreton that I reviewed did not include any guidelines or explanations. In saying that the packages were from late 2010 and late 2009 respectively, so I am not aware of those Council’s most recent formats.

Guidelines have been introduced in Brisbane’s conditions packages for the last few years. Have reviewed many approval packages, I would say that some of the included guidelines are well developed and add a great deal to the readability of the condition. Some are still developing and have some way to go.

I have noted that some referral agencies include an issues/ concerns section and then the reason or justification used in the setting of the condition. Refer to the extract from a main roads condition.

<table>
<thead>
<tr>
<th>Issue/ Concerns</th>
<th>Condition of Development for the subject application</th>
<th>The (reasons/ information/ studies/ findings) used in setting the conditions included:</th>
</tr>
</thead>
<tbody>
<tr>
<td>State- controlled roads can be affected by development which changes the location, level or flow rates of water run-off to, across and along State- controlled roads</td>
<td>1. The developer shall ensure that there is no increase in peak intensity of stormwater runoff onto the state-controlled road (XXX) All roof water drainage from the subject site is to be connected to field inlet in the north eastern corner of the site as shown on XXXX Dwg no XX.</td>
<td>1. Main Roads Road Drainage Design Manual</td>
</tr>
</tbody>
</table>

Here we see that the body of the condition (that is the action is contained within the central column. The first column assists by explaining issues that the referral agency is required to consider and the last column provides the reason for the inclusion of the condition and makes reference to a standards manual where more detailed design criteria can be obtained.
As stated above, the inclusion of guidelines may well be optional; however, I believe they add to assisting in defining and clarifying the condition. Both key elements to the purpose of conditions.

This is even more important when dealing with domestic type approvals, where the end user, the recipient of the conditions package is likely to be a ‘mum and dad’, not familiar with the complex legal framework of development. Confronted with an approval package containing a number of conditions that requires they do all sorts of things before they can enjoy their development. A clear, non technical explanation as to why the condition is required could be a simple step to reduce their confusion. For the assessment manager that wrote the condition, this may well benefit them by stopping that angry, frustrated telephone call demanding justification for this or that. You all know the call I mean.

**Proof of fulfilment**

Referring back to the section on the purpose of conditions, one of the issues identified was to ‘provide a mechanism for checking compliance with the approvals’.

To date, I have only seen a separated statement detailing how the developer is to provide proof of fulfilment of the condition included in conditions packages from Brisbane City Council. That is not to say that other authorities do not have this or that fulfilment requirements are not interwoven into the body of the condition.

For Brisbane this option is provided to assessment managers byway of the file management package used in the DA Branch. It provides the assessment manager, under a separate heading to clearly describe what evidence is required and to whom that evidence is to be given, to demonstrate that the condition has been completed.
Examples include:

For a condition attached to a reconfiguration of a lot approval that required the developer to enter into an agreement with telecommunication carrier to provide underground telecommunication services

PROOF OF FULFILMENT
A copy of the agreement is forwarded together with the request for survey plan endorsement to the Plan Sealing Officer, Development Assessment.

For a condition, again attached to a reconfiguration of a lot approval, that required the developer to obtain written consent for a lawful point of discharge.

PROOF OF FULFILMENT
Evidence should be provided in the form of a signed letter from the affected property or easement owner(s) through which the drainage is proposed to traverse agreeing to the point of discharge.

Where this really comes into play is at the time of plan sealing. The developer (or their consultants) can readily review the conditions and see what evidence is required to demonstrate compliance with each condition. That evidence can be collated and included with the application for plan sealing. The plan sealing officer can also then review the conditions package and confirm that all the necessary evidence is provided. With both parties having the requirements clearly explained, there is a reduced chance for misunderstanding and hold ups in the process whilst additional information is requested.
Conditions Package

S 335 of the SPA details the content of the decision notice. Subsection (1)(e) states:

(e) if the application is approved subject to conditions—
   (i) the conditions; and
   (ii) whether each condition is a concurrence agency or assessment manager condition, and if a concurrence agency condition, the name of the concurrence agency;

It would be fairly rare today to obtain an approval with only one condition. More and more we refer to a conditions package containing a suite of conditions, either embedded in the decision notice as observed in the Ipswich and Moreton examples that I reviewed, or as a separate package attached to the decision notice as is the case in Brisbane.

Multi-disciplinary Teams

Further, more often than not, the ‘assessment manager’, that is the ‘deciding authority’ is in fact a multi-disciplinary team of professionals, each assessing different components of the development and then setting the necessary conditions for that component. There are a lot of positives in such a system, because the person qualified to assess that component of the development, and often has been corresponding/ negotiating with a similarly qualified professional on the developers’ team, is able to draft conditions specific to that component of the development. However, there is a responsibility on the person charged with the duty to bring the package together to ensure consistency throughout the suite of conditions.

Standard Conditions

For Local Authorities with a high volume of applications, and as is the case in Brisbane, have a number of assessment team that assess applications on a regional basis, it is common to introduce a library of standard conditions. A standard condition is, as the name suggests, a condition that has been drafted to satisfy a compliance requirement for a particular type of development, for which the local authority assesses similar applications on a regular occurrence.
Brisbane examples include:

- Carry out the approved development
- Complete all building work
- Erect screen fence
- Pay outstanding charges or expense
- Grant easements.

There are great benefits to having a library of standard conditions. Firstly, the assessment manager does not have to draft (type) the condition from scratch for each and every application – which saves time and reduces typographical errors. Secondly, it provides for consistency across the local authority – something very important to the developer.

Many standard conditions can be taken from the library and inserted into the condition package unchanged. Others may need particular inputs to be added. In the ‘grant easements’ example above, the generally wording, guideline, proof of fulfilment and timing of the condition would remain unchanged from application to application. Particular details as to which lots and on which plans, which lots are encumbered and which lots are benefited would change for each application and thus need to be modified within the condition wording.

Care needs to be taken with compiling a conditions package using a library of standard conditions to ensure that all inputs (specific details) are included and are correct. It is embarrassing to have a condition requiring an acoustic barrier be constructed along the frontage of Smith Street, when the proposed development actually fronted Jones Street.

**Multi-choice conditions**

I have noticed a new type of condition creeping into approval packages. These conditions, that I call multi-choice conditions have emerged as a result of the creation of the Water Retail Authorities and the separation of ownership of water and wastewater infrastructure from local authorities. Conditions have been
drafted, and now used as standard conditions for most approvals that require, or may require enhancement of the water and wastewater infrastructure set out a smorgasbord of actions. In essence, the conditions operate like this.

- If situation A applies to your development, then do action A
- If situation B applies to your development, then do action B
- If situation C applies to your development, then do action C.
- Where required, construct and/ or alter public utilities …
- Where a new road opening or widening is required and ….

PROOF OF FULFILMENT

Condition requirements complied with to the satisfaction of the Delegate, Development Assessment.

Whilst there is some benefit in having such standard conditions, as there is a reduced demand for upfront engineering assessment and the turn around time in assessment is much reduced; the condition transfers a great deal of responsibility to the developer to determine which actions are required and there is uncertainty created as compliance with the condition is transferred to the Delegate, Development Assessment – that is the local authority, not necessarily the agency that set the condition. This has the potential to put more reliance on assessment and confirmation at the compliance stage of a development project. This typically though is usually the time when costs are at their highest and time is most valuable, thus increasing the risk to projects.

Whilst the uncertainties of which option is applicable to the development can be reduced where the developer engages a responsible and properly registered engineer, I see a risk to the maintenance and enhancement of the infrastructure network where the developer is a ‘mum and dad’ or novice.

Referring back to my original hypotheses that the purpose of conditions is to aid in defining and clarifying the development approval and for providing certainty, I
am concerned that this type of standard condition fails on all three accounts. We will need to watch this space to see how these conditions are enacted over time.

So far I have talked about the purpose of conditions, the components of individual conditions and about condition packages. I would now like to briefly discuss the language and tone of conditions.

**Language of conditions**

Again, going back to the straw poll on why are conditions attached to an approval, some of the responses were:

- to mitigate risk;
- to define in more detail what is shown on the approved proposal plans;
- to lock in things that can’t be shown on the plans
- to define the outcome
- to ensure what is on the ground is consistent with the approval

In essence, conditions are a mechanism for communicating. A good communicator writes with their audience in mind. I would suggest to those drafting conditions, that you have a wide audience. The most obvious is the applicant, who in most cases is also a planner or development professional like yourself. They are more than likely experienced in development assessment and understand the outcomes that are trying to be achieved.

However, I would suggest that your look past just the applicant. Other important stakeholders are the applicant’s customer – the developer, who may or may not be experienced in development assessment and in many cases may not be fully across the complex requirements of the planning legislation and of particular planning schemes. This is particularly evidenced when the client is a mum and dad, who for the most part may simply want to add an extension to their own home.
Just as importantly, your audience includes the general public. The role of the local authority in assessing applications is to ensure that future development is approved in accordance with the planning scheme (with the variances prescribed by the SPA). Interested and perhaps effected parties watch what you do.

So when you sit down to draft a condition. Use simple words. Your goal is to communicate, not prove to somebody else how big your dictionary is. At the same time, be specific. Detail what action is required, when it is required and how it can be demonstrated that it has been complied with. As a good example, I refer back the fence condition by Ipswich detailed above. It is very specific about what the developer is to provide – a fence, 1800mm high, solid from the ground to 1500mm and then 50% transparent from 1500mm to 1800mm. It is specific about where the fence is and where the fence is not to be constructed. It is specific about when the fence is required to be constructed. The condition uses simple words such as fence – not a visual or acoustic barrier.

Where possible reduce the use of jargon. This is not always possible, so where you need to include industry specific jargon, then include a note or guideline that explains in simple terms what and why the condition is included.

Reduce the use of acronyms. Acronyms are a short hand way of writing in generally correspondence between known parties. Conditions are not the place for acronyms. I saw a condition the other day, relating to the need to provide on the site areas for manoeuvring for service vehicles that included:

Construct and delineate or sign (as required) the following requirements as indicated on the approved plan(s) of layout:

i. Construct a pavement of minimum Type XX standard and surface with an impervious material (including associated drainage) to the area on which motor vehicles will be driven and/or parked.

ii. Manoeuvring on site for an AV and for the loading and unloading of the vehicle(s).

Now, we all in this room may know what an AV is – but is that to say that everybody else does. I ask how much longer it would have taken to write the words - articulated vehicle.
Summary and recommendations

The paper has asked the question – what is the purpose of conditions attached to a development approval? I have suggested the answer is to aid in defining and clarifying the development approval and for providing certainty. That is certainty to all stakeholders involved or impacted by the approved development.

When drafting conditions, I support Netherway’s suggestion that a condition should provide answers to the questions of who; what; when; and how. Having reviewed a number of condition packages from a couple of South East Queensland Local Authorities, I do like the format used by Brisbane City Council where each condition contains the following elements:-

- Number
- Title
- Body
- Timing
- Justification
- Proof of fulfilment

Approvals are generally issued with a number of conditions, commonly referred to as the conditions package. They are more often than not complied by a multi-disciplinary team, which while necessary to have the proper broad professional input, brings with it a range of risks including completeness and consistency that must be managed.

The use of standard conditions, selected from a larger library of conditions brings many advantages, most notable consistency across the local authority. Again, this brings some risks and proper diligence must be applied in selecting the correct standard condition and for completing any necessary application specific detail requirements.
I have introduced a new term – multi-choice condition that refers to an emerging type of standard condition that I believe do not meet the intended purpose of attaching the condition to an approval.

Finally, I briefly looked at the language and tone of the words within a condition and suggest that you should be as specific as possible, to use simple words and reduce the use of jargon. I do not believe that acronyms should ever be used in conditions.

So the next time you are about to draft a condition to be attached to an approval, I suggest you stop, think and ask yourself – what is the purpose of drafting this condition? Think about your audience and remember that your goal should be to communicate, specifically and simply.

Using standard conditions where every possible is good practice. But don’t add a condition just because it is in your library. Again, ask yourself the questions above and determine is this condition really necessary.

For those responsible for the management of an application and for those charged with the duty to decide applications, I suggest that prior to making a decision, it is necessary to review of the draft condition package and ask the following questions.

- Does the package flow logically? Will it make sense to a lay person?
- Are all of the drawings and documents, referred to in the conditions, including correct version numbers and dates, included in the drawings and documents registrar? It can be embarrassing to have the drawings registrar refer to version d of a particular plan and then have version b referenced specifically in a condition.
- Are the conditions consistent across discipline areas? It can be embarrassing to the local authority and very frustrating to the developer if an ecological condition requires the retention of an important stance of vegetation, when at the same time the engineering conditions require a
major upgrade to a sewer line that necessitates a 20 metre wide swath to be cut through that vegetation.

- Do the drafted conditions meet the ‘relevant’ and ‘reasonably required’ tests?

References


