

The nature and validity of conditions and the grounds for impugning them*

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Conditions have a subsidiary or auxiliary reputation or status, reinforced by the availability of judicial review to test their validity. However, once certain threshold tests have been met, decisions of courts and tribunals have tended to show considerable deference to regulators. Paradoxically, and despite their 'inferior' status, conditions are often just as important as the approval to which they are attached; hence, they are often extremely wide-sweeping in their operation. In fact, conditions critically shape any development, and development is rarely, if ever, free of conditions. Although they attach or affix to an approval they effectively integrate with the approval, making up a powerful regulatory regime. Because of the formal subsidiary status of conditions they perhaps remain 'under the radar' in any attempt to remove so-called 'green tape' and to streamline development processes.

1. Introduction

In this paper, we commence by considering the conceptual nature of a condition, noting that often conditions are seen as 'auxiliary' in quality. In truth; however, such obligations or restrictions attach themselves to, and then integrate with, a grant of planning approval. This is because, in reality, they fundamentally define the scope of any approval.

Next, the statutory basis for the imposition of such conditions is briefly examined. This task requires consideration of the scope and purpose of planning laws and their derivative instruments. Then, the statutory right of review of a condition is summarised, proceeding to mention of the well-established overarching test for validity flowing from the *Temwood* case² (and earlier UK and Australian authorities).

Also discussed is the *quid pro quo* approach (contemplated by statute in Western Australia) which is extracted from developers by way of the imposition of conditions upon the 'privilege' granted by the State with respect to the subdivision of land.

Common challenges to ambulatory conditions are then briefly considered, such as alleged uncertainty, sub-delegation, or the absence of finality.

The paper concludes by observing that the trend of planning cases in Western Australia and elsewhere suggests that the statutory power of regulation by the imposition of conditions will be interpreted broadly, permitting both the extensive and 'creative' use of such powers.

* This paper is based upon Peter McNab's presentation at the *NELA (WA) 2014 State Conference* on 16 October 2014, in the session: "After the Approval: Appeals, Compliance and Prosecutions"

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² *Western Australian Planning Commission v Temwood Holding Pty Ltd* (2004) 221 CLR 30. This test requires the cumulative examination of a condition's planning purpose; its "fair and reasonable" nexus to a subdivision or other development; and whether a condition is unreasonable in the *Wednesbury* sense.



2. The 'auxiliary' nature of an obligation classified as a condition

A condition, in law, can generally be seen as “[a] restraint annexed to a thing ...”.³ But, the word’s Latin roots (“*con* - together + *dicere* - to declare, tell, say, etc”) connote a “compact, stipulation, agreement upon terms”.⁴ Close to this meaning, in both ordinary dictionaries and in the law of contract, a condition is primarily defined as: “[s]omething demanded or required as a prerequisite to the granting or performance of something else”.⁵ Indeed, this meaning dovetails with the notion of *quid pro quo*, discussed below.

The conceptual nature of this obligation, based upon agreement, has unsurprisingly, and like other areas of private law, transferred into public law notions such that, for example, a Constitution (however described) can also be described as a “compact”.⁶

There is, in public law, perhaps an emphasis on the classification of conditions as in the ‘negative’ category: the category of requiring the “not doing [of] a thing”⁷; hence the reference already made above to notions of ‘restraint’ as essential to the concept of a condition.

Paradoxically, conditions, even those of ‘restraint’, are often conceptually regarded as having a separate, but often ‘inferior’ quality (in relation to the principal transaction that they are connected with). Sometimes conditions are regarded as merely subsidiary, supplementary or ancillary (“filling in the details”) to the principal transaction. So classified, one cannot then ‘condition down’ a proposed land use so as to make it acceptable. Thus, it has been said:

The primary concern of a planning authority is to control land use and the first question to be addressed should always be whether in the circumstances the proposed development is at least *prima facie* a suitable and appropriate use of the subject land having regard to the provisions of the development plan. To approach a planning decision by framing conditions designed to make the proposal suitable and appropriate is to bypass the primary question.⁸

However conditions are viewed, they derive their existence from the principal transaction. And, at least in planning law and in similar regulatory fields, they are necessary, basal and critical to grants of approval, such that, as Fogg noted, “[i]t will be extremely rare for any application to a local planning authority to be approved without the imposition of conditions upon that approval.”⁹ Similarly, in the branch of public law concerned with planning, conditions are regarded as “fundamental to the administration of any system of control of land use”.¹⁰ Stein, draws this discussion together by postulating that “[i]t is the conditions that create the true shape of the development.”¹¹

Accordingly, conditions both attach themselves to¹², and then effectively integrate with, a grant of planning approval.

³ *Mozley and Whitely's Law Dictionary*, 10th ed

⁴ OED

⁵ OED; *Encyclopaedic Australian Legal Dictionary*

⁶ See the discussion on compacts and covenants in, e.g., Bede Harris, *A New Constitution for Australia* (2002) at 123-124

⁷ *Black's Law Dictionary*, 6th ed

⁸ *Remove All Rubbish Pty Ltd v Corporation of the City of Salisbury* (1989) 51 SASR 26 (Jacobs J)

⁹ Alan Fogg, *Land Development Law in Queensland* (1987), 597

¹⁰ Fogg, 597

¹¹ L. A. Stein, *Principles of Planning Law* (2008) 216

¹² Cf: “a condition affixed to the approval of the plan of subdivision”: s 251(5), *Planning and Development Act 2005* (WA)

3. Conditions: attaching themselves to, and integrating with, a grant of planning approval

The multi-faceted or chameleon nature of conditions is reflected in the discussion surrounding *Meander Valley Council v Resource Management and Planning Appeal Tribunal*, an *ex tempore* decision of the Supreme Court of Tasmania.¹³ There, the court invalidated an order made by the Tribunal that had, apparently, separated the approval from the conditions. The Court said, at [5]:

The gravamen of the complaint common to all of the grounds of appeal is that the Tribunal decided the appeal and directed the appellant to issue a permit, without specifying the conditions that were to be attached to the permit ... and without making findings of fact or exposing its reasoning process relevant to all of the conditions that should be contained in the permit.

The court purported to apply the 2009 Federal Court decision in *Lawyers for Forests Inc v Minister for the Environment*¹⁴, saying, at [10]:

The permit and the conditions are not two separate things. They are components of a single process. I am wholly unable to see how a decision to grant a permit can be made without consideration of the specific conditions to be imposed on that permit as being necessary to justify the exercise of discretion involved.

The Full Federal Court in *Lawyers for Forests* had observed that:

It is also apparent from the [Commonwealth] Minister's reasons that the impugned conditions do not constitute a separate approval process. The approval ... was accompanied by the conditions attached to it. We do not accept the appellant's contention that ... conditions are "subordinate" to the approval. The approval and the conditions came into being *uno flatu* ["In one breath."]. [The Act] make[s it] clear that a consideration of what, if any, conditions are to be imposed will be an integral part of the decision to approve. The Act speaks of a condition being attached to an approval. But it is clear that there are not two different things – an approval and a condition. Rather, when a condition is attached to an approval, there is a conditional approval or an approval subject to conditions.¹⁵

Lawyers for Forests was a case concerned with bringing down a detailed and complex Ministerial approval given under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth). The plaintiff's attack included attempts to impugn the Minister's conditions for, in effect, uncertainty. The court, as did the trial Judge, upheld the validity of very wide-ranging, almost ambulatory, conditions attached to the approval, conditions that were,

... designed to deal with a residual risk from unexpected trends or events, and were imposed in accordance with the precautionary principle for the purpose of guarding against them by resort to monitoring and management.¹⁶

It appears that their Honours were making the point that the conditions attaching to an approval must be *read together with, or in the context of the subject matter of, the approval itself*. Thus, these observations of the Full Court¹⁷ do not in fact, with respect, say anything about the *process* by which such conditional approval is or can be expressed or implemented, still less in respect of such matters concerning the procedures of planning tribunals established under State law.

With respect, *Meander Valley's* formalism stands in contrast with the long-standing practice in the State Administrative Tribunal (and its predecessors)¹⁸ that, whilst it is desirable to resolve an

¹³ *Meander Valley Council v Resource Management and Planning Appeal Tribunal* (2013) 197 LGERA 35 (Estcourt J).

¹⁴ *Lawyers for Forests Inc v Minister for the Environment* (2009) 178 FCR 385 (FC)

¹⁵ *Lawyers for Forests*, n14 at [54]

¹⁶ *Lawyers for Forests*, n14 at [47]

¹⁷ *Lawyers for Forests*, n14 at [54]

¹⁸ Estcourt J noted, but rejected, an argument by counsel for the Attorney-General (see *Meander Valley* at [6]-[7]) that the Tasmanian Tribunal "should be permitted to, in effect, invite the parties to bring in permit conditions for approval as that is 'unexceptional and in accordance with the long established and common practice in the Tribunal'".

approval and its conditions simultaneously,¹⁹ sometimes this course will not be possible.²⁰ Thus, an approval might be granted with conditions to be worked out and then attached to the approval. However, such steps have always been regarded as steps in a review's continuous process towards final resolution, with conditions always consistent with and attaching to the approval.

However, both of these cases emphasise the basal, critical and substantively integrated nature of conditions in planning law.

4. Statutory sources authorising the attachment of conditions

At this point, it is convenient to briefly identify the statutory sources authorising or referring to the attachment of conditions. We will commence with s 143(1) of the *Planning and Development Act 2005* (WA) (**PD Act**),²¹ which deals with subdivision approvals and provides that the Western Australian Planning Commission (**WAPC**) may,

approve the plan of subdivision and require the applicant for approval to comply with such conditions as the Commission thinks fit ...

Compare the formulation: "a condition affixed to the approval of the plan of subdivision" found in s 251(5) of the PD Act.

Then there is s 69 of the PD Act²² providing for development controls "subject to conditions" as matters that may be dealt with in town planning schemes. Clause 10.3(a) of the *Model Scheme Text*,²³ which deals with a Local Government determination of an application for planning approval, refers to "grant[ing] its approval with or without conditions".

5. Principal statutory sources authorising appeals (reviews) against conditions

For reviews in connection with subdivision decisions (including any "condition affixed to the approval of the plan of subdivision"), see PD Act, s 251. For reviews in connection with land use and development decisions, see PD Act, s 252(1)(c), which provides, in a bifurcated way, that where a local government has:

- (i) refused the application; or
- (ii) granted it subject to any condition,

[then] the applicant may apply to the State Administrative Tribunal for a review, in accordance with this Part, of the responsible authority's decision.

This bifurcation of appeal rights (apparently severing the link between conditions and approval) probably says nothing, ultimately, about the essential correctness of *Meander Valley* if for no other reason than, if *Waterfront v Hervey Bay City Council*²⁴ has application in WA, perhaps the whole approval may be reviewed on an appeal or a review of a condition. This position would not be inconsistent with the reasoning found in the *Lawyers for Forests* case.

¹⁹ The preferred practice for SAT, if not its immediate predecessor TPAT, is for there to be a "one stop" hearing about approval and conditions, facilitated by applying standard orders 52 and 53 (filing of draft conditions).

²⁰ See, e.g., *Empire Grazing Pty Ltd and Shire of Bridgetown-Greenbushes* [2010] WASAT 102; *PMR Quarries Pty Ltd and City of Mandurah* [2010] WASAT 87; *Bush Beach Holdings Pty Ltd and City of Mandurah* [2014] WASAT 50; *Ransberg Pty Ltd and City of Bayswater* [2014] WASAT 12; *AAA Egg Company Pty Ltd and Shire of Gingin* [2013] WASAT 149, cases which suggest that a more "fluid" approach is sometimes adopted to the issue of approvals and subsequent conditions. In each case, conditions were, in effect, attached by an order of the Tribunal. See further, Peter McNab, "Marginal Improvements in the West" (2014) 31 EPLJ 300

²¹ Hereafter, "the PD Act"

²² See item 9 of Sch 7, and s 69 of the PD Act: "Approval, refusal or approval subject to conditions of any use or class or kind of development by a consideration of any matter to which the Act relates including the public interest."

²³ *Model Scheme Text* (Appendix B to the *Town Planning Regulations 1967* (WA))

²⁴ (2008) 160 LGERA 367 (Planning and Environment Court of Queensland, Brabazon QC DCJ)

6. Appropriate matters to be regulated by conditions

According to Stein, conditions arise out of the statutory source empowering the giving of planning approval itself, and are otherwise “related and circumscribed by the subject matter of planning, and therefore must be for a planning purpose”.²⁵ Returning to the fundamental importance of conditions, Stein also suggests that a planning authority “must envisage how the impact on [for example] amenity can be controlled if the use or development is approved”.²⁶

“[D]etailed controls” imposed through conditions annexed to an approval are permissible, as detailed controls are themselves “a relevant town planning matter”²⁷ Hence, the potential reach and scope of conditions, whilst obviously not unlimited, has been stated historically in extensive terms (“wide discretion”; “wide charter indeed”).²⁸ It is axiomatic that modern planning laws contain many restrictions “which they have long imposed upon an owner’s right to develop and use land without regulation (including the development which is most financially beneficial)”²⁹ Similarly, it has been noted that:

[T]he bundle of rights involved in a fee simple are greatly modified by social considerations imposed under planning laws and by many restrictions upon ownership under local government laws, health and taxing laws.³⁰

These statements of general principle concerning the width and impact of planning regulation have been cited with approval in SAT cases.³¹

Within this framework, and having regard to the scope of planning controls, the well-established, overarching tests for validity flow from the *Temwood* case³² and earlier UK and Australian authorities.³³ As is well-known, this test requires the cumulative examination of:

- a condition’s planning purpose (as found in the relevant statutory planning framework³⁴);
- its fair and reasonable nexus to the subdivision or other development; and
- whether a condition is unreasonable in the *Wednesbury* sense.

These tests, and the *quid pro quo* of extracting developers’ contributions for the favourable exercise of the State’s discretion to approve the subdivision of land, are both illustrated, for example, in *Claddagh Holdings WA Pty Ltd and City of Gosnells*.³⁵

²⁵ Stein, 224

²⁶ Stein, 216. In *City of Perth v Food Plus Pty Ltd* (1982) 51 LGRA 222 Olney J suggested, at 227, that a condition-making power “authorizes ... the imposition of conditions which have the effect of ensuring with some greater certainty than would otherwise be the case that the intention of the town planning scheme will be realised.”

²⁷ Gifford and Gifford, *Town Planning Law and Practice*, vol 2 at [63-7], citing Asprey JA in *Parramatta City Council v Kriticos* [1971] 1 NSWLR 140; (1971) 21 LGRA 404 (NSW CA)

²⁸ Per Else-Mitchell J in *Woolworths Properties Pty Ltd v Ku-ring-gai Municipal Council* (1964) 10 LGRA 177, 180 cited by Fogg at 597-598

²⁹ *Tolocorp Pty Ltd v Noosa Shire Council* [2007] QPELR 362 per Fryberg J at 365 (dissenting on whether leave to appeal should be granted).

³⁰ *CBC Properties Limited v Parramatta City Council* (NSW, LEC,1992, Bannon J, BC9202770)

³¹ See, for example, *Hawkins v City of Joondalup* [2008] WASAT 64, and *Atlas Point Pty Ltd v Western Australian Planning Commission* [2013] WASAT 33 (aff’d: [2014] WASC 26)

³² *Western Australian Planning Commission v Temwood Holding Pty Ltd* (2004) 221 CLR 30

³³ *Newbury District Council v Secretary of State for the Environment* [1981] AC 578 (HL) and *Cardwell Shire Council v King Ranch Aust Pty Ltd* (1984) 58 ALJR 386

³⁴ A planning purpose is one that implements a planning policy whose scope is ascertained by reference to legislation that confers planning functions on the authority, not by reference to some preconceived general notion of what constitutes planning.

³⁵ *Claddagh Holdings WA Pty Ltd and City of Gosnells* [2014] WASAT 126

Claddagh Holdings

In this case, there were six grouped dwellings constructed and the applicant then sought built strata subdivision approval. The City of Gosnells was the delegate of the WAPC for such purposes. The City imposed a condition on the strata approval reflecting a contribution of 10% of the land being reserved for public open space requirements. This contribution could be collected under a statutory mechanism by payment to the City of Gosnells of cash in lieu.

The 10% requirement was also replicated in a note on the outline development plan for the precinct. There was no suggestion here that the contribution had been otherwise met or that there was some case based on the merits that justified, say, a reduction of the 10% requirement. The contribution was imposed here on what may be regarded as the final stage of development. The applicant argued that the condition was unexpected and that it had created a significant financial burden.

The applicant submitted that there was insufficient connection (i.e. a nexus argument) between the development and the contribution and that it ought to have been collected at various earlier points in the development process. Planning practice, published by the WAPC, indicated that it was usual for the contribution to be imposed either at the structure planning stage, in a subdivision prior to further development, or at the time of the consideration of any development application.

This public open space amenity requirement was established in many planning instruments and had been regularly imposed in the State on subdivision and other development approvals, and then for some considerable time. The Tribunal had consistently accepted the rationale for the contribution and generally upheld the 10% obligation.³⁶

The Tribunal upheld the validity of the condition under review. The condition furthered a proper planning purpose found in the planning framework and was reasonably and fairly related to the amenity needs arising out of the subdivision.³⁷

There was authority at the highest levels suggesting that a developer contribution for amenity infrastructure was a proper *quid pro quo* for the privilege of the State's permission to subdivide land.

The delegate did not lose the power to attach this condition after the strata development was built because notice of the contribution had been given in the planning framework and the obligation to contribute subsisted to the final stage of the development.

Although the condition, if divorced of its context and history, seemed inappropriate for a development of only six strata lots, long-standing public open space requirements, administrative consistency between other cases and approvals, and the connection between the form of the condition and the statutory mechanism available for regulating cash in lieu payments³⁸ mandated approval of the condition.

The application for review was therefore dismissed and the decision to impose the condition was affirmed.

³⁶ The statutory mechanism for strata approval contemplated application to the City of Gosnells for approval *before* the construction of the grouped dwellings unless the delegate 'otherwise agreed'. The Tribunal had, in an earlier unrelated case, held that where the WAPC's delegate had 'otherwise agreed' to accept the application then the delegate did not lose its power to attach conditions to the approval. The Tribunal reaffirmed that decision. Here, the delegate had 'otherwise agreed' to accept the application after the construction was completed. However, the Tribunal had envisaged in that earlier case that there may be some limitations on the scope of any condition imposed after a strata building was completed.

³⁷ It is, of course, well-established that a condition cannot solely arise from the existence of a public need which bears no relationship to the subdivision.

³⁸ See s 153 of the PD Act and *Tierney and Western Australian Planning Commission* [2011] WASAT 192

8. Ambulatory conditions and related challenges

Approvals and the conditions affixed to them must have sufficient certainty in their meaning and operation to meet the critical attributes of a valid approval.

The public, declaratory nature of an approval is noted, for example, in *Brisville Pty Ltd v Brisbane City Council*³⁹:

The development approval is a public document, which constitutes the decision of the local authority, expressed in a formal manner and is required to operate in accordance with its terms. It is not personal to the applicant. It runs with the land and may be relied upon by many persons dealing with the grantee (or others exercising the rights conferred by it). A breach of its terms may ... result in proceedings not only at the instance of the local authority, but by any person. In construing an approval, the search is not for what the Council may have intended or the applicant understood. Each approval must speak according to its written terms, construed in context, but having regard to its enduring function.⁴⁰

Ambulatory conditions may be defined as those conditions which suggest that they are not sufficiently fixed or final and may be capable of change or alteration undermining the “enduring function” of an approval. Common, related challenges to conditions are: alleged uncertainty,⁴¹ sub-delegation (abdication), or the absence of finality.

But we think that the starting point must always be as follows:

[I]n planning cases an over-technical approach should not be adopted in seeking to give a sensible meaning to conditions imposed in permits, for of necessity the condition is to operate *in futuro* and cannot be so worded as to contain every last detail which human ingenuity might conceive to be desirable.⁴²

Perhaps the most common challenge to an alleged ambulatory condition is that arising out of the apparent deferment of a matter to the satisfaction of others or to the happening of some event. Cases in the Full Federal Court where such challenges have been made to extensive and wide-sweeping environmental conditions are instructive. In *Buzzacott*,⁴³ after a review of the leading authorities, the court said:

Decisions such as *Mison*, *Winn*, *Kindimindi* and *Ulan Coal Mines* go to confirm the observation that, under the general law, the question whether a conditional approval or a condition attached to the approval of some activity is valid, is an exercise in statutory construction. They also confirm that, as a general principle, the approval or a condition will not necessarily be considered invalid because a condition retains in the decision-maker some ongoing flexibility in relation to the implementation of an approved activity or because it delegates some authority in relation to the implementation of the decision to some other person or agency.

Each case concerning alleged deficiencies found in ambulatory conditions will raise questions of fact and degree but this case and the NSW authorities it examined suggest that, for example, extensive plans of management and attempts at ‘adaptive management’ regimes (imposed by conditions, reaching, in effect, “into the future” with, in effect, a “feedback loop”) are likely to survive.

³⁹ [2007] QPEC 63; [2007] QPELR 637; (2007) 1 PDQR 165, cited in *AAA Egg Company Pty Ltd and Shire of Gingin* [2013] WASAT 149 at [26]

⁴⁰ *Brisville Pty Ltd*, at [7]-[9]

⁴¹ See, e.g., *Phil Lukin Pty Ltd and Lowe Pty Ltd and Shire of Busselton* [2006] WASAT 124

⁴² *Weigall Constructions Pty Ltd v Melbourne & Metro Board of Works* [1972] VR 781; (1972) 30 LGRA 333, cited by Stein at 223

⁴³ *Buzzacott v Minister for Sustainability* (2013) 215 FCR 301; 196 LGERA 372 at [179]

9. The trend towards increasing regulation

To conclude, we can briefly take two quite different local illustrative examples of the width of regulatory power, available to authorities through the imposition of conditions:

- *Carbone Bros Pty Ltd v Shire of Harvey*; ⁴⁴ and
- *Hanson Construction Materials Pty Ltd and Shire of Serpentine-Jarrahdale*.⁴⁵

In *Carbone Bros*, Jenkins J in the Supreme Court of WA upheld “road maintenance and upgrade levies” in the form of conditions imposed under extractive industry licences and planning consents. These obligations were levies (resembling taxes) calculated solely by reference to the volume of material extracted from a quarry on private land. Her Honour said, at [45], after making reference to, inter alia, authorities such as *Temwood*, that:

... there is an obvious connection between quarrying activities which affect the use of roads and conditions on related planning consents which require Carbone to make a reasonable contribution to assist in defraying the costs incurred in remediating that affect.

In *Hanson Construction*, the State Administrative Tribunal (Parry DCJ) determined that “stakeholder engagement conditions requiring a Community Consultation Framework and a Community Consultation Group to be established” were lawful. The Tribunal said:

These conditions are for a planning purpose, namely the preservation of the amenity of the locality and orderly and proper planning, by providing a forum for discussion between the developer, relevant authorities, and the surrounding community, about the operation of the approved development and mitigation of its environmental and amenity impacts.

10. Conclusions

As has already been seen at various points in this brief survey, courts and tribunals appear to be increasingly deferential, but in an evolutionary way (and reflecting the growth in parent statutory controls), to regulatory power given to authorities to manage complex (and even not so complex) planning and environmental transactions through extensive, ‘active’ and perhaps even ‘proactive’ conditions.

Periodic calls to cut so-called ‘green tape’ and to streamline development approvals are sometimes attractive options for law makers. While the subsidiary nature of conditions remains, they may continue to attract less attention in such reform and deregulatory schools of thought, despite their fundamental and critical role in implementing and shaping approvals.

⁴⁴ *Carbone Bros Pty Ltd v Shire of Harvey* (2014) 202 LGERA 455 (Jenkins J)

⁴⁵ *Hanson Construction Materials Pty Ltd v Shire of Serpentine-Jarrahdale* [2012] WASAT 140