What is the test for approval of development applications?

By Dr Chris McGrath, 11 March 2015

The basic test when assessing a proposed development is that if it is consistent with the planning scheme and other planning instruments, it is likely to be approved. Conversely, if a proposed development is not consistent with the planning scheme and other planning instruments, it is likely to be refused unless there are sufficient grounds to justify it.[1] When interpreting a planning scheme in this context, it should be read broadly as a whole, rather than pedantically, and adopting a sensible, practical approach.[2] Planning schemes and other planning instruments are typically complex documents and a proposal can be inconsistent in many ways, some minor, some major.

Ultimately, if a proposal is inconsistent with a planning scheme, the greater the inconsistency is, the more difficult it is to gain approval. In more technical terms, this test is found for development applications made under the *Sustainable Planning Act* 2009 (Qld) ("SPA") in s 326 of SPA:

> **326 Other decision rules**
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> (1) The assessment manager's decision must not conflict with a relevant instrument unless—
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> (a) the conflict is necessary to ensure the decision complies with a State planning regulatory provision; or
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> (b) there are sufficient grounds to justify the decision, despite the conflict; or
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> (c) the conflict arises because of a conflict between—
>
> (i) 2 or more relevant instruments of the same type, and the decision best achieves the purposes of the instruments; or
>
> *Example of a conflict between relevant instruments—*
>
> a conflict between 2 State planning policies
>
> (ii) 2 or more aspects of any 1 relevant instrument, and the decision best achieves the purposes of the instrument.
>
> *Example of a conflict between aspects of a relevant instrument—*
>
> a conflict between 2 codes in a planning scheme
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> (2) In this section—
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> ***relevant instrument*** means a matter or thing mentioned in section 313(2) or 314(2), other than a State planning regulatory provision, against which code assessment or impact assessment is carried out.

The relevant instruments for code assessable and impact assessable development stated, respectively, in ss 313(2) and 314(2) of SPA include the relevant planning scheme. "Grounds" is defined in Sch 3 (Dictionary) of SPA as:

> ***grounds***, for sections 326(1)(b) and 329(1)(b)—
> 1 *Grounds* means matters of public interest.
> 2 *Grounds* does not include the personal circumstances of an applicant, owner or interested party

This test is similar to the tests under the repealed *Local Government (Planning and Environment) Act 1990* (Qld) ("P&E Act") and *Integrated Planning Act 1997* (Qld) ("IPA").

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[1] There are exceptions to this general proposition. For instance, development that is identified as "prohibited development" in Schedule 1 of SPA cannot even be applied for so no grounds will be able to justify it.

[2] Wilson DCJ gave a useful summary of the relevant principles and case law for interpreting planning schemes in *Luke v Maroochy Shire Council* [2003] QPELR 447; [2003] QPEC 5 at [45]-[48].

The decisions of the Court of Appeal in *Grosser v Gold Coast City Council* [2001] QCA 423; (2001) 117 LGERA 153 and *Weightman v Gold Coast City Council* [2002] 2 Qd R 441; [2002] QCA 234, while involving the repealed legislation, continue to provide important statements of principle in the application of the test under SPA. Atkinson J stated a three-stage test in *Weightman* at [35] in relation to a similar test in the P&E Act, which referred to "planning grounds" rather than "grounds":

> The proposal must be refused [where it conflicts with the strategic plan] if there are not sufficient planning grounds to justify the approval *despite the conflict*. The discretion, as White J observed in *Grosser v Council of the City of the Gold Coast* (at [50]), is couched in negative terms, that is, the application must be dismissed unless there are sufficient grounds. This is a mandatory requirement. If there is a conflict, then the application must be rejected unless there are sufficient planning grounds to justify its approval despite the conflict. …
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> In order to determine whether or not there are sufficient planning grounds to justify approving the application despite the conflict, as required by s 4.4(5A)(b) of the P&E Act, the decision-maker should:
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> (1) examine the nature and extent of the conflict;
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> (2) determine whether there are any planning grounds which are relevant to the part of the application which is in conflict with the planning scheme, and if the conflict can be justified on those planning grounds; and
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> (3) determine whether the planning grounds in favour of the application as a whole are, on balance, sufficient to justify approving the application despite the conflict

Fryberg J (with whom McMurdo P and Holmes J agreed) applied a similar test under the IPA in *Woolworths Ltd v Maryborough City Council* [2006] 1 Qd R 273; [2005] QCA 62 at [25] (footnotes omitted):

> If s 3.5.14(2)(b) [of IPA] is dealt with in the sequence suggested by its form the identity of any conflicts between the decision and the scheme will have been established by the time the question of justification comes to be considered. That question will require the identification of planning grounds which might justify the decision and the determination of their sufficiency to do so. In making that determination regard will doubtless be had to the nature and extent of the conflict. That is substantially the process approved by this Court in *Weightman v Gold Coast City Council* in relation to a previous section. It would, however, be a mistake to treat the relevant passage in that judgment as if it were a code for the determination of justification. Some of the submissions in the present case smacked of that error. Notwithstanding some differences in terminology, I think the same approach now has to be taken to s 3.5.14(2) of the IPA, and that the authorities require the Court to identify with some precision the extent of the conflict with planning scheme provisions that will, in the end result, be excused.

The importance of having careful regard to the conflicts with the planning scheme in determining whether there are sufficient grounds to justify an inconsistency were reiterated by the Court of Appeal in *Australian Capital Holdings P/L & Ors v Mackay City Council* [2008] QCA 157 at [54]-[70] (Muir JA with whom Holmes JA & White J agreed). The principles involved were discussed and applied in *Lockyer Valley Regional Council v Westlink Pty Ltd & Ors* [2012] QCA 370 at [18]-[32] (Holmes JA with whom White JA & Atkinson J agreed).

Consequently, anyone applying for a proposed development should ensure that their applications are consistent with the planning scheme and other relevant planning instruments and, to the extent that they choose to depart from what the relevant planning instruments allow, they should have sufficient grounds to justify any inconsistencies.

Conversely, the basic argument for people who wish to object to a proposed development should be that it is not consistent with the planning scheme (or other relevant planning instrument) and there are not sufficient grounds to justify the approval despite the inconsistency.