

Summary of principles for imposing lawful conditions under the *Sustainable Planning Act 2009 (Qld)*

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Section 345 of the *Sustainable Planning Act 2009 (Qld)* (SPA) provides the central test for the imposition of lawful conditions under the Act:¹

345 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.

In the first limb of this test, “**relevant to**” means that the condition falls within the proper limits of a government authority’s functions under legislation, as imposed to maintain the proper standards in government, local development or some other legitimate sense (e.g. the provision of public land; rational development of roads; foreshore protection; preserve a rail corridor).² “Not an unreasonable imposition” means that the condition must not be excessive in the circumstances (i.e. reasonable).³

In the second limb of this test, “**reasonably required**” means that when taking into account the fact of the development and the changes the development is likely to produce (e.g. increased traffic to a road), such condition is reasonably required by the circumstances.⁴ Put in another way, the question is whether there is a relevant nexus between the use of the land and the condition sought to be imposed, that nexus being that the proposed use creates such a change in existing affairs that the condition is a reasonable response to it.⁵ The change caused by a development need not be an increase in use, merely that the reserve capacity of a system (e.g. sewerage or water) is lessened.⁶ Related tests are that a condition must not be imposed arbitrarily⁷; must not be intended to “cripple” a proposal, ie. designed to make the application in practice impossible⁸; and must not be so unreasonable that no reasonable planning authority could have imposed it⁹.

The leading case of *Cardwell Shire Council v King Ranch Australia Pty Ltd* (1984) 54 LGRA 110 provides a useful illustration of the nature of the reasonably required test. The facts of the case concerned a disputed condition attached to a development approval under the *Local Government Act 1953 (Qld)*, in which the council sought to require payment of a monetary contribution for repairs to a bridge. The bridge was located outside of the site of the proposed residential subdivision on a public road. The trial judge accepted that the repairs were needed in part because of the increased traffic that would result from the development. Despite this, the judge refused to allow the condition because it related to works outside of the site of the proposed subdivision. The High Court overturned this decision and stated the test to be applied (at 113) as follows:

The statutory test that has to be applied by a local authority in deciding whether to attach conditions to its approval in a case such as the present is whether the conditions are reasonably required by the subdivision. This means that the local authority, in deciding whether a condition is reasonably required by the subdivision, is entitled to take into

¹ Sections 346, 346A and 347 impose additional rules. For recent caselaw and commentary, see Fogg A, Meurling R and Hodgetts I, *Planning and Development Queensland* (Lawbook Co, Sydney, 2001 (looseleaf)).

² *Lloyd v Robinson* (1962) 107 CLR 142; *Proctor v Brisbane City Council* (1993) 81 LGERA 398 at 404 (CA Qld); *Maroochy Shire Council v Wise* (1998) 100 LGERA 311 (CA Qld).

³ See generally *Delfin Property Group Pty Ltd v Thuringowa City Council* [2000] QPELR 282; *DG Robertson Holdings Pty Ltd v Douglas Shire Council* [2000] QPELR 428 at [18]; and *Hammercall Pty Ltd v Gold Coast CC* [2004] QPELR 122 at [40].

⁴ *Cardwell Shire Council v King Ranch Australia Pty Ltd* (1984) 54 LGRA 110 at 113 (HCA).

⁵ *Wootton v Woongarra Shire Council* (1985) 56 LGRA 301, Ryan J at 303 (Full Ct Qld); *Felixstowe Pty Ltd v Gladstone City Council* (1994) 85 LGERA 234 at 239 (CA Qld); *Townacre Development Pty Ltd v Thuringowa City Council* (1995) 86 LGERA 165 at 176 (CA Qld).

⁶ *Wootton v Woongarra Shire Council* (1985) 56 LGRA 301 per Ryan J (Full Ct Qld).

⁷ *Prices and Consumer Affairs Commissioner v Charles Moore (Aust) Ltd* [1975] 12 SASR 214 at 229.

⁸ *Hartnell v Minister of Housing and Local Government* [1965] AC 1134 at 1172.

⁹ *Newbury District Council v Secretary of State for Environment* [1981] AC 578 (although this test is more applicable to judicial review proceedings than merits appeals in the Planning and Environment Court).

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.

While the two tests in s 345 of SPA are stated as alternative tests,¹⁰ in practice, decision-makers are wise to treat both tests as mandatory rather than alternatives.

Section 346A provides for environmental offset conditions to supplement on-site mitigation measures. The offset may include works on another site (e.g. restoring a degraded site) or a monetary payment.

Section 347 of SPA prohibits certain conditions being imposed, including conditions requiring monetary payment for the establishment, operating and maintenance costs of **development infrastructure** (e.g. local government water supply, sewerage, stormwater, transport & park networks).¹¹ Local governments may levy an **infrastructure charge** on landholders for supplying trunk infrastructure and impose a condition for necessary or additional trunk infrastructure that is not identified in Local Government Infrastructure Plan (LGIP) and other circumstances identified in Ch 8 of SPA.¹²

In addition to the statutory tests in the SPA, the courts apply a number of other tests:

- A condition must be “**certain**”. This means that the condition must be reasonably capable of sensible interpretation, but it is not necessary that the condition be written with the strictness of parliamentary drafting, nor should it be construed by an over-technical approach.¹³ A condition will only be void for uncertainty if it can be given no meaning or no sensible or ascertainable meaning and not merely because it is ambiguous or leads to absurd results.¹⁴ A related test is that if a condition provides a formula, it must impose a clear and objective standard for the application of the formula.¹⁵
- Ambiguity will generally be construed in a way which places the least burden on the landowner¹⁶ (i.e. ambiguity will be resolved in favour of the person who is said to have breached the condition). The ambiguity, however, must be a genuine one.¹⁷
- The condition must be “**final**”. This means that the condition provides rights and obligations that are not subject to further approval by the planning authority.¹⁸ However, conditions may impose requirements for further management plans or similar documents to be submitted for approval by the administering authority provided that the matters dealt with in the plans are incidental or ancillary to the development (e.g. a landscape management plan, stormwater management plan, etc) and do not defer the final approval of the development to a later time.¹⁹

¹⁰ Note *Proctor v Brisbane City Council* (1993) 81 LGERA 398.

¹¹ “Development infrastructure” is defined in s 627 of SPA. Under SPA all local governments were previously required to include a Priority Infrastructure Plan (PIP) in their planning schemes. Following amendments in 2014, local governments are now required to include a Local Government Infrastructure Plan (LGIP) instead of a PIP. See Infrastructure Planning at <http://www.dip.qld.gov.au/infrastructure-planning-and-reform/priority-infrastructure-plans.html>

¹² See SPA, ss 629, 649 and 650. For an example of a PIP, see, <http://www.brisbane.qld.gov.au/bccwr/lib181/Appendix5.pdf>.

¹³ See *Caloundra City Council v Taper Pty Ltd* [2003] QPELR 558 at [33].

¹⁴ *Fawsett Properties Ltd v Buckingham County Council* [1961] AC 636 at 678; *Corporation of the City of Adelaide v City of Salisbury & Anor* (1998) 100 LGERA 160 (SA Sup Ct).

¹⁵ *King Gee Clothing Pty Ltd v Commonwealth* (1945) 71 CLR 184 at 198; *Environmental Protection Authority v Genkem Pty Ltd* [1993] 79 LGERA 47 at 60 (NSWLEC); *Mt Marrow Blue Metal Quarries Pty Ltd v Moreton Shire Council* (1994) 85 LGERA 408 (CA Qld); *McBain v Clifton Shire Council* (1995) 89 LGERA 372 (CA Qld).

¹⁶ *Matijesevic v Logan City Council (No 2)* (1983) 51 LGERA 51 at 57; *BP Australia Ltd v Caboolture Shire Council* [2004] QPEC 012 at [6] per Quirk DCJ; *Caloundra City Council v Taper Pty Ltd* [2003] QPELR 558 at [65]-[66] per Robertson DCJ.

¹⁷ Consider *Caloundra CC v Pelican Links Pty Ltd* [2004] QPEC 52; [2005] QPELR 128; *Caloundra CC v Pelican Links Pty Ltd & Anor* [2005] QCA 84; [2005] QPELR 596; and *Lucy v OCC Holdings P/L* [2008] QDC 4.

¹⁸ *Mt Marrow Blue Metal Quarries Pty Ltd v Moreton Shire Council* [1996] 1 Qd R 347; *McBain v Clifton Shire Council* [1996] 2 QdR 493; *Eastern Waste Management Authority Inc v City of Tea Tree Gully* (1996) 92 LGERA 1 (SA Sup Ct (Full Ct)); *Corporation of the City of Adelaide v City of Salisbury & Anor* (1998) 100 LGERA 160 (SA Sup Ct); *Caloundra City Council v Pelican Links Pty Ltd & Anor* [2005] QCA 84; [2005] QPELR 596.

¹⁹ *Scott v Wollongong City Council* (1992) 75 LGERA 113 (CA NSW); *Oshlack v Richmond River Shire Council* (1993) 82 LGERA 222 at 230 (NSWLEC); *GFW Gelatine International Ltd v Beaudesert Shire Council* [1993] QPLR 342.