Practical guidance for environmental professionals on writing and interpreting conditions of approval

(originally presented at an EIANZ seminar on 28 August 2019)[1]

Determining what an application applies to

1. As you begin to write an application for approval (acting for a developer) or to assess it (as a regulator), clearly identify what activity or development the application applies for, including incidental activities and/or ancillary uses by reference to the categories of activities or development specified under the law the application is made under.

2. Clearly identify in the approval what activity or development is approved.

Writing the approval and attaching conditions (where standard or model conditions need to be extended or adapted)

3. The approval should clearly identify the activity that is approved and the conditions imposed upon the approval without a need to refer to the application (i.e. the approval should be a stand-alone document that either attaches or cross-references to any documents incorporated into it such as an approved plan).

4. In the context of the *Planning Act 2016* (Qld) (**Planning Act**), the general rules,[2] stated in s 65, are that conditions must be:

   (a) "relevant", which means they are 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); and

   (b) "reasonably required", which 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 a condition is reasonably required by the circumstances.

5. In the context of the *Environmental Protection Act 1994* (Qld) (**EPA**), a condition is likely to be lawful if that is legitimately directed to protecting Queensland's environment from the environmental harm caused by the activity the subject of approval or other legitimate purposes such as the effective and efficient administration of the Act.

6. If you see an environmental impact caused by the activity you are approving, you should be able to tailor conditions to address it that meet the tests for conditions ("relevant" and "reasonably required" or "necessary and desirable") or impose similar requirements such as payment of an infrastructure charge.

7. Remember, the law sets broad limits on the ability of regulators to impose conditions but within these broad limits there is enormous scope to tailor conditions to effectively and efficiently regulate the impacts of any activity according to good administrative practice. To use a

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[1] A recording of the seminar and a longer (14 page) handout is available at http://envlaw.com.au/conditions/. If required, references for the points made in this handout are available in the longer paper but are not essential to refer to for the purposes of ENVM3103 / ENVM7123. The essential points for ENVM3103 / ENVM7123 are made in this handout.

[2] The Planning Act prohibits certain conditions, but these prohibitions are quite limited and mostly aimed at avoiding inconsistency with other measures. For instance, s 66 prohibits certain conditions being imposed, including conditions requiring a monetary payment for the establishment, operating or maintenance costs of, works to be carried out for, or land to be given for infrastructure, unless under Ch 4 (Infrastructure), Pts 2 or 3. 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 4 of the Planning Act.

metaphor: the law gives you a frame within which you paint the picture of what the conditions require to be done.

8. An approval should provide finality (i.e. not be subject to further approval under conditions); 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).

9. If you wish a document such as a landscaping or rehabilitation plan to be incorporated into the conditions of an approval you should refer to it expressly into the conditions.

10. Remember your overall policy goals (as a regulator) in writing and interpreting conditions of approval are to implement the law in an effective, efficient and equitable way.

11. Writing conditions of approval is a "Goldilocks problem": the aim is to provide sufficient detail and certainty without becoming too complex and unwieldy. Conditions of approvals must balance the advantages and disadvantages of detailed, quantitative conditions and simple, qualitative conditions. There is no single, "perfect" answer of how to do this and much depends on the facts of each case.

Interpreting conditions of approval

12. In practice, most conditions are reasonably clear and do not involve difficult questions of interpretation. Disputes over whether a condition has been contravened are usually about the *facts* and the *evidence* establishing the contravention, not difficulties over the interpretation of the conditions.

13. Generally, an approval is to be interpreted as a stand-alone document without reference to the application material or other documents unless they are incorporated expressly or by implication (e.g. a condition that requires an approved rehabilitation plan to be complied with).

14. Conditions 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. 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 or absurd results.

15. While in practice most conditions are clear, unambiguous and will be interpreted literally, where a condition is unclear two approaches have emerged for interpretation:

    (a) Genuine ambiguity in a condition is construed in a way which places the least burden on the landowner (i.e. ambiguity will be resolved in favour of the person who is said to have breached the condition).

    (b) Environmental Authorities (**EAs**) are construed as statutory instruments in accordance with s 14 and Sch 1 of that act, s 14A(1), s 14B(1) and s 35C of the *Acts Interpretation Act 1954* (Qld) applies so that:

        (i) the interpretation is to be preferred that best achieves the purposes of the EA;
        (ii) regard may be had to extrinsic material, provided certain circumstances exist; and
        (iii) any heading to a provision of the EA forms part of that provision.

    Which of these two approaches is correct is likely to be addressed in further cases.

Fixing mistakes and problems in conditions

16. Once an approval is granted, there are only limited powers to correct mistakes and problems in conditions without the consent of the approval holder. It is, therefore, important to get conditions right *at the time* the approval is granted – you can't expect to fix mistakes and problems later.