Conditions run with the land? It depends.

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Introduction[1]

"According to M-theory, ours is not the only universe. Instead, M-theory predicts that a great many universes were created out of nothing."[2]

One may ask what the multiverse concept of reality has to do with the nature of an approval. It's just that, when attempting to unify the separate recent decisions which touch on the ongoing nature of a planning approval, it is hard not to be struck by the idea that they have been developed in isolation of each other, in something like parallel universes, without due regard to the other recent cases on point. Often the decisions also do not adequately consider the key principles of planning law relating to the validity of a condition. Consequently, a unified body of law relating to the question of whether conditions run with the land seems as elusive and at times perplexing as a unified theory of the universe.

In May 2015, the Deputy Premier Jackie Trad MP announced that the state government had re-instituted the reform process relating to planning. The directions paper '*Better Planning for Queensland*' indicates that one of the key directions to delivering better planning for Queensland is the creation '*of an open and transparent and accountable planning system that delivers investment and community confidence*'.[3] As part of this agenda, one of the reform priorities relates to ensuring that enforcement notices attach to the land[4]. A crucial element in enforcement proceedings relates to the nature of the approval in question and whether it continues to bind the landholder. A consultation draft Planning Bill 2015 has now been released which is open for public consultation until 23 October 2015. The new legislation is expected to replace the *Sustainable Planning Act 2009* (**SPA**) in the second half of 2016. Given the ongoing reform process, it is therefore timely to re-consider this fundamental area of planning law.

The legislative regime is of key importance, not just the provision relating to the nature of an approval but also how approvals can be dealt with. As there is currently no ability to cancel a development approval once development has started[5] and limited options in respect of changing extant conditions of an approval[6],this restrictive state of the law may have contributed to litigation in this area. If an approval and its

[1] The law discussed in this article is current at 11 September 2015.
[2] Hawking S, and Mlodinow, L, (2011) '*The Grand Design*', (Chapter 1, The Mystery of Being) E-book by Transworld Publishers, Version 1.0 Epub ISBN 9781409081524 9780552819229
[3] 'Better Planning for Queensland', May 2015, at Queensland Government- Department of Infrastructure, Local Government and Planning,, http://www.dilgp.qld.gov.au/planning-reform (accessed 27 July 2015).
[4] s.166(6) of the Planning Bill 2015 provides that an enforcement notice is to be affixed to the premises so that people entering the premises would normally see the notice.
[5] See s. 380 SPA.
[6] ss 367-377 SPA

conditions are binding and one can't change them[7], then the owner is stuck with them and this can have unfortunate results[8]. Therefore more generous provisions allowing for changing conditions, inconsistent conditions in later approvals and cancelling approvals warrant further consideration at a time when the current state government is drafting and considering new planning legislation.

The current legislative provision: section 245 SPA

The current legislative provision governing the continuing nature of approvals appears uncomplicated at first blush. However, recent decisions of Queensland's Planning and Environment Court, as well as the Court of Appeal, which consider the ongoing nature of approvals, highlight that this issue is not at all straightforward[9].

Section 245 of SPA states:

> **245 Development approval attaches to the land**
> *(1) A development approval-*
> *(a) Attaches to the land the subject of the application to which the approval relates; and*
> *(b) Binds the owner, the owner's successors in title and any occupier of the land.*
> *(2) To remove any doubt, it is declared that subsection (1) applies even if later development, including reconfiguring a lot, is approved for the land or the land is reconfigured.*

The term 'development approval' includes any conditions imposed by the assessment manager, a concurrence agency, the Minister or under another Act[10] and is not limited by reference to the type of development which it permits[11]. Therefore, one would presume that the section means that all development approvals (including attaching conditions) such as development permits, preliminary approvals and deemed approvals for any development, bind future successors in title. However, recent case law reveals that the nature of the approved development may be a key factor as well as the express terms of a condition in determining the ongoing applicability of conditions.

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[7] Because for example it is not possible to gain the owner's consent, or the changes are not 'permissible changes'.

[8] Apart from issues of decreased amenity when the non-compliance concerns a neighbour such as the unfortunate position as discussed by I Neil and R Mannion, *Does a Local Authority have a duty to Enforce Conditions of an Approval? The case of Van Kretschmar v Singh Properties Pty Ltd & Scenic Rim Regional Council,* (2011/2012) 17 (78) QEPR 209, development carried out without an effective development permit or in contravention of its conditions is a development offence which can attract hefty penalties: Ss. 578. and 580 SPA.

[9] See comments of Robin QC, DCJ in *Rofail v Wells* [2011] QPEC 107 at pages 4 and 5 where he states '*the law in respect of the extent to which development approvals and conditions in them by reason of s.245 of SPA (and formerly s.3.1.28 of IPA) bind subsequent owners, particularly those who may not have notice of certain matters, is relatively undeveloped and cannot be said to be certain. See for example Hillpalm v Heaven's Door (2004) 220 CLR 472'*

[10] s. 244 SPA.

[11] see definition of 'development' schedule 3 of SPA and s.244 which states that an approval includes any conditions.

Operational works-

Rofail v Wells [2011] QPEC 12512

In *Rofail v Wells*, Dorney QC DCJ noted that there had been '*no express guidance by any relevant authority of any kind which provides for an easy resolution of the question of the continuing effect of a development approval after all operational works have been completed and conditions fulfilled*'[13]. Nonetheless, he found that an operational works permit will be unlikely to have continuing effect without a very clear legislative provision where the relevant works have been completed prior to further 'development'[14].

Rofail v Wells, involved consideration of a condition in the operational works permit[15] associated with subdivision for the residential development by the applicants. The respondent was the successor in title to the land subsequent to the reconfiguration and the works associated with the operational works permit. After purchasing the land, the respondent had built a swimming pool and in the process exchanged a pipe which was 250mm to two 125mm pipes. The exchange of pipes was exempt operational work under the relevant planning scheme. The original pipe had been used for storm water drainage from the applicants' neighbouring land across the respondent's land towards the Council's stormwater drainage. Of particular note, as the later exchange of pipes by the Respondent did not require a development approval in this case, the prohibition against later approvals including inconsistent conditions was not enlivened[16].

There was no stormwater easement over the respondent's land and the applicants relied on the operational works development permit for the continued requirement for the original larger pipes.

Was the respondent bound by the earlier approval conditions and had they committed a development offence that could be the subject of orders? Was the respondent required to request a change to the approval conditions in order to alter the pipes?

Dorney QC DCJ found that the operational works permit contained no continuing obligation. Once the operational works were complete (and the 250 mm pipe was laid)[17], and once the associated conditions had been fulfilled and a transfer affected, he found that it was difficult if not impossible for s.245 to impose any liability on the new owner[18]. In coming to this conclusion Dorney QC DCJ applied the majority High Court decision in *Hillpalm Pty Ltd v Heaven's Door Pty Ltd* (2004) 220 CLR 472, highlighting the clash of the creation of statutory rights 'in rem' with the effective operation of a system of Torrens Title. He also placed reliance on the definition of

[12] This case was noted in (2011/2012) 17(80) QEPR 269, a further summary is provided here for the purposes of canvassing the issues raised in that decision alongside the later PEC cases discussed in this article.
[13] [2011] QPEC 125 at para [14]
[14] at para 25
[15] Dated 16 February 2007 and issued under IPA which is transitioned as a development approval under SPA by s.801 SPA.
[16] s.347 SPA,
[17] The works were considered 'off maintenance' on 18 May 2010.
[18] At para [29]

'development' in IPA and SPA, as being an action rather than the result of an action. Dorney QC DCJ also traced the '*germ of the notion of a limited time of application of the consent (or approval) embracing the idea of continuance only until fulfilment*'[19] on Hodgeson JA's Court of Appeal judgment in *Cumerlong Holdings Pty Ltd v Dalcross Properties Pty Ltd* (2002) 55 NSWLR 446 at 449 [18].

This case distinguishes development approvals which permit and condition an ongoing 'use' of land as distinct from approvals that allow development that are capable of completion such as operational works (and presumably reconfiguration of land, plumbing, drainage and building works).[20] It is likely that the intention of the Council in drafting the condition requiring the larger pipes on the respondent's land was that such pipes would service the other allotments in the future stages of the subdivision. However, Dorney QC DCJ stated that this intention could only be reasonably inferred in the circumstances[21] and this was not enough to overcome Torrens Title indefeasibility. He commented that although the legislature in enacting s.245, '*may have intended to create rights that bound actual land even if of Torrens Title*' legal commentary suggests that '*Torrens Title legislation is resistant to implied repeal.*'[22]

Having concluded that the conditions had been fulfilled and therefore no longer had continuing effect, it was unnecessary for Dorney QC DCJ to consider the validity of the condition had it been of an ongoing nature. Obviously continuing conditions, like all conditions, must satisfy the legislative and judicial tests of validity. A judicial test of '*extremely respectable pedigree in Queensland*'[23] is that of 'enforceability': for a condition to be valid it must not be impossible to enforce or be one that would make enforcement extremely difficult[24]. Conditions have readily been struck down as invalid on the grounds that they are unenforceable[25]. This is often problematic when conditions are of a continuing nature. It would clearly have been impossible for the Council in the circumstances of the *Rofail* case to police the diameter of pipes used for drainage where the subsequent exchange of pipes was exempt development.

Furthermore, although the point was not considered in the decision of *Rofail v Wells*, a continuing obligation for the pipes to remain a certain size may have also been invalid on the grounds that it would have restricted an 'as of right' use of the land[26].

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[19] At the end of para 22. He relied on Hodgeson JA's Court of Appeal judgment in *Cumerlong Holdings Pty Ltd v Dalcross Properties Pty Ltd* (2002) 55 NSWLR 446 at 449 [18] who stated that, "*there is a contravention of a condition of a development consent for as long as the development continues and the condition is fulfilled.*"

[20] See comments by Dorney QC, DCJ at the end of para [24]

[21] At para [7].

[22] At para [23].

[23] Fogg, A, *Land Development Law in Queensland*, Law Book Co, Sydney, 1987, p625

[24] *R v Lukin; Exparte Sunshine Pty Ltd* [1967] Qd R 49; *Southedge Daintree Pastoral Co Pty Ltd v Douglas Shire Council* [1985] QPLR 309 a more recent consideration of this principle see *Chuwar Recycling and Land Filling Pty Ltd v Ipswich City Council* [2008] QPELR 256 at [14]-[18]; *Mackay Resource Developments Pty Ltd v Mackay Regional Council* [2015] QPEC 32 at [9].

[25] See Fogg, A, *Land Development Law in Queensland*, Law Book Co, Sydney, 1987, p625 and Wilcox M, *The Law of Land Development in New South Wales*, The Law Book Co, 1967 at pp399-400 and also *Westfield Management Ltd v Pine Rivers Shire Council* [2005] QPELR 534.

[26] *Transcontinental Development Pty Ltd v Pine Rivers Shire Council (*1969) 25 LGRA 7 at 12*; Poton v* BCC (1970) 25 LGRA 73 at 77; *Comiskey v Pine Rivers Shire Council [1996] QPELR 158 at 160; Lewiac Pty Ltd &ING Real Estate Joondalup v Gold Coast CC [2003] QPELR 385 at pp 399-401, [62] and [71];*

As already noted the exchange of the pipes was exempt development. It is well established planning law that conditions must reasonably and fairly relate to the zone in which the approval is given and also the approval sought by the applicant. Mylne DCJ held in the key decision of *Transcontinental Development Pty Ltd v Pine Rivers Shire Council* [1969] 25 LGRA 7 , that '*to impose a condition restricting in the proposed zone a use of land that may be conducted without the consent of the council in that zone would be contrary to the town planning scheme and therefore unlawful*.'

This test is not without its own difficulties with regards application. The principle was applied by Newton DCJ in *Lewiac Pty Ltd &ING Real Estate Joondalup v Gold Coast CC* [2003] QPELR 385 at pp 399-401, [62] - [71], where he found that a proposed condition relating to an application for a development permit for a material change of use and a preliminary approval for the extension of the Harbour Town shopping Centre was invalid[27]. His Honour held, applying the *Transcontinental* case, that the proposed centre would be too expansive to sit comfortably within the planning scheme's hierarchy of centres and that the condition limiting the floor area and type of retail was repugnant to the scheme[28]. In contrast, in *Genamsom Holding Pty Ltd v Caboolture Shire Council* [2009] QPLR 305, Keane JA disinclined to apply the principle to declare a condition of a rezoning approval that required compliance with a layout plan as being invalid[29]. Keane JA held that '*the respondent's decision in November 1991 to approve the rezoning subject to the conditions which included condition 2(1) purported both to entitle and oblige the then developer to develop the land in accordance with the layout plan to which reference was made. The conditions did not purport to prohibit any form of development permitted in the Central Commercial Zone. To the extent that an owner of the land might be disposed not to use the land as 'shops', the land might lawfully be used for other permitted forms of development*'[30]. Therefore, the shops had to comply with the condition even though shops in the Central Commercial Zone were one of the uses for which buildings and other structures did not require the consent of Council.

The distinction between these two cases is not easily drawn. As Professor Fogg has noted, '*there are intrinsic difficulties in separating legal from factual aspects of tests concerning conditions, and the boundary line is not always clearly drawn in*

Genamson Holding Pty Ltd v Caboolture Shire Council [2009] QPLR 305; Maller Holdings Pty Ltd v Gold Coast City Council & Ors [2013] QPEC 51; see also Fogg A, *Land Development Law in Queensland*, Law Book Co, Sydney, 1987, p.647.

[27] The particular condition sought to limit the retail area of the extension at the same time as permitting the size of centre that, under the draft planning scheme at the time, would usually incorporate a higher level of community, administrative/government and higher order retailing which the proposed development did not supply. The condition was intended to minimise the impact of the approval on the hierarchy of centres in the planning scheme.

[28] A consideration of this case would not be complete without noting that there was an unsuccessful application for leave to appeal this decision. Williams JA found that the applicant had demonstrated that there were some arguable errors of law in the course of Newton DCJ's reasoning (de Jersey CJ inclined that such matters were either no errors of law or rather findings of fact). Despite this, both Williams and Atkinson JJA held that any supposed errors could not have been said to materially affect the decision and therefore leave to appeal was unanimously refused: *Lewiac v Gold Coast CC* [2003] QPLR 538.

[29] It had been argued by the appellant that the condition restricted the right of the landholder to use the land for any of the purposes permitted in that zone under the planning scheme.

[30] At para [26], Keane JA also noted that if the condition was declared to be invalid, in those circumstances so would the rezoning to which it applied; para [28].

arguments and judgments in the courts'[31]. However, the cases reveal the central theme whereby conditions must not prohibit further and perhaps different as of right uses even though the permitted development may be under certain restrictions.

The *Rofail* case would have been an opportunity to further clarify the application of this test. There would have been strong arguments to suggest that an ongoing condition requiring pipes to be a certain diameter could not validly restrict the further 'as of right' use of the respondent's land such as constructing a swimming pool and exchanging the pipes with plumbing which has a different diameter.

Peet Flagstone City v Logan City Council [2014] QCA 210

In *Peet Flagstone City v Logan City Council* the Court of Appeal considered the ongoing nature of conditions of an operational works permit, this time for clearing vegetation, and came to the opposite conclusion in *Rofail v Wells*. The appellants had bought land at New Beith (28 July 2011) which had recently been declared part of the Greater Flagstone Urban Development Area (**UDA**) for the purposes of the now repealed *Urban Land Development Authority Act 2007* (**ULDAA**)[32]. In February 2008, the former local government[33] had issued an operational works permit for the selective clearing of vegetation on the land on certain conditions. Clearing work occurred pursuant to this permit and it was common ground between the parties that this clearing work had been completed to the satisfaction of the former local government.

In 2012, further clearing took place and the successor Council complained that the clearing contravened the conditions of the 2008 permit. In particular, it was argued that the clearing contravened the Vegetation Clearing Management Plan and condition 2 which required the applicant/appellant to maintain the remaining vegetation in a healthy condition. The declaration of the land as part of the Greater Flagstone UDA meant that no development approval was required to clear vegetation under SPA. However, s.14 of the ULDAA provided for the continuation of SPA approvals that were in effect prior to the declaration of the land as a UDA. Therefore the issue as to whether the approval was still in effect and whether the conditions were binding was the subject of this action. The appellants argued that the conditions were no longer in effect because once the clearing had been completed the development approval terminated.

The Court of Appeal found otherwise. Gotterson JA held that this argument was '*contradictory of the character of a condition of a development approval as a 'community price' a developer must pay for a development approval and a 'vehicle for minimising adverse effects' of permitted development*'[34]. Applying *Genamson Holdings Pty Ltd v Caboolture Shire Council* [2009] QPLR 305[35], he rejected the argument that the approval and conditions had terminated. Importantly he noted that the conditions included obligations after the clearing had been undertaken: the

[31] Fogg, A, *Land Development Law in Queensland*, Law Book Co, Sydney, 1987, p 613.
[32] The *Urban Land Development Authority Act 2007 was repealed by the Economic Development Act 2012*
[33] The Beaudesert Shire Council.
[34] At page 6, [28] quoting *Hymix Industries Pty Ltd v Alberton Investments Pty Ltd* [2002] QPELR 116, per Atkinson J at [23]; as applied in *Mackay Resource Developments Pty Ltd v Mackay Regional Council* [2015] QPEC 32 at para [31] per Dorney QC DCJ.
[35] at [22],

maintenance of the vegetation and the prohibition of clearing outside of the areas marked on the Vegetation Clearing Management Plan[36].

Unfortunately, it appears that the Court was not referred to the earlier authorities mentioned in this paper. It is regrettable that the Court of Appeal decision did not refer to *Rofail v Wells* (discussed above) where the operational works permit was found to have terminated on completion. It is also regrettable that the issue of conditions restraining 'as of right' development was not more fully canvassed so as to also refer to *Lewiac Pty Ltd &ING Real Estate Joondalup v Gold Coast CC* (as discussed above). Moreover, the reasonableness of an ongoing condition, supposedly continuing ad infinitum, which requires vegetation to be maintained in a healthy condition (in drought conditions) was not argued or considered. Nor was the practicality of enforcing such a condition. These themes would have been highly relevant to the appellants' arguments. Leave was granted by the Court of Appeal on the grounds that the arguments put forward by the appellants '*would have significant implications for development approvals beyond this case*'[37]. Regrettably as these arguments were not fully canvassed in the decision, clarity has not been achieved.

The *Peet Flagstone City* case was referred to in *Hymix Australia Pty Ltd v Brisbane City Council (No. 2)* [2015] QPEC 6, where conditions relating to the recommencement of a concrete batching plant and precast facility were being considered. An applicant appeal had succeeded against refusal and the only issue that remained were two conditions that related to hours of operation and lighting. The appellant sought the inclusion of words that provided that the development could operate outside the terms of the two conditions if it became exempt development in the future. The request was in response to the decision in the *Peet Flagstone City* case. The appellant did not want to be hamstrung by the more restrictive conditions if in the future the development became exempt by way of supplying a major project that was added to schedule 4 of the Sustainable Planning Regulations. (It was agreed that such a major project would likely be also designated a coordinated project under the *State Development Public Works and Organisation Act 1971* (**SDPWOAct**).)

Rackemann J commented that the *Peet Flagstone City* decision was '*not without difficulty and its implications, beyond its own facts, is yet to be authoritatively decided*'[38]. While he noted that any Coordinator-General's conditions would have primacy if indeed the development became exempt due its relationship with a coordinated project in the future, Rackemann J declined to include the qualification to the conditions. He found that it was better to '*set the conditions of the subject approval by reference to what is appropriate on the basis of the evidence in this case and to leave such hypothetical matters for resolution by reference to the legislative provisions, as they might be at the relevant time, in the event that such an issue were to arise*.'[39]

[36] The appellants also unsuccessfully argued that as vegetation clearing following the UDA declaration was now exempt, on the commencement of SPA, the development approval and conditions ceased to have effect. The Court held that the transitional provisions in both the ULDAA (s.14) and SPA (s.801) continued the operation of the approval as it was still in effect.
[37] Page 9, para [41].
[38] Page 4 para [6].
[39] Page 7 para [15].

Therefore, there remains uncertainty as to whether an approval involving operational works that is capable of being completed terminates or as a general rule must continue in effect as the 'vehicle for minimising adverse effects' of a permitted development[40]. Obviously the wording of the condition is of the utmost importance and where there are conditions that operate after the works are completed (such as in the *Peet Flagstone City* case), this will be indicative of an enduring nature. However, conditions then fall within the territory of the general tests of invalidity such as on the basis of unenforceability, lacking finality, unreasonableness as well as restrictions on 'as of right' uses. It appears from the recent cases relating to operational works permits that these further requirements have at times been overlooked.

Development permit for reconfiguration of land- condition requiring dedication of land as park

In *Gold Coast City Council v Crest Hill Pastoral Company* [2012] QPEC 25 the Council sought an interim enforcement order to prevent the sale of land required to be dedicated as park by a mortgagee in possession. The condition requiring dedication was associated with a development approval for reconfiguration of land[41]. The land to be dedicated (lot 15) was of considerable size (65 hectares). Only part of the development had been completed before the developer defaulted on its mortgage; 18 out of the 100 allotments had been completed. Separate titles now existed for those allotments. The Council had not enforced the condition requiring dedication of the park and four years had elapsed. The marketing information for the auction of the remaining undeveloped allotments including lot 15 described that land with the words '*elevated home site possible*'. The respondent mortgagee argued that it could deal with its security independently of entitlements of Council and that any purchaser would be subject to *caveat emptor* as conditions run with the land applying *Sunshine Coast Regional Council v Recora* (2012)191 LGERA 1.[42]

Robin QC DCJ held that on the balance of convenience, lot 15 was to be excluded from the auction so that its status and fate could be determined before its sale. He stated that if the auction went ahead, '*there was a real risk that a purchaser of lot 15 would hold it free of obligation to dedicate it to Council, even if the balance of the development were to go ahead on the basis that the new owner of lot 15 had not implemented any development proposal*'[43]. Furthermore, the legal counsel for the mortgagee in possession argued, and his Honour noted, that if the reconfiguration approval is not sufficiently acted upon, the reasonableness of the dedication of the 65 hectares could be questioned relying on *Hammercall v Gold Coast CC* [2005] QPELR 498 (where the Council and Main Roads through delay rendered themselves unable to secure dedication of a road under a condition).

[40] Per Atkinson J, *Hymix Industries Pty Ltd v Alberton Investments Pty Ltd* [2001] QCA 334 at [23].
[41] A decision notice dated 2004 and later amended in January 2006 required a subdivision development to be generally in accordance with a drawing indicated and '*the land shown as park on the plan of subdivision shall be dedicated to the Crown as park at the applicant's expense'.*
[42] This case involved unpaid infrastructure charges. A new owner was bound by the condition attached to the development approval for reconfiguration requiring their payment.
[43] At page 7 lines 40-50

Relevantly Robin QC DCJ held:

> *'the effect of SPA s 245 and IPA s.3.5.28 is that conditions bind only an owner or occupier who carries out development under the approval (not contract or doing work, for example: Sunshine Coast Regional Council v Sugarloaf Road Pty Ltd [2011] QPEC 124). The real difficulty here is that a purchaser of lot 15 who does not 'develop' for whatever reason (perhaps that the approved development has been completed) is not bound. See Rofail v Wells [2011] QPEC 107; [2011] PEC 125. In such contexts the indefeasibility of titles under the Torrens system is likely to protect a purchaser from having to comply with some development conditions, for example to create an easement. The view may be taken that the reconfiguration approval has become spent: see Hillpalm Pty Ltd v Heaven's Door Pty Ltd (2004) 220 CLR 472'.*

This decision involved orders to prevent the land in question being sold pending final determination of the status of the land vis-à-vis the approval for reconfiguration and did not determine the issue. The action to determine the status of the land was in fact settled between the parties in December 2013, with the Council becoming the owner of the relevant parcel of land and the issue was never judicially considered. Therefore, caution should be exercised in relying on Robin QC DCJ's comments in *Crest Hill Pastoral* in order to extend the principles outlined in *Rofail* to approvals involving reconfiguration of land where conditions have not been fulfilled or where a development is partially completed. Although, they do highlight the existing problems associated with the application of s.245 SPA.

An example of a reconfiguration case involving continuing conditions is *Gold Coast City Council v GMA Certification* [2011] QPEC 29. In this case Robin QC DCJ found that a building certifier could not issue a development permit for building work that was contrary to a development permit for reconfiguration of a lot despite the plans having been sealed and the land on-sold. The relevant development permit had issued in 2006 allowing creation of more than 1000 allotments. The land was in '*problematic terrain*' and included a condition that '*any retaining structures such as retaining walls not exceed 1.2 metres in height without the approval of the chief executive*'.[44] The building certifier issued a development approval (following a decision of the Building and Development Resolution Committee) for the retaining wall that was two metres in height. Robin QC DCJ found that the development approval had not lapsed or ceased to have effect notwithstanding it had been fully implemented and held that the conditions would continue to bind the owners of the subdivided land.[45]

[44] At page 3

[45] Also see *Hawkins & Izzard v Permarig & BCC (no. 3)*[2001] QPELR 423, while the developer continued to be bound by conditions of a development approval for reconfiguration of land that related to earthworks and the treatment of contaminated land despite it having been subdivided and on-sold, Brabazon QC DCJ acknowledged in obiter dictum (at page 429) that the approval ran with the land. (This case is often cited for the proposition that the original applicant cannot avoid obligations under a development approval simply because they have run with the land and similarly bind a new purchaser.)

Town Planning Consent Permit for a multi-unit development, approval for subdivision and later modified consent

KCY Investments (No. 2) Pty Ltd v Redland City Council & Anor [2012] QPEC 17[46] involved an appeal from a Council refusal to grant a code assessable development permit for material change of use of land at Point Lookout, Stradbroke Island on the grounds that 1994 development conditions that required protection and retention of vegetation and dunal topography continued to attach to the land and bind the current owners. A Consent Order had been made by the Court under the *Local Government (Planning and Environment) Act 1990* and a town planning consent permit (C2307) was issued on 7 April 1994 approving multiple dwelling units on part of the land and conditioning this approval with the requirement that certain parts of the land retain vegetation (the 'preservation area')[47] and that no further development be permitted in the area. The land was the subject of subdivisional approvals[48] so that a new lot 4 became almost entirely the preservation area. Lot 4 was the subject of the refusal by Council.

The appellant/applicant emphasised that the Council had not placed conditions on the subsequent reconfigurations of the land and that the proposed code assessable development was not affected by the 1994 conditions[49]. Reliance was placed on the supremacy of proprietary rights in Torrens Title land as stated in the High Court decision of *Cumerlong*[50].

Durward SC, DCJ found that the conditions continued to apply as the conditions were unequivocal and clear in their meaning and were in contemplation of any development (not just the original development) on the preservation area. He distinguished the cases of *Cumerlong*[51] and *Mimehaven* and *Genamson*[52] on the grounds that they were rezoning cases and not applicable.

Rofail was also distinguished by Durward SC DCJ who considered that the circumstances between the cases were quite different. No explanation as to the

[46] This case was noted in (2012/2013) 18(81) QEPR 20 but like Rofail v Wells, a further summary is provided here for the purposes of canvassing the issues raised in that decision alongside the later PEC cases discussed in this article.
[47] The 1994 Order was subsequently modified on 6 May 1998 but the modified approval continued to include the requirements for preservation of vegetation. On February 1996 a new development control plan was incorporated into the 1988 Town Plan.
[48] Dated 20 July 1994 and 4 October 1999.
[49] As well as arguing that and that in any event, the proposed management measures would satisfy the environmental protection intended by the conditions.
[50] *Cumerlong v Dalcross* (2011) 279 ALR 248. The respondent Council and co-respondents by election (who had been parties to the original Court action in 1994) argued that the proper construction of IPA accorded no impact on proprietary rights given the requirement for owner's consent in the original application and that the approval and conditions created rights as well as obligations that could not be taken away on reconfiguration. Without a requirement that the appellant/applicant change the existing conditions, any subsequent approval allowing development in the preservation area would be a development offence. Only if the approval had lapsed where no development had been started pursuant to the 1994 approval could the approval and conditions cease to be applicable.
[51] On the grounds that that case involved the analysis of the relationship between a statutory restrictive covenant and s. 28 of the *Environment, Planning and Assessment Act NSW*
[52] *Mimehaven Pty Ltd v Cairns City Council* (2002) 121 LGERA 216 and *Genamson Holdings Pty Ltd v Caboolture Shire Council* (2008) 163 LGERA 386.

differing circumstances was proffered and presumably the distinction lay in the fact that *Rofail* concerned completed operational works. In this case, the approval was a town planning consent for multiple dwellings under the *Local Government (Planning and Environment) Act 1990*. Through the transitional arrangements in the successive legislative provisions, IPA and SPA, this approval would now be considered a development permit for material change of use.[53] Also in *Rofail* the conditions were capable of completion and were in fact completed[54].

The completion of the unit development in 1994 had the opposite effect to what occurred in *Rofail*, in that the completion cemented the binding nature of the conditions on successors in title (rather than exhausting them). Durward SC DCJ held: '*The completion of the unit development subject to the 1994 approval also has the effect that the 1994 conditions remain in force and effect and are binding on the owner and occupiers of the land: SPA s 245*'.[55] Durward SC DCJ quoted Mason P in *House of Peace Pty Ltd v Bankstown CC* (2000) 48 NSWLR 498 stating that planning law operates 'in rem' and that once granted it makes lawful, in a town planning context, what would otherwise be unlawful but does so by reference to the acts done and not the identity of the user.[56] Durward SC DCJ found that the application should be approved subject to the appellant taking the necessary steps to free the land of the conditions of the earlier approval[57].

Regrettably, it appears that no argument was raised by the parties in respect of the validity of the condition requiring no further development in the preservation area. Surely such a condition would fall foul of the principle that conditions must not fetter the Council's future discretion in respect of the land. Afterall, since the 1994 conditions had been imposed, a new planning scheme had come into force, the land was designated within the Conservation Zone and the proposed use was a code assessable use within that zone. The principle that a condition must not unlawfully fetter a future Council discretion was applied by the Planning and Environment Court in *Hall-Bowden & Geiger v. Pine Rivers Shire Council* [2006] QPLR 546 and has recently been applied in *BM Carr Holdings v Southern Downs Regional Council* [2013] QPELR 372. In the latter case, a condition requiring '*no dwelling other than a caretaker residence ... be developed*' in buffer land was struck down as void on the basis that it was a fetter on Council's future exercise of discretion. Searles DCJ stated that the condition, '*should not be expressed in prohibitory terms but be clear enough for any assessment manager in the future to identify the intent of the condition*.'[58] He suggested that the provision for buffer land should instead be expressed so as to highlight the importance of any future use not being adversely affected by any odour from the current development.

While the *KCY Investments (No. 2)* did not consider the earlier cases relating to the validity of a condition which fetters a decision maker's discretion, nor the did the *BM*

[53]Sections 6.1.23 IPA and 801 SPA

[54] There is a plethora of case law that indicates that unfulfilled conditions, in particular those relating to infrastructure charges, will continue to bind successors in title and many of these cases involve permits for material change of use: see *Sunshine Coast Regional Council v Recora* [2012] QPEC ; *Montrose Creek Pty Ltd and Manningtree (Qld) Pty Ltd v BCC* [2012] QPEC 65*; MC Property Investments Pty Ltd v Sunshine Coast Regional Council (No. 2)* [2011] QPEC 133.

[55] See para [70].

[56] Para [76]

[57]Following the remarks of Keane JA in *Genamson* at [26]-[27]

[58] At para [30] page 382.

Carr Holdings case consider *KCY Investments (No. 2)*. Both cases involved conditions essentially prohibiting future development on a specific area of land. This would appear an example where caselaw has been developed separately without due regard to other relevant decisions.

Practical implications of cases

These cases indicate that it is important to consider the type of approval (such as whether it permits a 'use' of land or 'works' (that are capable of completion)) as well as the precise wording of the relevant conditions in determining whether they will continue to bind future owners of land. The straightforward words used in the section mask their difficult application, in particular their tension with the indefeasibility of Torrens Title.

It seems unremarkable that permits in respect of ongoing use of land will have ongoing conditions which come within the scope of s. 245 (such as in *KCY Investments (No.2)*).[59] The problem lies in determining which conditions of other approvals will have ongoing application as can be seen in the cases involving operational works (Rofail as compared with Peet) and reconfiguration of land (*Crest Hill Pastoral* as compared with *GMA Certification*). Common sense may come to the rescue in situations like the *GMA Certification* case (as noted above, that related to retaining walls). However, it could also be argued that there was nothing necessarily inherently ongoing about the requirements of retaining walls being a certain height despite the nature of the terrain. In *Rofail*, it was reasonably inferred by the circumstances that the drainage pipes would have an ongoing use but that inference was not enough in the circumstances of the case to make them binding on the new owner of the land. Often operational works will have ongoing impacts compared with, for example, building works relating to a structure. In the latter case, it would be extraordinary to presume that the conditions relating to a building permit for an extension on a house should have ongoing applicability once completed.

Curiously, few of the cases directly considering s.245 SPA turn on or adequately consider the key judicial tests relating to the validity of conditions generally, even though on an holistic view they would have been relevant. Ongoing conditions on approvals relating to use of land as well as operational works and reconfiguration of land must all equally pass the tests of reasonableness, enforceability, being certain and final, not curtailing 'as of right' uses of land as well as the prohibition against fetters on Council's future discretion.

Proactive steps to avoid the pitfalls

As already noted, the existing restrictions on changing and cancelling approvals have exacerbated the consequences of the lack of clarity surrounding whether an approval has continuing application. Having canvassed this problematic judicial and legislative landscape, it is worth considering the steps that can be taken by decision-makers, landholders as well as the legislature that may help avoid and perhaps cure these pitfalls.

Caution should be exercised by decision makers with respect to drafting approvals that have conditions that are capable of completion and where there may be doubt

[59]See also commentary in Fogg, Meurling & Hodgetts, *Planning and Development Queensland,* Lawbook Co, Sydney, 2015 *at para [6.620].*

as to their ongoing nature[60]. If a decision maker intends these conditions to have an on-going application, the conditions ought to be framed accordingly in precise and unambiguous language and preferably be included in the 'use' approval (if at all possible). The use of appropriate covenants in accordance with s.349 SPA would also ensure the condition is recorded on the certificate of title for the land. If structures such as pipes for common drainage are required, easements ought to be obtained. Time limits could also be considered which reflect the intentions of the parties. Obviously, as already discussed in this paper, ongoing conditions must satisfy both the legislative tests of relevance and reasonableness[61] as well as the judicial tests[62]. Therefore a thorough consideration of these requirements is essential for decision makers in drafting valid conditions.

Landholders are in the most difficult position when there is uncertainty relating to the ongoing nature of a condition. Certainly, deliberation as to whether a condition can be changed is worthwhile in these circumstances. Both Keane JA in *Genamson*[63] and Durward SC DCJ in *KCY Investments*[64] acknowledged that this was relevant to the landholders in question. Early discussions with decision-makers about changing approval conditions is infinitely better than a head in the sand, fingers crossed approach. However, the current restrictive provisions relating to permissible changes[65] and cancelling development approvals[66] makes taking advantage of this approach somewhat difficult where the attitude of the decision-maker is negative.

Legislative change

The lack of clarity around the issue of the binding nature of an approval and its conditions obviously is deeply rooted in the existing legislative provision. The foregoing cases are not uniform in their application of section 245 SPA. Further, the need to have a determinative interpretation of how section 245 applies in various situations is intensified where it is difficult to change or cancel an extant development approval and there is a prohibition on later approvals containing inconsistent conditions. The Planning Bill 2015 contemplates some changes that are a step in the right direction in resolving some of the issues faced in previous litigation. It will apply to existing approvals as if they had been made under that Bill[67].

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[60] It is settled law that '*the responsibility to ensure that approvals of development are clear and unambiguous rests with the approving authority, generally speaking the local authority': KCY Investments (No. 2) Pty Ltd v Redland City Council & Anor* [2012] QPEC 17 at [48] applying Dodds DCJ in *Aqua Blue Noosa Pty Ltd v Noosa Shire Council* [2005] QPELR 318.

[61] Conditions must be relevant and not an unreasonable imposition on the development or use as well as being reasonably required: s. 345 SPA.

[62] such as, must be for planning purposes and not an ulterior one, they must be fair and reasonable in relation to the permitted development as well as the zone in which the approval is given, they must satisfy the Wednesbury Corporation test of reasonableness and they must not be unnecessary, unenforceable or imprecise: see Fogg, A, *Land Development Law in Queensland*, Law Book Co, Sydney, 1987, chapter 10 pp597-626 and also commentary in Fogg, Meurling & Hodgetts, *Planning and Development Queensland,* Lawbook Co, Sydney, 2015 in respect to s.3.5.30 IPA at paras [4390]-[4480].

[63] At para [26].

[64] At para [84].

[65] s.367 SPA and Divisions 1 and 2 of part 8, Chapter 6 SPA.

[66] s.379 SPA.

[67] s.308(3) Planning Bill 2015.

Attachment to premises under the Planning Bill 2015

Section 71 of the Planning Bill 2015 is similar to the existing s.245 SPA except for two important additions (which are underlined). It reads:

> ***71 Attachment to the premises***
> *(1) While a development approval is in effect, the approval—*
> *(a) attaches to premises, even if—*
> *(i) a later development (including reconfiguring a lot) is approved for the premises; or*
> *(ii) the premises are reconfigured; and*
> *(b) binds the owner, the owner's successors in title and any occupier of the land.*
> *(2) However, a development approval does not confer or imply any proprietorial rights to—*
> *(a) the land; or*
> *(b) a resource.*
> *Note— However, see the Coastal Act, section 123 for the right to occupy land that is the subject of a development approval for tidal works under particular circumstances.*

The words '*while a development approval is in effect*' are new and require consideration of the nature of the approval itself and whether it is capable of completion or continues ad infinitum. Therefore the provision presumes the existence of approvals such as the operational works permit in *Rofail* that ceased to be in effect or terminated.

Also the words '*a development approval does not confer or imply any proprietorial rights to— (a) the land; or (b) a resource*' are new and may suggest that the legislature does not intend planning approvals to overcome Torrens Title. They also suggest a perhaps unintended endorsement of the decision of *Rofail*, where the respondents were seeking to rely on a condition of an approval to ensure drainage rights over another person's land.

Academic literature highlighting the current fragmented nature of obligations and restrictions on land title and their relationship with Torren's Title suggests that legislation intending to create obligations and restrictions on land title *in rem* should require the obligation to be registered[68]. Therefore the omission of this requirement from the proposed s.71 may also indicate the legislature's reluctance to defeat Torrens Title. However, if this is really the intention, we are left with the question relating to the practical meaning and application of the words: '*approval attaches to the premises ..and binds the owner, the owner's successor in title and any occupier*'.

Therefore, some may suggest that the proposed section is a step forward in clarifying the intent to which the legislature intends a planning approval to affect Torrens Title. However, it would also be fair to say that it does not go far enough in clarifying the legislature's intention.

[68] Bell J and Christensen, S '*Use of Property Rights Registers for Sustainability- A Queensland Case Study'*, (2009) 17 APLJ 86.

Changing approvals under the Planning Bill 2015

Under SPA only a 'permissible change' can be made to a development approval. The Planning Bill 2015 introduces Division 2 of Part 6 (ss 72-81) which allows for two types of changes to development approvals: minor changes and other changes. Minor changes (as defined in schedule 1) are remarkably similar to permissible changes under SPA[69]. However, other changes not being minor changes are also contemplated and require the change application to be assessed, just like any application, but rather than requiring the whole application to be assessed again it requires just the change to be assessed. Public notification may be required but not if the only reason the change fails the minor change definition and is therefore an 'other' change, is due to additional referrals. The relevant section reads:

> **80 Assessing and deciding application for other changes**
> *(1) This section applies to a change application, other than for a minor change to a development approval.*
> *(2) The responsible entity must deal with the change application under sections 43, 50 to 60, and 62 to 65, and the development assessment rules, as if—*
> *(a) the responsible entity were the assessment manager; and*
> *(b) the change application was the original development application with the change included, but was made when the change application was made.*
> *(3) However, the requirement for public notification under section 51 does not apply to the change application if the change is not a minor change only because the change may cause—*
> *(a) a referral to a referral agency if there were no referral agencies for the development application; or*
> *(b) a referral to extra referral agencies.*
> *(4) The following provisions apply for assessing and deciding the change application in relation to the development approval, as if the change were the entire development—*
> *(a) sections 53 to 56;*
> *(b) part 4, division 2, other than section 61 and 62;*
> *(5) The power to impose a development condition under sections 54(1)(b)(i) or 58 includes a power to amend* a condition of the original development approval.

This section is a welcome step forward in allowing the relevant parties to consider changes that would have failed the restrictive 'permissible change' test. It can never mean an open slather to change development approvals, just the chance for decision-makers and landholders to have the discussion and assess such an application which is not possible today.

[69] They must not result in substantially different development or involve additional referral agencies, cause prohibited development or require public notification if it was not required earlier. Although, there is the additional requirement that the change must also not cause a referral agency to assess the application against, or have regard to, extra matters prescribed by regulation.

Inconsistent conditions of a later approval

The Planning Bill 2015 also allows for inconsistent conditions in later approvals in certain circumstances. Currently, a new application cannot include inconsistent conditions to the earlier approval[70]. Where the earlier approval cannot be changed, the landowner really is stuck with the problematic condition. Section 64 of the Planning Bill 2015 provides for prohibited development conditions and is similar to the existing s.347 of SPA but with an important addition relating to later approvals. It reads (with the addition underlined):

> **64 Prohibited development conditions**
> *(1) A development condition must not—*
> *(a) require a person other than the applicant to carry out works for the development; or*
> *(b) require a person to enter into an infrastructure agreement; or*
> *(c) other than under chapter 4, part 2 or 3, require a monetary payment for the establishment, operating or maintenance costs of, works to be carried out for, or land to be given for—*
> *(i) infrastructure; or*
> *(ii) for the imposition of a condition by a State infrastructure provider—infrastructure or works to protect the infrastructure's operation; or*
> *(d) require an access restriction strip; or*
> *(e) limit the period a development approval has effect for a use or works forming part of a network of infrastructure, other than State-owned or State-controlled transport infrastructure; or*
> *(f) be for water infrastructure about a matter for which the SEQ Water Act requires a water approval.*
>
> *Examples for paragraph (f)— A development condition that requires—*
> - *works to be carried out*
> - *a monetary payment*
> - *land in fee simple to be given.*
>
> *(2) A development condition must not be inconsistent with a development condition of an earlier development approval in effect for the development, unless—*
> *(a) the same person imposes the conditions; and*
> *(b) the applicant agrees in writing, to the later condition applying;*
> *(c) If the applicant is not the owner of the premises-the owner agrees, in writing to the later condition applying.*
> *(3) A development condition that complies with subsection (2) applies instead of the earlier condition.*
> *Note— For other limits on development conditions about environmental offsets, see the Environmental Offsets Act, section 14.*

Therefore, s. 64 of the Planning Bill 2015 allows for the situation where circumstances have changed and the parties are in agreement in respect of different conditions relating to the same development[71]. The precondition to this scenario is that the same

[70] s.347(a)SPA

[71] See Explanatory notes for the Planning and Development Bill 2014, page 77.

person (or body of persons)[72] must impose the later condition and the owner and applicant must agree to the imposition.

Cancelling approvals under the Planning Bill 2015

Development approvals cannot be cancelled once development has started[73]. The Planning Bill 2015 introduces a slight relaxation on this restriction. The relevant section reads (with the new additional words underlined):

> ***82 Cancellation applications***
> (1) *A person may make an application (a cancellation application) to cancel a development approval, unless—*
> (a) *the development has started; and*
> (b) *there are responsibilities under the approval relevant to the development already undertaken—*
> *(i) about the ongoing conduct or management of uses started or works carried out under the approval; or*
> *(ii) that remain unfulfilled; and*
> *Examples of paragraph (b)—*
> - *a development condition about operating hours, traffic management or waste management*
> - *a development condition about restoring or rehabilitating the land or a building*
>
> (c) *the responsibilities have not been superseded under another development approval, or authority, under this or another Act.*
> (2) *A cancellation application must be made to the assessment manager.*
> (3) *The application must be accompanied by—*
> (a) *the required fee; and*
> (b) *evidence of the consent of—*
> *(i) if the applicant is not the owner of the premises—the owner of the premises; and*
> *(ii) if there is a written agreement for a person to buy the premises from the owner of the premises—the other person; and*
> *(iii) if the premises are subject to an easement in favour of a public utility—the public utility.*
> (4) *On receiving an application that complies with this section, the assessment manager must—*
> *(a) cancel the development approval; and*
> *(b) give notice of the cancellation to—*
> *(i) the applicant; and*
> *(ii) each referral agency; and*
> *(c) release any monetary security for the development approval.*

While there may still be difficulties in determining what exactly is an 'ongoing responsibility' in some cases, this section goes some way for opening the door to cancelling approvals that are no longer relevant rather than requiring declaratory relief in the Courts for the parties to seek certainty. The provision is not as liberal as the current provision in South Australia which generally gives the power to the relevant

[72] 'Person' is defined in schedule 1 to include '*a body of persons, whether incorporated or unincorporated*'.
[73] s.380 SPA.

authority to cancel a development authorisation.[74] However it is a slight improvement on the nonsensical position whereby approvals presumably last forever.

Conclusion

Finding a unified approach to the application of section 245 SPA has been difficult due to the nature of the law relating to the validity of conditions as well as the broad definition of 'development' under SPA. The current legislative reform would do well to acknowledge that this area of planning law is troublesome. Legislative assistance is a welcome step forward in creating certainty for landholders and decision-makers. The proposed legislative reform does contain some helpful provisions (such as with the extended ability to change and cancel approvals as well as later inconsistent conditions) which may help avoid litigation in the future. However, an upfront consideration of how the legislature intends approvals and conditions (which continue to attach to land) to work alongside Torrens Title indefeasibility is still warranted within this process.

Recent case law reveals that the question whether a particular approval including its conditions continues to bind owners (or occupiers) of land can be difficult to answer and necessarily requires consideration of the type of development approved, the expressly stated ongoing nature of the conditions as well as the legislative and judicial tests of validity. Even with the legislative reforms that are proposed through the consultation draft Planning Bill 2015, it is important for decision makers and development applicants to be aware that not all conditions in approvals will continue to bind owners of land and their successors and alternatively some will. Therefore, great care ought to be taken with respect to the wording of relevant conditions so as to ensure their intended application as well as of course ensuring that they are a valid exercise of the power to condition development.

[74] s. 43 of the *Development Act 1993(SA)*