

A Three-step Test – Not a Two-step Test – for Validity of Planning Conditions: Reid V WAPC

By Peter Wittkuhn

In Reid v Western Australian Planning Commission [2016] WASCA 181 the Western Australian Court of Appeal unanimously allowed an appeal against the decisions of the Supreme Court and State Administrative Tribunal (SAT) to uphold certain subdivision conditions. While this case does not represent a dramatic shift in the law, it does serve as an important reminder as to the distinctions of three elements in the legal test for validity of a subdivision or development condition. The three elements can be summarised as ‘planning purpose’, ‘nexus’ and ‘reasonableness’. The SAT and the Supreme Court at first instance were found by the Court of Appeal to have elided the distinction between ‘planning purpose’ and ‘nexus’.

FACTS AND LITIGATION HISTORY

The appellants had applied to the Western Australian Planning Commission (WAPC) to subdivide approximately 40 hectares of rural land in Warrenup into two lots. The WAPC granted approval subject to conditions including:

- sinking of the electrical power lines to the land;
- the granting of a restrictive covenant in perpetuity for the protection of 23 ha of bushland on the site; and
- the landowners obtaining an approved bushfire management plan.

The landowners appealed against the imposition of those conditions in the SAT. The SAT upheld the validity of the conditions in Reid and Western Australian Planning Commission [2015] WASAT 35. Senior Member McNab and Senior Sessional Member Hunt found that because of the high conservation value of the vegetation on the property, without the conditions the subdivision could never have been approved. As such, the protection of the bushland formed the quid pro quo for the subdivision approval. They found that this was a legitimate planning purpose which arose directly from the facts of the subdivision and thus provided adequate nexus for the conditions.

The appellants then took the matter to the Supreme Court, where Chaney J refused leave to appeal in Reid v Western Australian Planning Commission [2015] WASC 293. Chaney J stated at [22]-[23]:

It is not necessary, in order to satisfy the second requirement from Temwood, that the proposed development create a “need”, in a physical sense, for the subject matter of a condition. A condition will reasonably and fairly relate to a

development if the policy framework under which the application for development is considered leads to the conclusion that the development should only be permitted if the condition is imposed.

I do not consider that, properly construed, the Tribunal's reasons simply conflated the notion of a "quid pro quo" with satisfaction of the second of the tests identified in Temwood. The Tribunal was entitled to reach the conclusion which it did and did not err in doing so.

THE COURT OF APPEAL DECISION

Martin CJ's judgment, with which Newnes and Murphy JJA agreed, overturned the decisions of the SAT and the judge at first instance. In doing so, Martin CJ focused on the principle that there must be a connection between the purpose for which a condition is imposed and the specific potential consequences of the subdivision approved.

His Honour traced the development of this principle through the decisions of *Lloyd v Robinson* [1962] HCA 36 and *Cardwell Shire Council v King Ranch Australia Pty Ltd* [1984] HCA 39 before examining McHugh J's adoption of a three-part test for validity in *Western Australian Planning Commission v Temwood Holdings Pty Ltd* [2004] HCA 63:

A condition attached to a grant of planning permission will not be valid therefore unless:

1. The condition is for a planning purpose and not for any ulterior purpose. A planning purpose is one that implements a planning policy whose scope is ascertained by reference to the legislation that confers planning functions on the authority, not by reference to some preconceived general notion of what constitutes planning.
2. The condition reasonably and fairly relates to the development permitted.
3. The condition is not so unreasonable that no reasonable planning authority could have imposed it.

The three elements can be summarised as 'planning purpose', 'nexus' and 'reasonableness' respectively.

Martin CJ found that the SAT and the judge at first instance had confused the planning purpose and nexus limbs of McHugh J's Temwood test and had failed to establish that the nexus limb, that the condition reasonably and fairly relates to the development, was satisfied. The Chief Justice noted that the planning purpose and nexus limbs are framed separately and therefore, simply because a condition is for a planning purpose will not be enough to demonstrate that it relates to the development. Instead, His Honour reiterated at [37]:

Those principles require the establishment of a connection or relationship between the planning purpose for which the condition has been imposed, and the likely or possible consequences of the proposed subdivision. That connection or relationship must be established as a matter of fact.

It is important to note that while Martin CJ found that the SAT erred in failing to establish such a connection between the subdivision and the conditions as a matter of fact, his Honour did not find that there was not such a relationship, and thought it likely the SAT's error arose from a mistaken belief that such a finding was not required. Accordingly the Court of

Appeal remitted the matter to the SAT for re-determination.

ANALYSIS

The clarification of legal principles by the decision in *Reid v Western Australian Planning Commission* imposes a more demanding obligation on planning authorities to expressly justify the imposition of conditions on development. Taking the example of sunken power lines, they offer significant advantages in reducing bushfire risk to native vegetation in any rural subdivision with considerable remnant vegetation. Given this fact, to what extent do decision makers need to establish the nexus between the planning purpose of conservation and the bushfire risks arising from above ground power lines in the specific circumstances of a given subdivision? If the requirements of establishing that connection as a matter of fact are too loose and based on general factors, then as Martin CJ points out, the distinction between the planning purpose and nexus limbs of the test in *Temwood* is elided. If, on the other hand, the requirements are too strict, then the burden on decision makers to justify conditions may become too great and conditions which would otherwise have served valuable public purposes may not be imposed.

Planning authorities routinely impose conditions on the basis of policies which state that a certain class of developments or subdivisions should not be approved without those conditions. The passage of reasoning of the judge at first instance which came under particular criticism from the Court of Appeal at [44] was the following:

'... A condition will reasonably and fairly relate to a development if the policy framework under which the application for development is considered leads to the conclusion that the development should only be permitted if the condition is imposed.'

Instead, in order for conditions of planning approval to satisfy the nexus limb of the test for validity, there must be established, as a matter of fact, a relationship or connection between the planning purpose served by the condition and the likely or possible consequences of the approved development or subdivision. Local governments and other decision makers should be thinking in these terms when imposing conditions and should be prepared to justify conditions based on the specific facts of a particular approval if those conditions are challenged.

With regard to the undergrounding of power, if the justification offered in *Reid* was:

'Because if this subdivision proceeds without this condition, the consequences would, or could potentially be:

- Visual amenity which is not in keeping with the amenity appropriate for a contemporary rural subdivision;
- An unacceptable level of fire hazard; and
- Unacceptably frequent and costly maintenance in comparison with underground powerlines' –

then in the writers' view, these would be, in form at least, valid answers satisfying the nexus test. Whether they would represent the 'correct and preferable decision' as a matter of planning merit is another thing. If the SAT had expressed its

reasons for upholding the undergrounding of power condition in terms along those lines, the Court of Appeal would not have detected an error of law.

Is Reid therefore merely a salutary reminder to planning authorities to express their justification for the conditions they impose in a more transparent way, or does it have wider implications?

It could be argued that requiring a justification for a condition by reference to the consequences of the proposed subdivision or development, may suffer the shortcoming of being insufficiently emphatic, in cases where there is a presumption against subdivision, and the decision-maker would not have granted approval except with the imposition of that condition. This was the case as regards the conservation covenant condition in Reid. The subject matter of the condition – the conservation covenant – was the very criterion which attracted the exemption from the WAPC’s presumption against subdivision of rural land. For a decision-maker in equivalent circumstances, the condition is virtually an essential and indivisible part of the approval itself – it is conceived of by the decisionmaker as part of that which is being approved.

The Court of Appeal’s approach could be read as suggesting that once a planning authority starts down the track of entertaining the possibility of an approval, the proposed subdivision needs to be conceived as if it were a ‘given’, and any condition then needs to be justified by reference to the consequences of that ‘given’ – even a condition which would have conventionally been a sine qua non for the approval of the subdivision. It is far from clear that this approach would produce optimal environmental and planning outcomes. It would be equally concerning, however, if a precautionary response on the part of planning authorities was to refuse subdivision proposals which would have previously been approved. The concern would be that the power to condition subdivisions is emasculated by an approach that requires the subdivision proposal to be assessed, to a degree, as if a ‘given’, with conditions required to be justified in terms of the impact of that ‘given’.

We would argue, however, that it is still possible, consistently with Reid, to justify conditions which are so fundamental that without them, the subdivision or development would not have been approved.

The conventional justification for a presumption against subdivision against rural land, has been the concern that fragmentation of rural land holdings endangers the viability of agricultural pursuits on land, incrementally affecting the State’s economy and self-sufficiency. In some cases where a subdivision of rural land is approved subject to a condition requiring a conservation covenant over a portion of bushland, the question ‘Why is this condition imposed?’ may well be answered:

‘Because if this subdivision proceeds without this condition, then the consequence would be the fragmentation of rural land, imperiling the viability of agricultural activity, WITHOUT at the same time securing any offsetting benefit in the form of enhanced protection of bushland.’

In the writers’ view, a justification expressed in that way would satisfy the nexus test. In Reid, the rural-zoned land was predominantly bushland. It was not cleared farmland. Concerns about prejudicing the land’s viability for agriculture would not appear to arise. What appears to be lacking in the SAT’s reasons was a clear articulation of what anticipated adverse effect underpinned the WAPC’s concern about fragmenting privately owned bushland into smaller privately-owned lots. The SAT quoted various planning policies including DCP Policy 3.4 ‘Subdivision of rural land’, however on a reading of that policy it is not entirely clear what the anticipated adverse effect would be. Nevertheless, in answer to the question ‘Why is this condition imposed?’, an answer along the following lines would appear to be plausible:

'Because if this subdivision proceeds without a conservation covenant, then privately-owned bushland would be fragmented into separate landholdings, which would entrench existing separate occupation and create further expectations on the part of separate owners, for separate, increased or upgraded residential related facilities and features, WITHOUT at the same time securing any offsetting benefit in the form of enhanced protection of bushland.'

It would seem to the writers that this too would have been, in form at least, a valid answer satisfying the nexus test. Whether it would represent the 'correct and preferable decision' as a matter of planning merit is another thing. In the writers' view, if the SAT had expressed its reasons for upholding the condition in terms along those lines, there would have been no error of law.

The hypothetical justifications referred to above bear a close resemblance to hypothetical justifications for a refusal of subdivision. However this should not be surprising. If the policy framework establishes a presumption against A unless accompanied by condition B, then it is to be expected that the same justification for a refusal of A absent B, would be relied on to justify 'only A if accompanied by B'.

At first glance, this might be thought to be just another way of expressing a quid pro quo test which appears to have been disapproved by Martin CJ. However the difference is that the justification is expressed in terms of the consequence of the subdivision proceeding without the condition. This can be contrasted with Chaney J's view (disapproved by the Court of Appeal) that it is sufficient to satisfy the nexus test, that the policy framework leads to the conclusion that the development should only be permitted if the condition is imposed. The missing element is: what is it about approval of the subdivision that is said to make it unsupportable in the absence of the condition? The fact that a policy states that subdivision should not be approved without the challenged condition cannot by itself predetermine that the condition is necessary.

Martin CJ stated in Reid at [37] that the nexus limb must be established as a matter of fact. However in the writers' view, this does not imply that every case will require detailed evidence on the point. In some cases, identifying the adverse consequence which is said to flow if the condition is not imposed, might be as simple as identifying the central vice which the relevant policy is concerned to avoid (eg fragmentation of rural lots undermining agricultural viability). If it is a straightforward, uncontestable proposition as a matter of fact that that circumstance would arise if the subdivision were to proceed in the absence of the condition, then the factual foundation for the justification is established, and it becomes from that point a matter of weight and merits. If the establishment of the anticipated adverse outcome is not straightforward to establish as a matter of proof, then a more complicated factual contest can arise. The point is, however, that it is not as simple as pointing to a policy which establishes a presumption against a particular type of proposal in the absence of particular condition, and relying on the policy as if it were a self-standing justification for the condition.

In theory, planning authorities ought not be overly concerned, in light of Reid, that they would be better advise to refuse proposals than to condition them, in cases where there is a presumption against A unless conditional on B. This is because, in such cases, the reason proffered for the condition is, as mentioned, likely to resemble the reason that would have been proffered for a refusal. That being the case, on review, the SAT should either support the merits of the reason proffered, or dismiss the merits of the reason proffered. If the SAT dismisses the merits of the reason proffered for the condition, then logically it would have also dismissed that same reason if it had been proffered instead as a justification for a refusal. The net outcome – approval without the desired condition – would have been the same whether the planning authority had refused or merely conditioned the proposal. However, whether that theoretical analysis stands up in case decisions that later

interpret Reid, remains to be seen.

CONCLUSION

At a conceptual level, the Court of Appeal's decision in Reid v Western Australian Planning Commission is in keeping with decades of High Court authority. However, it serves as an important reminder for decision makers to consciously and deliberately give separate consideration to each of the three elements of the legal test – planning purpose, nexus and reasonableness – and not to merge one or more of them. The Court of Appeal has made it clear in Reid that the existence of a policy expressing a presumption that development should not proceed without the condition is not enough in and of itself to satisfy the nexus element. The concept of a condition being a quid pro quo for subdivision or development was also subjected to critique in Reid. Instead, to satisfy the nexus test, a condition must be capable of being justified by reference to the consequences of the subdivision or development if the condition were not imposed. The connection between the anticipated adverse consequence, and its alleviation by means of the condition, must be established as a matter of fact. Where a condition is of the kind that is so fundamental that the subdivision or development would not have been approved without the condition, a valid justification for the condition would be very similar in form to the justification that would be given for a refusal of the development. In theory, the Reid decision ought not lead to a situation where planning authorities are more prepared to refuse developments than to condition them. However whether that theory is borne out in practice may depend on how subsequent Court and Tribunal decisions interpret and refine the principles in Reid.

If you would like to discuss any of the matters raised in this article further, please do not hesitate to contact Peter Wittkuhn by email at pwittkuhn@mcleods.com.au. The information contained in this update should not be relied upon without obtaining further detailed legal advice in the circumstances of each case.