Is code assessment out of the box?

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Introduction

Since the coming into effect of the *Local Government (Planning and Environment) Act* 1990 this state's planning legislation has had (in various formulations) a two step conflict / sufficient grounds test for assessing development approvals. The most recent iteration of the test was contained in s326 of the *Sustainable Planning Act* 2009 ("SPA") and provided that *an assessment manager's decision must not conflict with a relevant instrument unless there are sufficient grounds to justify the decision, despite the conflic*t.

Unsurprisingly, over time there developed a body of case law, which assisted town planners, councils and the legal profession in interpreting and apply the test. The impact of the case law has on occasion, brought about significant changes in the thinking and approaches necessary to understand and apply the test - for instance the famous formulations in the Court of Appeal's judgments in *Grosser v City of Gold Coast*[1]; *Weightman v Gold Coast City Council*[2]; and more recently *Bell v Brisbane City Council.*[3]

The *Planning Act* 2016 (the "*PA*") has replaced the test for code assessment in fundamentally different terms in s60(2).

Whereas previously the instruction being given to assessment managers was that a decision *must not* conflict with a relevant instrument unless there were sufficient grounds, the test is now a decision "tree" within s60(2) of the *PA* whereby the assessment manager:

- *must decide to approve* the application if there is compliance with the relevant assessment benchmarks; and
- *may decide* to approve even if the development does not comply with some benchmarks; and
- *may* impose development conditions; and
- *may only* refuse for non-compliance with some or all of the assessment benchmarks only if compliance can not be achieved by imposing development conditions.

The new test has now begun to receive consideration by the Planning and Environment Court and Court of Appeal and an understanding of some aspects of it is beginning to emerge.

The relevant provisions

The key provisions relating to the code assessment in the *PA* are set out below:

> ***"Part 1 Types of development and assessment***
>
> ***43 Categorising instruments***
>
> *(1) A categorising instrument is a regulation or local categorising instrument that does any or all of the following—*

[1] (2001) 117 LGERA 153 at 166.
[2] [2002] QCA 234 at [36].
[3] [2018] QCA 84.

(a) categorises development as prohibited, assessable or accepted development;

(b) specifies the categories of assessment required for different types of assessable development;

*(c) sets out the matters (the **assessment benchmarks**) that an assessment manager must assess assessable development against.*

(2) An assessment benchmark does not include—

(a) a matter of a person's opinion; or

(b) a person's circumstances, financial or otherwise; or

(c) for code assessment—a strategic outcome under section 16(1)(a); or

(d) a matter prescribed by regulation.

Examples of assessment benchmarks—

a code, a standard, or an expression of the intent for a zone or precinct

(3) A local categorising instrument is—

(a) a planning scheme; or

(b) a TLPI; or

(c) a variation approval, to the extent the variation approval does any of the things mentioned in subsection (1).

(4) A regulation made under subsection (1) applies instead of a local categorising instrument, to the extent of any inconsistency.

(5) A local categorising instrument—

(a) may state that development is prohibited development only if a regulation allows the local categorising instrument to do so; and

(b) may not state that development is assessable development if a regulation prohibits the local categorising instrument from doing so; and

(c) may not, in its effect, be inconsistent with the effect of a specified assessment benchmark, or a specified part of an assessment benchmark, identified in a regulation made for this paragraph.

Note—

Assessment benchmarks are given effect through the rules for assessing and deciding development applications under section 45, 59 or 60.

(6) To the extent a local categorising instrument does not comply with subsection (5), the instrument has no effect.

(7) A variation approval may do something mentioned in subsection (1) only in relation to—

(a) development that is the subject of the variation approval; or

(b) development that is the natural and ordinary consequence of the development that is the subject of the variation approval.

(8) Subsections (4) and (6) apply no matter when the regulation and local categorising instrument commenced in relation to each other."

"45 Categories of assessment

(1) There are 2 categories of assessment for assessable development, namely code and impact assessment.

(2) A categorising instrument states the category of assessment that must be carried out for the development.

(3) A code assessment is an assessment that must be carried out only—

(a) against the assessment benchmarks in a categorising instrument for the development; and

(b) having regard to any matters prescribed by regulation for this paragraph.

(4) When carrying out code assessment, section 5(1) does not apply to the assessment manager.

(5) An impact assessment is an assessment that—

(a) must be carried out—

i. against the assessment benchmarks in a categorising instrument for the development; and

ii. having regard to any matters prescribed by regulation for this subparagraph; and

(b) may be carried out against, or having regard to, any other relevant matter, other than a person's personal circumstances, financial or otherwise.

Examples of another relevant matter—

- *a planning need*
- *the current relevance of the assessment benchmarks in the light of changed circumstances*
- *whether assessment benchmarks or other prescribed matters were based on material errors*

Note:

See section 277 for the matters the chief executive must have regard to when the chief executive, acting as an assessment manager, carries out a code assessment or impact assessment in relation to a State heritage place.

(6) An assessment carried out against a statutory instrument, or another document applied, adopted or incorporated (with or without changes) in a statutory instrument, must be carried out against the statutory instrument or document as in effect when the application was properly made.

(7) However, if the statutory instrument or other document is amended or replaced before the assessment manager decides the application, the assessment manager may give the weight that the assessment manager considers is appropriate, in the circumstances, to the amendment or replacement."

"Division 2 Assessment manager's decision

59 What this division is about

(1) This division is about deciding properly made development applications, including variation requests.

(2) An assessment manager must follow the development assessment process for the application even if a referral agency's response directs the assessment manager to refuse the application.

(3) Subject to section 62, the assessment manager's decision must be based on the assessment of the development carried out by the assessment manager.

60 Deciding development applications

(1) This section applies to a properly made development application, other than a part of a development application that is a variation request.

(2) To the extent the application involves development that requires code assessment, and subject to section 62, the assessment manager, after carrying out the assessment—

(a) must decide to approve the application to the extent the development complies with all of the assessment benchmarks for the development; and

(b) may decide to approve the application even if the development does not comply with some of the assessment benchmarks; and

Examples—

1 An assessment manager may approve an application for development that does not comply with some of the benchmarks if the decision resolves a conflict between the benchmarks.

2 An assessment manager may approve an application for development that does not comply with some of the benchmarks if the decision resolves a conflict between the benchmarks and a referral agency's response.

(c) may impose development conditions on an approval; and

(d) may, to the extent the development does not comply with some or all the assessment benchmarks, decide to refuse the application only if compliance can not be achieved by imposing development conditions.

Example of a development condition for paragraph (d)—

a development condition that affects the way the development is carried out, or the management of uses or works that are the natural and ordinary consequence of the development, but does not have the effect of changing the type of development applied for

(3) To the extent the application involves development that requires impact assessment, and subject to section 62, the assessment manager, after carrying out the assessment, must decide—

(a) to approve all or part of the application; or

(b) to approve all or part of the application, but impose development conditions on the approval; or

(c) to refuse the application.

(4) The assessment manager must approve any part of the application for which, were that part of the application the subject of a separate development application, there would be a different assessment manager—

(a) other than to the extent a referral agency for the development application directs the refusal of the part under section 56(1)(c); and

(b) subject to any requirements of the referral agency under 56(1)(b).

(5) The assessment manager may give a preliminary approval for all or part of the development application, even though the development application sought a development permit.

(6) If an assessment manager approves only part of a development application, the rest is taken to be refused."

On appeal, the *Planning and Environment Court Act* 2016 ("*PECA*") also relevantly provides:

"***46 Nature of appeal***

(2) The Planning Act, section 45 applies for the P&E Court's decision on the appeal as if-

(a) the P&E Court were the assessment manager for the development application; and

(b) the reference in subsection (7) of that section to when the assessment manager decides the application were a reference to when the P&E Court makes the decision."

For any application requiring code assessment therefore, the decision is governed by the relevant parts of ss45 and 60 of the *PA* and s46(2) of the *PECA*. Subsection 59(3) of the *PA*, anchors the decision under s60 to the assessment required by s45.

The difference between the assessment framework under the *PA* for code assessment and impact assessment was the subject of the following observation by Kefford DCJ in *Jakel Pty Ltd v Brisbane City Council & Anor* [2018] QPELR 763 at [76]:

> *"A comparison between the assessment regimes for code and impact assessment reveals that the identified matters relevant to code assessment do not include 'any other relevant matter'. Regard can, however, be had to the common material. This can include a very broad range of matters."*

The requirement to approve compliant development in s60(2)(a)

The first task of an assessment manager or the PEC hearing an appeal about code assessable development is to consider the extent to which the application achieves compliance with the assessment benchmarks. The principle that conflict must be plainly identified[4] appears to remain relevant to the task of determining non-compliance.

In *Klinkert v Brisbane City Council*[5] the Court considered an appeal brought against the council's refusal of the proposed demolition of a dwelling house within the traditional building character overlay. The development application *did comply* with the demolition code in force at the time the application was properly made but, due to the removal of an exclusion relevant to the building in question, *did not* comply with an amended version of the code which came into effect before the council decided the application.

The appeal, at first instance, proceeded on the basis of three agreed issues:

1. *Whether the proposed development complies with the Demolition code in force at the date the development application was properly made?*

2. *In the event the proposed development complies with the Demolition code in force at the date the development application was properly made, does s60(2)(a) of the PA mandate that the application must be approved?*

3. *If s60(2)(a) of the PA does not mandate an approval in this case, what weight, if any, is to be given to the December 2017 amendments to City Plan 2014 and whether the discretion conferred by s 60 (2) (b) ought be exercised in the Appellant's favour?*

The court answered the first question in the affirmative - the development complied with the Demolition Code in force when the application was made.

In relation to the second question, the court held, having found that the development complied with the assessment benchmarks in force at the time the application was properly made, that s60(2)(a) was engaged with the consequence that the application must be approved.

In reaching this conclusion the court rejected the argument mounted by the council that s60(2)(a) required the applicant to demonstrate the development complies with ALL assessment benchmarks being the assessment benchmarks in force at the time the application was properly made and those which came into force subsequently. The relevant parts of the Court's judgment:[6]

1. noted that the starting point was the language of 45(3) of the *PA* which defines code assessment with language which draws a distinction between *carrying out an assessment* against the assessment benchmarks and, on the other hand, *having regard to* matters prescribed by regulation;

2. observed that the phrase "*carrying out against*" was also used within the language of section 45(6) of the *PA* in relation to the version of the assessment benchmarks in force at the date the application was properly made;

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[4] *Fitzgibbon Hotel Pty Ltd v. Logan City Council* [1997] QPELR 208 at 212.
[5] [2018] QPEC 30.
[6] [2018] QPEC 30 at [79] to [97].

3. concluded that sections 45(3) and 45(6) of the *PA* make clear that the act requires an assessment to be "*carried out against*" the assessment benchmarks in force when an application is treated as being properly made. Those provisions did not require the assessment manager, or the court, to carry out an assessment of the application against amended provisions of the planning scheme, which came into effect after that date;

4. rejected the Council's argument that s60(2)(a) requires the applicant to demonstrate the development complies with ALL assessment benchmarks being the assessment benchmarks in force at the time the application was properly made and those which came into force subsequently;

5. noted that s 45(7) speaks only of weight and omits any reference to the notion of "*carrying out an assessment*".

Having made this finding, the court concluded that it was bound to approve the application.

The Council appealed this decision and a decision of the Court of Appeal was delivered on 12 March 2019 dismissing the appeal.[7] The judgment of Gotterson JA was critical of the drafting and operation of s45(6) and (7):

> "[1*] I agree with the orders proposed by Boddice J and his Honour's reasons for them. I would add the following brief observations.*
>
> *[2] The meaning intended for s 45(7) of the Planning Act 2016 (Qld) is unclear. It follows a provision, s 45(6), which mandates that an assessment of an application that is carried out against a statutory instrument or other document which is applied, adopted or incorporated, must be carried out against such instrument or document as is in effect when the application was properly made.*
>
> *[3] Section 45(7) operates if the statutory instrument or other document is amended or replaced before the application is decided. The section implies that when there is such an amendment or replacement, the assessment which is to precede determination of the application may be carried out having regard to the terms of the amendment or the replacing document.*
>
> *[4] However, as I have noted, the immediately preceding provision, s 45(6), expressly stipulates that the assessment must be carried out against the statutory instrument or other document as in effect when the application was properly made; that is to say, the statutory instrument or other document as it is in effect prior to the amendment or replacement.*
>
> *[5] Within the framework for which s 45(6) provides, it is quite unclear how the assessment manager might "give weight" to the amendment or replacement. Section 45(7) gives no guidance as to what is meant by that expression. Moreover, the provision confers a discretion to give weight but throws no light on when, or for what purpose, the discretion is intended by the legislature to be exercised.*
>
> *[6] Despite this lack of clarity, it is, I think, tolerably clear from the emphatic terms in which s 45(6) is enacted, that s 45(7) is not a vehicle for displacement or modification by the assessment manager of the statutory instrument or other document as in effect when the application was properly made."*

The Court's reasons were more fully set out in the judgment of Boddice J with which all of the members of the court agreed.

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[7] *Brisbane City Council v Klinkert* [2019] QCA 40.

"*[31] Section 60 of the Planning Act imposes obligations on an assessment manager in respect of properly made development applications. By those obligations, the assessment manager "must decide" to approve the application, to the extent the development complies with all of the assessment benchmarks for the development, and "may decide" to approve the application even if the development does not comply with some of the assessment benchmarks.*

[32] The clear intent of s 60 is that there be no discretion in the assessment manager's decision in respect of developments that comply with all of the assessment benchmarks."

The Court of Appeal's reasons up to this point seem clear. However, what is less easy to follow is what the court said about the circumstances in which weight could be given to the amended Code:

"[*35] A proper interpretation of s 60(2)(a) of the Planning Act, having regard to the contents of the Act as a whole, is that s 60(2)(a) requires the assessment manager to approve a development application that complies with the assessment benchmarks in the Code in force at the time the application was properly made. The primary judge was correct in rejecting the applicant's submission below that, for s 60(2)(a) to operate, there was required to be an assessment of the properly made application carried out for compliance with both the original assessment benchmarks and the amended assessment benchmarks.*

[36] The assessment manager determines whether the assessment benchmarks in the original Code have been met, after giving weight to the contents of the amended Code, if the assessment manager determines to give weight to that amended Code. The giving of weight, if appropriate, does not mean s 60(2)(a) requires that an assessment manager must decide to approve the development application only if it complies with the assessment benchmarks in both the original Code and the amended Code. In carrying out a code assessment of a properly made application, the assessment manager may not replace the assessment benchmarks in the original Code with those in the amended Code.

[37] This conclusion is consistent with the contents of s 45(3) of the Act. That section confirms that a code assessment is to be undertaken only against assessment benchmarks. The reference in s 43(2) of the Act to a matter of personal opinion not being an assessment benchmark is also consistent with this conclusion. The code assessment is being undertaken having regard to whether the relevant assessment benchmarks are met by the proposed development. The paramountcy of those assessment benchmarks is confirmed by s 43(5). It provides that a local categorising instrument may not in its effect be inconsistent with the effect of a specified assessment benchmark.

[38] The respondent's submission that s 45(7) is only intended to play a role with impact assessment, is not supported by a consideration of s 45 as a whole. There is no basis to conclude that ss 45(6) and (7) are intended only to apply to an impact assessment, but not to a code assessment. Neither s 45(3), nor s 45(5) refer to assessments carried out against a statutory instrument or other document. An interpretation of s 45 as a whole supports the conclusion that subsections 45(6) and (7) relate to assessments of assessable developments, be they code or impact assessment.

[39] Contrary to the respondent's submissions, there is no inconvenience, injustice or absurdity in an interpretation of s 60(2)(a) which gives appropriate force to the contents of s 45(7) of the Act. Whilst the assessment manager is entitled to give weight to an amendment or replacement, if considered appropriate, any weight given is in the context of a statutory requirement for the assessment manager to carry out the assessment only against the assessment benchmarks that are in effect when the application was properly made. Further, to the extent that an amendment is given weight, that weight must be

> *afforded, having regard to the prohibition on a local characterising instrument, in its effect being, inconsistent with the effect of a specified assessment benchmark.*
>
> *[40] This construction also gives due weight to public interest considerations. It is in the public interest that an assessment manager have the ability to give weight to such amendments, if considered appropriate, whilst ensuring that properly made applications are ultimately assessed in accordance with the assessment benchmarks in operation at the time of the properly made application."* (emphasis added)

It is difficult, given the court's findings about s60(2)(a) and s45(7) not being a vehicle for displacing or modifying the earlier statutory instrument to readily understand the circumstances in which weight could be given to an amended instrument. If there is a role for the giving of weight to later instruments in those circumstances it is evidently a very limited role.

The discretion to approve non-compliant development in s60(2)(b)

In *Klinkert* at first instance the court also considered the appellant's alternative case that, in the event that s60(2)(a) of the *PA* was not engaged, whether it would, exercise its discretion under s 60(2)(b) to approve the application.

The court noted that the discretion expressed within s 60(2)(b) was in permissive and broad terms.[8] It was further noted that this discretion was subject to an important constraint, namely the constraint expressed in s 59(3) of the *PA* requiring the decision to be based on the assessment carried out pursuant to s45.

While the outcome of the case did not turn on it, the court considered balancing considerations of:

1. for the applicant - fairness to the applicant – who had after all made a compliant application under the scheme when the application is properly made;

2. for the council - that the amendments represented deliberate contemporary planning consistent with a long held planning strategy of the Council involving the retention of traditional building character and tradition in Brisbane, entitled it to the court's respect;

and concluded that had circumstances permitted, the amendments would have been given determinative weight and the appeal would have been dismissed. The facts of the case gave rise to the following six considerations upon which the court would have declined to exercise its discretion to approve:

1. the nature of the development the subject of the application is not such that conditions of approval could, for the purposes of s 60(2)(d) of the *PA* be imposed to achieve compliance with City Plan 2014;

2. demolition of the house in question would represent a substantial loss of traditional building character in circumstances where the house forms part of an exceptional setting of traditional housing constituting an unsatisfactory planning outcome;

3. that the amendments to the planning scheme were publicly advertised for months prior to the application being properly made;

4. the amendments were the product of a deliberate planning decision and there was no suggestion that the expression of planning policy resulting from the amendments wasn't soundly based or, for planning reasons, not otherwise entitled to the court's respect;

[8] *Klinkert v BCC at [102].*

5. approval would be contrary to the deliberate planning policy involving the retention of a high-quality piece of traditional building character which had a potential to impact not only the application of the planning policy to the land but also adjoining land:

6. refusal the application in reliance of the amended planning provisions would not represent the end of the line for the appellant as it had the right to make a request for a superseded planning scheme to apply the proposed development.

In *Di Carlo v Brisbane City Council*[9] the court exercised its discretion under s60(2)(b) to allow the demolition of a character home which did not comply with the Demolition Code. The court's reasons were:

1. to start by agreeing with *Klinkert* as to the "permissive and broad" nature of the discretion;

2. that the house in question was;

   (a) not a building which formed part of a streetscape exhibiting traditional building character;

   (b) lacked architectural merit; and

   (c) was not readily visible;

3. that the Demolition Code had a particular focus on protecting buildings which form part of a character streetscape of similar buildings;

4. the respondent council had made a policy decision to protect every single building exhibiting traditional building character in Bulimba;

5. that there was no meritorious planning basis for the application of the relevant provision of the code to provide a blanket protection on the demolition of the house.

The reasoning of the trial judges in both *Di Carlo* and *Klinkert* therefore demonstrate a potential willingness to exercise the discretionary power to approve non-compliant development - a willingness that came to fruition in *Di Carlo*.

Also potentially instructive to the exercise of discretion are comments by the Court in *Smout v. Brisbane City Council* [2019] QPEC 10 at [54] that "*given the complexity of modern performance based planning schemes, not every non-compliance…will warrant refusal*". While *Smout* was an impact assessment appeal under s60(3) it is apparent that the court will not regard all non-compliance equally. It will have regard to the words of the planning scheme itself and the degree of importance attached to it for a particular planning principle[10]. The extent to which a flexible approach to the exercise of the discretion will prevail in the face of any non-compliance with a planning scheme will turn on the facts and circumstances of each case.[11]

Conditions - sections 60(2)(c) &(d)

Pursuant to s.60(2)(d) of the Planning Act, the assessment manager (and the Court on appeal):

> *"may, to the extent the development does not comply with some or all the assessment benchmarks, decide to refuse the application only if compliance can not be achieved by imposing development conditions.*"

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9 [2019] QPEC 4.

10 *Smout v. Brisbane City Council* [2019] QPEC 10 at [54]

11 *Smout v. Brisbane City Council* [2019] QPEC 10 at [54]

To date no jurisprudence is available about s60(2)(d) of the *PA*. The drafting of the provision indicates that the circumstances in which code assessable development can be refused has been intentionally limited to provide that an application may only be refused if compliance cannot be achieved through conditions. The example provided in s60(2)(d) suggests a broad approach to the type of conditions which could be imposed is contemplated by the *PA*. The drafting indicates an expectation that assessment managers and the court will be required to explore and test possible development conditions suited to addressing non-compliance before refusing an application.

Situations will certainly arise in which a developer applicant will propose as a basis for approval, conditions intended to address non-compliance with assessment benchmarks. The consideration of what conditions to impose upon development normally entails a range of factors not only as to the lawfulness of the conditions but a broad range of discretionary matters such as the practicality of the condition; the burden upon assessment manager in monitoring and entering compliance; common law principles; matters of public interest etc. How the Court will approach balancing these considerations when a condition is, at least theoretically available to address non-compliance, is keenly awaited.