

Infrastructure planning and charging framework under the Planning Act 2016

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This article discusses the current infrastructure planning and charging framework in respect of local governments in Queensland

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Introduction

Infrastructure planning and charging framework

On 3 July 2017, the *Planning Act 2016* (**Planning Act**) commenced, supported by the *Planning Regulation 2017* (**Planning Regulation**).

The Planning Act adopts a capped infrastructure planning and charging framework for local governments (**current capped framework**) which is an evolution of earlier frameworks established under the following:

- Amendments to the *Sustainable Planning Act 2009* (**SPA**) in June 2011 by the *Sustainable Planning (Housing Affordability and Infrastructure Charges Reform) Amendment Act 2011* to implement the original capped infrastructure planning and charging framework for local governments and distributor-retailers in South-East Queensland (**original capped framework**).
- Further amendments to SPA on 4 July 2014 by the *Sustainable Planning (Infrastructure Charges) and Other Legislation Amendment Act 2014* to provide for the previous infrastructure planning and charging framework (**previous capped framework**).

Under the current capped framework, provisions for infrastructure planning and charging by local governments are retained in the Planning Act and those applicable to distributor-retailers are retained in the *South-East Queensland Water (Distribution and Retail Restructuring) Act 2009* (**SEQ Water Act**).

This paper focuses only on the current capped framework in respect of local governments. While the infrastructure planning and charging framework for local governments and distributor-retailers under the previous capped framework was largely the same, the changes introduced by the current capped framework affect only local governments such that distributor-retailers remain under the previous capped framework. However, the extent of the differences between the previous capped framework and the current capped framework are not significant. References to the comparable provisions for distributor-retailers under the SEQ Water Act are provided for interest and ease of reference.

Key elements of the current capped framework

This paper considers the following key elements of the current capped framework:

- Infrastructure scope.
- Identification of trunk and non-trunk infrastructure.
- Infrastructure planning instrument.
- Local infrastructure charging instrument.
- Infrastructure charge.
- Development charge.
- Conditions for trunk and non-trunk infrastructure.
- Conversion applications for non-trunk infrastructure conditions.

However, this paper does not consider other elements of the current capped framework, including:

- Offsets and refunds for trunk infrastructure and development charge.
- State infrastructure provider powers.
- Infrastructure agreements.

Infrastructure scope

The scope of the current capped framework is based on the definition of "development infrastructure" which includes water cycle management infrastructure, transport infrastructure, public parks infrastructure and land for specified local community facilities.¹

Unlike the original capped framework, development infrastructure under the current capped framework (as with the previous capped framework) does not include the local function of State-controlled roads in relation to transport infrastructure.²

Identification of trunk and non-trunk infrastructure

The current capped framework empowers a local government to identify development infrastructure as trunk infrastructure in a local government infrastructure plan (called an **LGIP**). Development infrastructure that is not identified as trunk infrastructure in the LGIP (**LGIP unidentified infrastructure**) will generally be non-trunk infrastructure.³

However LGIP unidentified infrastructure can become trunk infrastructure in the following circumstances:

- *Necessary infrastructure condition* – The LGIP unidentified infrastructure is required by way of a necessary infrastructure condition and services development consistent with the assumptions in the LGIP about the type, scale, location or timing of development.⁴
- *Conversion application* – The LGIP unidentified infrastructure is required by way of a non-trunk infrastructure condition and the relevant local government subsequently approves a conversion application.⁵

Infrastructure planning instrument

The current capped framework requires a local government to include an LGIP in its planning scheme before it may levy charges for or impose conditions requiring the provision of trunk infrastructure under Chapter 4 of the Planning Act.⁶ An LGIP under the current capped framework (as with the previous capped framework) is similar to a priority infrastructure plan (**PIP**) under the original capped framework.

For local governments that included a PIP in their planning scheme under the original capped framework, that PIP was transitioned to become an LGIP under the previous capped framework and constitutes an LGIP under the current capped framework.⁷

All local governments have now proceeded to prepare an LGIP.

Local infrastructure charging instrument

Charges resolution

The current capped framework (as with the previous capped framework) empowers a local government to adopt a resolution (called a **charges resolution**).⁸ A charges resolution under the current capped framework is similar to an adopted infrastructure charges resolution under the original capped framework.

A charges resolution adopts charges (each an **adopted charge**) for providing trunk infrastructure for development, but does not of itself levy a charge.⁹

An adopted charge in a charges resolution may be made for development in the following circumstances:¹⁰

- *Prescribed by regulation* – the adopted charge is prescribed for the development in section 52 and Schedule 16 of the Planning Regulation.
- *No more than the maximum* – the adopted charge is no more than the maximum adopted charge for providing trunk infrastructure for the development as prescribed in Schedule 16 of the Planning Regulation.

An adopted charge must not be for the following:

- works or use of premises authorised under the *Greenhouse Gas Storage Act 2009*, the *Mineral Resources Act 1989*, the *Petroleum Act 1923* or the *Petroleum and Gas (Production Previous and Safety) Act 2004*; or

¹ See definition of "development infrastructure" Schedule 2 of the Planning Act and Schedule of the SEQ Water Act.

² See definition of "development infrastructure" Schedule 3 of SPA (28 May 2014 reprint).

³ See definition of "non-trunk infrastructure" in Schedule 2 of the Planning Act and Schedule of the SEQ Water Act.

⁴ See section 128 of the Planning Act and section 99BRCR of the SEQ Water Act.

⁵ See section 142 of the Planning Act and section 99BRDE of the SEQ Water Act.

⁶ See section 111 of the Planning Act.

⁷ See section 982 of SPA (19 May 2017 reprint).

⁸ See section 113 of the Planning Act.

⁹ See sections 113(1) and (2) of the Planning Act and sections 99BRCF(1) and (2)(a) of the SEQ Water Act.

¹⁰ See section 114(1) of the Planning Act and section 99BRCG(1) of the SEQ Water Act.

- development in a priority development area under the *Economic Development Act 2012*; or
- development by a department, or part of a department, under a designation; or
- development for a non-State school under a designation.¹¹

A charges resolution is also required to provide for the following:

- *Effective date* – The day when an adopted charge under the resolution is to take effect.¹²
- *Charges breakup* – For local governments that are a participating local government for a distributor-retailer, the charges breakup for all adopted charges between the local government and the distributor-retailer.¹³
- *Offset and refund calculation methodology* – A methodology for working out the cost of infrastructure the subject of an offset and refund, which must be consistent with the parameters provided for under a guideline made by the Minister and prescribed by regulation.¹⁴ That methodology is provided for in Part 1 of Chapter 6 of the Minister's Guidelines and Rules dated July 2017 (**MGR**).
- *Conversion criteria* – The criteria for deciding a conversion application, which must be consistent with the parameters provided for under a guideline made by the Minister and prescribed by regulation.¹⁵ That criteria is provided for in Part 2 of Chapter 6 of the MGR.

Automatic increase

A charges resolution may also provide for automatic increases in a levied charge from the date it is levied to the date it is paid.¹⁶ However, the amount to be paid cannot be more than would result from increasing the charge by the 3 yearly average of the producer price index and cannot exceed the maximum amount that could be levied for the amount at the time the charge is paid.¹⁷

It is relevant to note that, unlike the original capped framework, the maximum increase under the current capped framework (as with the previous capped framework) is calculated by reference to the producer price index rather than the consumer price index.¹⁸

Method for working out the cost of infrastructure

A local government's charges resolution must include a method for working out the cost of the infrastructure that is the subject of the offset or refund, which must be consistent with the parameters provided for under Part 1 of Chapter 6 of the MGR.¹⁹

The MGR prescribes the following parameters:

- *Clarity* – the methodology should be clear, certain and transparent.
- *Cost effective* – the methodology for pursuing an actual cost valuation should not be cost prohibitive for applicants.
- *Time efficient* – timeframes should be realistic and encourage the efficient resolution of actual cost valuations.

While the MGR also provides further specific parameters for undertaking land valuations to work out the cost of infrastructure that is land, it does not provide a specific process for working out the cost of infrastructure that comprises works. Accordingly, local governments have to determine their own method consistent with the parameters in the MGR to include in their charges resolution.

Most local governments have adopted a method that refers to the establishment cost of infrastructure specified in the schedule of works in their LGIP. However, it is relevant to note that under the current capped framework (as with the previous capped framework) the definition of "*establishment cost*" is different to under the previous capped framework,²⁰ when many local governments prepared their LGIP (at that time called a PIP). Under the current capped framework the "*establishment cost*" for trunk infrastructure means the following:²¹

- *Existing infrastructure (works)* – the current replacement cost of the infrastructure as reflected in the relevant local government's asset register.

¹¹ See section 113 (Adopting charges resolution) of the Planning Act, see also section 99BRCF (Power to adopt charges by board decision) of the SEQ Water Act for similar but not identical requirements under that Act.

¹² See section 113(4) of the Planning Act and section 99BRCF(3) of the SEQ Water Act.

¹³ See section 115(4) of the Planning Act.

¹⁴ See section 116 of the Planning Act and section 99BRCH of the SEQ Water Act.

¹⁵ See section 117 of the Planning Act and section 99BRCHA of the SEQ Water Act.

¹⁶ See section 114(3)(b) of the Planning Act and section 99BRCG(3)(b) of the SEQ Water Act.

¹⁷ See section 114(5) of the Planning Act and section 99BRCG(5) of the SEQ Water Act.

¹⁸ See for comparison sections 648D(9) and (10) and 755KA(2), (3) and (4) of SPA (28 May 2014 reprint).

¹⁹ See section 116 of the Planning Act and section 99BRCH of the SEQ Water Act.

²⁰ See definition of "*establishment cost*" in Schedule 3 of SPA (28 May 2014 reprint).

²¹ See definition of "*establishment cost*" in Schedule 2 of the Planning Act and section 99BRCC of the SEQ Water Act.

- *Existing infrastructure (land)* – the current value of the land acquired for the infrastructure.
- *Future infrastructure* – all costs of the land acquisition, financing, and design and construction for the infrastructure.

Conversion criteria

The conversion criteria included in a local government's charges resolution must be consistent with the parameters provided under Part 2 of Chapter 6 of the MGR.²²

The MGR provides the following parameters for criteria for deciding a conversion application:

- *Capacity to service other developments* – The infrastructure has capacity to service other development in the area.
- *Consistency with identified trunk infrastructure* – The function and purpose of the infrastructure is consistent with other trunk infrastructure identified in an LGIP or a charges resolution for the area.
- *Not consistent with non-trunk infrastructure* – The infrastructure is not consistent with non-trunk infrastructure for which conditions may be imposed in accordance with section 145 of the Planning Act.
- *Most cost effective option* – The type, size and location of the infrastructure is the most cost effective option for servicing multiple users in the area. The most cost effective option is the least cost option based on the life cycle cost of the infrastructure required to service future urban development in the area at the desired standard of service.

Infrastructure charge

Levied charge

The current capped framework requires a local government to give an applicant an infrastructure charges notice (called an **ICN**)²³ which levies a charge by applying the adopted charge (called a **levied charge**)²⁴ under a charges resolution in the following circumstances:²⁵

- *Development approval* – A development approval has been given.
- *Adopted charge* – An adopted charge applies to providing trunk infrastructure for the development.

Infrastructure charges notice

Under the current capped framework, an ICN is required to state or include all of the following:²⁶

- *Amount* – The current amount of the levied charge.
- *Calculation* – How the amount of the levied charge has been worked out.
- *Premises* – The premises to which the levied charge relates.
- *Timing* – When the levied charge will be payable.
- *Automatic increase* – Whether the levied charge is subject to automatic increases and how the increases are worked out.
- *Offset or refund* – Whether an offset or refund applies and, if so, information about the offset or refund, including when the refund will be given. However, this requirement may be waived by the recipient of the ICN.
- *Date* – The date of the ICN.
- *Appeal rights* – Any appeal rights the recipient of the ICN has in relation to the ICN.
- *Other information* – Any other information prescribed by the Planning Regulation.

Originally, the Planning Act required an ICN to be issued with a decision notice, which was defined to include the decision, the reasons for the decision, the date on which the decision was made and any relevant appeal rights. However, following the decision in *Sunland Group Limited & Sunland Developments No 22 Pty Ltd v Gold Coast City Council* [2018] QPEC 22 (**Sunland Decision**) the Planning Act was amended to remove the requirement for a decision notice. The requirement for an information notice in respect of distributor-retailers under the SEQ Water Act remains the same.²⁷

²² See section 117 (Criteria for deciding conversion application) of the Planning Act.

²³ See section 119(2) of the Planning Act and section 99BRCI(2) of the SEQ Water Act.

²⁴ See section 119(12) of the Planning Act and section 99BRCI(6) of the SEQ Water Act.

²⁵ See section 119(1) of the Planning Act and section 99BRCI(1) of the SEQ Water Act.

²⁶ See section 121 of the Planning Act and section 99BRCK of the SEQ Water Act.

²⁷ See definition of "information notice" in Schedule of the SEQ Water Act.

Recent amendments to the Planning Act, also following the Sunland Decision, save ICN's given under the SPA after 4 July 2014 but before the commencement of the Planning Act which fail to comply with the requirement to provide an information notice.²⁸

The inclusion of offset and refund information in an ICN under the current capped framework (as with the previous capped framework) provides greater certainty to an applicant about its financial liability for the provision of infrastructure for development without the need for an infrastructure agreement. However, unlike the original capped framework, the effect is that a local government must now determine its liability for an offset or refund at the decision stage of the development assessment process, whereas previously that liability would have been determined by the later negotiation of an infrastructure agreement.

The recipient of an ICN may enter into an infrastructure agreement with the local government about the payment of the levied charge or the provision of infrastructure instead of paying the levied charge.²⁹ However, unlike the original capped framework,³⁰ the power of a local government to give a land contribution notice in lieu of, or in addition to, the payment of infrastructure charges has been removed since the previous capped framework and under the current capped framework.

Power to issue an infrastructure charges notice where there is an earlier preliminary approval

In *Sunland Group Limited and Anor v Gold Coast City Council* [2019] QPEC 19, the Planning and Environment Court considered a condition of a preliminary approval which sought to vary the effect of a local planning instrument imposed under the *Integrated Planning Act 1997* and which required the payment of infrastructure contributions. The Planning and Environment Court was required to consider whether the local government ought issue an ICN in respect of later development permits given in respect of the preliminary approval, or whether the local government could only rely upon the preliminary approval conditions for the payment of infrastructure contributions.

The Planning and Environment Court relevantly held that the earlier preliminary approval conditions were preserved such that the local government could only seek the payment of the relevant infrastructure contributions under the conditions of the preliminary approval and could not issue an ICN in respect of the later development permits. It is the writers' view with respect that this principle ought only apply where the subsequent development permit is in respect of development which accords with the earlier preliminary approval, which ordinarily would have been made code assessable under the preliminary approval and not development that does not accord with the earlier preliminary approval, which ordinarily would have been made impact assessable by the earlier preliminary approval. The reason for this is that the infrastructure requirements of the later development were not contemplated by the conditions of the preliminary approval.

Features of a levied charge

The current capped framework for a levied charge has the following features:

- *Limited to extra demand* – A levied charge may only be for extra demand placed upon the trunk infrastructure which will be generated by the development.³¹ It is relevant to note that the previous capped framework used the alternative terminology of "*additional demand*", which continues to be used in the SEQ Water Act. The difference in terminology is unlikely to have material consequences.

A levied charge must therefore not include infrastructure demand generated by the following:³²

- *Existing use* – An existing use on the premises if the use is lawful and already taking place on the premises.
- *Previous use* – A previous use that is no longer taking place on the premises if the use was lawful at the time the use was carried out.
- *Other development* – Other development on the premises if the development may be lawfully carried out without the need for a further development permit, such as development for which a development permit has been given but not yet implemented and development that is accepted development under the relevant planning scheme.

It is of interest to note that while an adopted infrastructure charges resolution under the original capped framework could provide for a discount to an adopted infrastructure charge, taking into account the existing usage of trunk infrastructure by the premises, there was no requirement for a local government not to include demand generated by a previous or existing use or other development lawfully carried out on the premises.³³

²⁸ See section 344 of the Planning Act.

²⁹ See section 123 of the Planning Act and section 99BRCM of the SEQ Water Act.

³⁰ See sections 648K(3) and (4) and 755MA(4) and (5) of SPA (28 May 2014 reprint).

³¹ See section 120(1) of the Planning Act and section 99BRCJ(1) of the SEQ Water Act.

³² See section 120(2) of the Planning Act and section 99BRCJ(2) of the SEQ Water Act.

³³ See section 648D(1)(d) of SPA (28 May 2014 reprint).

- *Payable by the applicant* – A levied charge is payable by the applicant.³⁴ An applicant for a development approval is stated to be the person who applied for the approval or a person in whom the benefit of the approval vests.³⁵
- *Attaches to the premises* – A levied charge attaches to the premises.³⁶
- *Taken to be a rate* – A levied charge is for the purpose of its recovery taken to be a rate of the local government.³⁷ However, this does not apply if the local government and the applicant have entered into an agreement in relation to the payment of the levied charge.³⁸ In the case of *Trevorrow v Council of the City of Gold Coast* [2018] QCA 19 the Court of Appeal held that the levied charge could be recovered from the applicant as well as the owner of the relevant land, even where the owner of the relevant land was not also the applicant.³⁹ However, this was decided in circumstances where the statutory regime did not provide an express statement as to who must pay the levied charge. This has been amended in the Planning Act which relevantly states that the levied charge must be paid by the applicant.⁴⁰

It is relevant to note that there is no equivalent provisions under the SEQ Water Act to recover a levied charge as a rate since a distributor-retailer is not a government entity with the power to recover rates.

Infrastructure charge versus development charge

A levied charge under the current capped framework has the following important characteristics:

- *Infrastructure charge not development charge* – A levied charge is an infrastructure charge which has the primary goal of recovering the cost of trunk infrastructure to be provided by a local government to service development.⁴¹

A levied charge is different to a development charge, which is a charge designed to internalise the marginal external costs that are imposed by development, and which has the primary goal of influencing the location and nature of development.⁴²

- *Average cost approach not marginal cost approach* – The maximum adopted charges prescribed by the State in Schedule 16 of the Planning Regulation are calculated by reference to an average State-wide cost approach. The adopted charges in a local government's charges resolution upon which a levied charge in an ICN is based are calculated by reference to an average municipality-wide cost approach, but limited to the maximum amount prescribed by the State.⁴³

Accordingly, levied charges under the current capped framework are based on an average cost approach and are capped, and therefore do not reflect the true marginal cost of providing the infrastructure. As such, levied charges do not achieve full cost recovery as was the case with infrastructure charges prior to the introduction of the original capped framework.

Development charge

Extra payment conditions

The current capped framework empowers a local government to impose a condition on a development approval requiring the payment of extra trunk infrastructure costs for development (called an **extra payment condition**) if it meets the following criteria:⁴⁴

- *Infrastructure demand* – The development achieves one of the following:
 - Generates infrastructure demand of more than that required to service the type or scale of future development that the LGIP assumes.
 - Requires new trunk infrastructure earlier than when identified in the LGIP.
 - Is for premises completely or partly outside the priority infrastructure area (**PIA**) identified in the LGIP.

³⁴ See sections 119(12)(b) of the Planning Act and section 99BRCI(6)(b) of the SEQ Water Act.

³⁵ See section 280 of the Planning Act.

³⁶ See section 119(12)(c) of the Planning Act and section 99BRCI(6)(c) of SEQ Water Act.

³⁷ See section 144(1) of the Planning Act.

³⁸ See section 144(2) of the Planning Act.

³⁹ See *Trevorrow v Council of the City of Gold Coast* [2017] QSC 12.

⁴⁰ See section 119(12)(b) of the Planning Act.

⁴¹ Productivity Commission (2011) *Performance Benchmarking of Australian Business Regulation: Planning, Zoning and Assessment*, Research Report, Volume 1, April 2011, page 198.

⁴² Productivity Commission (2011) *Performance Benchmarking of Australian Business Regulation: Planning, Zoning and Assessment*, Research Report, Volume 1, April 2011, page 198.

⁴³ Clinch JP and O'Neill E *Designing Development Planning Charges: Settlement Patterns, Cost Recovery and Public Facilities*, Urban Studies, 15 March 2010, page 2152.

⁴⁴ See section 130(1) of the Planning Act and section 99BRCU(1) of the SEQ Water Act.

- *Extra trunk infrastructure costs* – The development would impose extra trunk infrastructure costs on the local government after taking into account levied charges for the development and the provision of trunk infrastructure by the applicant.

It is relevant to note that under the previous capped framework the alternative terminology of "*additional trunk infrastructure cost*" was used, which continues to be used in the SEQ Water Act. The difference in terminology is unlikely to have material consequences.

An extra payment condition requiring the payment of extra trunk infrastructure costs for development is a development charge which is intended to internalise a local government's marginal external costs imposed by development that is inconsistent with the LGIP.

An extra payment condition is therefore intended to influence the location and nature of development. This is unlike a levied charge the primary purpose of which is cost recovery, although under the current capped framework full cost recovery is far from being achieved.

Contents of an extra payment condition

An extra payment condition imposed on a development approval is required to state all of the following:⁴⁵

- *Reason* – The reason why the condition was imposed.
- *Amount* – The amount of the payment to be made under the condition.
- *Details* – Details of the trunk infrastructure for which the payment is required.
- *Timing* – The time that the amount becomes payable.
- *Option to provide* – That the applicant may, instead of making the payment, elect to provide part or all of the trunk infrastructure.
- *Details for provision* – If the applicant elects to provide part or all of the trunk infrastructure, the extra payment condition must state the requirements for providing the trunk infrastructure and when it must be provided.

Extra payment condition for development completely inside the PIA

For an extra payment condition for development completely inside the PIA the following applies:⁴⁶

- *Extra payment condition* – The extra payment condition may only require a payment for the following:
 - *Earlier than planned* – For trunk infrastructure to be provided earlier than planned in the LGIP, the extra establishment cost that the local government incurs to provide the trunk infrastructure earlier than planned.
 - *Different type or scale* – For infrastructure associated with a different type or scale of development from that assumed in the LGIP, the establishment cost of any extra trunk infrastructure made necessary by the development.
- *Refund* – The payer is to be refunded the portion of the establishment cost of the extra trunk infrastructure that may be apportioned reasonably to other users of the extra trunk infrastructure and has been, is, or is to be, the subject of a levied charge.⁴⁷

Extra payment condition for development completely or partly outside the PIA

If an extra payment condition is for development completely or partly outside the PIA it may only require a payment of the following:⁴⁸

- *Trunk infrastructure cost* – The establishment cost of infrastructure that is made necessary by the development and, if the local government's planning scheme indicates the premises are part of an area intended for future development for purposes other than rural or rural residential purposes, necessary to service the rest of the area.
- *Temporary trunk infrastructure costs* – The establishment costs of any temporary trunk infrastructure required to ensure the safe or efficient operation of infrastructure needed to service the development or costs made necessary by the development.
- *Decommissioning, removal and rehabilitation costs* – Any decommissioning, removal and rehabilitation costs of any temporary trunk infrastructure.
- *Maintenance and operating costs* – The maintenance and operating costs for up to 5 years of the infrastructure and temporary infrastructure.

⁴⁵ See section 131 of the Planning Act and section 99BRCV of the SEQ Water Act.

⁴⁶ See section 132 of the Planning Act and section 99BRCW of the SEQ Water Act.

⁴⁷ See section 134 of the Planning Act and section 99BRCY of the SEQ Water Act.

⁴⁸ See section 133 of the Planning Act and section 99BRCX of the SEQ Water Act.

Issues arising from extra payment conditions

Extra payment conditions give rise to the following legal issues:

- *Spending of the extra payment* – The statutory scheme does not expressly state that the local government is to spend the payment and deliver the extra trunk infrastructure. However, equitable principles in respect of constructive trusts are likely to apply such that the local government is required to expend the payment only on the extra trunk infrastructure.
- *Accounting for the payment* – The local government is likely, under the equitable principles in respect of constructive trusts, to be required to account to the applicant for the extra payment when it becomes apparent that the local government does not intend to provide the extra trunk infrastructure.
- *Timing* – In the case of extra payment for development in the PIA, the statutory scheme does not oblige the local government to provide the extra trunk infrastructure earlier than when identified in the LGIP. Whilst the extra payment condition is required to state when an applicant is to provide the extra trunk infrastructure, should it elect to do so, this timing obligation does not apply to the local government. However, equitable principles in respect of constructive trusts are likely to apply such that the local government is required to expend the extra payment or account to the applicant for the extra payment where it is not expended earlier than that identified in the LGIP.
- *Multiple development applications* – An extra payment condition may be imposed on multiple development applications for the same extra trunk infrastructure. Where this occurs, the first applicant who carries out the development which requires the extra trunk infrastructure will bear the cost of complying with the extra payment condition by either making the payment or providing the extra trunk infrastructure. After the first applicant makes the payment or provides the extra trunk infrastructure, the other applicants are no longer required to satisfy the relevant extra payment condition as the requirement to provide the extra trunk infrastructure has been satisfied. For development in the PIA, the first applicant may however be entitled to a refund being the proportion of the establishment cost of the extra trunk infrastructure that may be apportioned to other users. This amount is to be worked out reasonably.

8. Conditions for trunk and non-trunk infrastructure

8.1 Types of development conditions for infrastructure

The current capped framework empowers a local government to impose the following conditions on a development approval requiring the provision of trunk and non-trunk infrastructure:

- *Necessary infrastructure condition* – A condition requiring the provision of trunk infrastructure if trunk infrastructure has not been provided or has been provided but is not adequate, and either of the following apply:⁴⁹
 - The trunk infrastructure is or will be located on premises that are the subject of a development application, whether or not the infrastructure is necessary to service the subject premises.
 - The trunk infrastructure is or will be located on other premises, but is necessary to service the subject premises.
- There are two types of necessary infrastructure conditions:
 - *LGIP identified infrastructure* – If the LGIP identifies adequate trunk infrastructure to service the subject premises, a condition may require either or both the infrastructure identified in the LGIP or different trunk infrastructure delivering the same desired standard of service to be provided at a stated time.⁵⁰
 - *LGIP unidentified infrastructure* – If the LGIP does not identify adequate trunk infrastructure to service the subject premises, a condition may require development infrastructure necessary to service the premises to be provided at a stated time if the development it will service is consistent with the assumptions in the LGIP about the type, scale, location or timing of development.⁵¹
- *Non-trunk infrastructure condition* – A condition requiring the provision of non-trunk infrastructure for one or more of the following:⁵²
 - *Internal network* – A network, or part of a network, internal to the premises.
 - *Connection to external network* – Connecting the premises to external infrastructure networks.
 - *Safety or efficiency of network* – Protecting or maintaining the safety or efficiency of the infrastructure network of which the non-trunk infrastructure is a component.

⁴⁹ See sections 127 of the Planning Act.

⁵⁰ See section 128(1) of the Planning Act and section 99BRCQ of the SEQ Water Act.

⁵¹ See section 128(2) and (3) of the Planning Act and section 99BRCR of the SEQ Water Act.

⁵² See section 145 of the Planning Act and section 99BRDJ of the SEQ Water Act.

A non-trunk infrastructure condition must state the infrastructure to be provided, and when the infrastructure must be provided.⁵³

Power to impose a development condition for infrastructure

The power to impose a condition on a development approval is subject to the following requirements:

- *Relevant or reasonable requirement* – The condition must be relevant to, but not an unreasonable imposition, or be reasonably required.⁵⁴
- *Conditioning power identified* – The local government's decision notice in respect of the development approval must state the provision of the Planning Act under which the condition was imposed.⁵⁵

The current capped framework (as with the previous capped framework) is significantly different from the original capped framework, where a necessary infrastructure condition could only be imposed if the trunk infrastructure is identified in the PIP or an adopted infrastructure charges resolution of the local government.⁵⁶

Relevant and reasonable test for a necessary infrastructure condition

A necessary infrastructure condition is taken to comply with the relevant and reasonable requirement if the following are satisfied:⁵⁷

- *Most efficient and cost effective solution* – Generally, infrastructure required is the most efficient and cost effective solution for servicing other premises in the general area of the subject premises.

According to common law principles, the infrastructure is likely to be an efficient and cost effective solution in the following circumstances:

- Construction of the infrastructure is not carried out on a piecemeal basis.
- Infrastructure that is necessary to service other premises in the general area of the subject premises is carried out in full rather than in part as development of other premises progresses.
- *Not an unreasonable imposition* – For infrastructure required to be provided on the subject premises, the infrastructure is not an unreasonable imposition on the development or the use of the subject premises as a consequence of the development.

According to common law principles, the infrastructure required to be provided on the subject premises is not an unreasonable imposition in the following circumstances:

- The infrastructure involves the following:
 - > No or minor redesign of the development.
 - > No significant restriction on the development.
 - > No significant additional cost burden.
- The infrastructure is in the interests of rational development or efficient and orderly planning of the general area in which the subject premises is situated.
- The infrastructure is actually needed to service existing, approved or foreseeable development.
- The infrastructure is subject to an identifiable timeframe for the provision of the infrastructure.

It is relevant to note that, unlike the previous capped framework, the current capped framework does not require that the infrastructure required by the necessary infrastructure condition be "*necessary to service the subject premises*" for the condition to be taken to be relevant and reasonable.⁵⁸ The requirement that the infrastructure is "*necessary to service the subject premises*" is now only a prerequisite to the imposition of a necessary infrastructure condition where the trunk infrastructure will be located on premises that are not the subject of a development application.⁵⁹

However, that requirement for the condition to be taken to be relevant and reasonable remains in respect of distributor-retailers under the SEQ Water Act.⁶⁰ The current capped framework also declares that a necessary

⁵³ See section 145(a) of the Planning Act and section 99BRDJ(3) of the SEQ Water Act.

⁵⁴ See section 65(1) of the Planning Act and section 99BRAJ(1) of the SEQ Water Act.

⁵⁵ See section 63(2)(e)(iv) of the Planning Act and section 99BRAI(2)(e) of the SEQ Water Act.

⁵⁶ See section 649 of the SPA (28 May 2014 reprint).

⁵⁷ See section 128(4) of the Planning Act.

⁵⁸ See for comparison section 648(1)(a)(i) of SPA (19 May 2017 reprint).

⁵⁹ See section 127 (Application and operation of subdivision) of the Planning Act.

⁶⁰ See section 99BRCS(1)(a)(i) of the SEQ Water Act.

infrastructure condition may be imposed for infrastructure even if the infrastructure will service premises other than the subject premises.⁶¹

Relevant and reasonable test for a non-trunk infrastructure condition

A non-trunk infrastructure condition is required to satisfy either of the following:⁶²

- *Relevant to, but not an unreasonable imposition* – The non-trunk infrastructure required by the condition must satisfy the following:

- The non-trunk infrastructure must be relevant to the development or use of the premises as a consequence of the development.

According to common law principles, the infrastructure is likely to be relevant to the development or use of the premises as a consequence of the development where the non-trunk infrastructure is required for the following purposes:

- > Maintain proper standards.
- > Another legitimate basis such as where it is imposed in the interests of rational development of the general area in which the premises is situated.

- The non-trunk infrastructure must not be an unreasonable imposition on the development or use of the premises as a consequence of the development.

According to common law principles, the infrastructure is not likely to be an unreasonable imposition in the following circumstances:

- > The infrastructure would result in the following:
 - No or minor redesign of the development.
 - No significant restriction on the development.
 - No significant additional cost burden.
- > The infrastructure is in the interests of rational development or efficient and orderly planning of the general area in which the subject premises is situated.
- > The infrastructure is actually needed to service existing, approved or foreseeable development.
- > The infrastructure is subject to an identifiable timeframe for the provision of the infrastructure.

- *Reasonably required* – The non-trunk infrastructure required by the condition must be reasonably required in relation to the development or use of the premises as a consequence of the development.

According to common law principles, the infrastructure is likely to be reasonably required if a nexus exists between the infrastructure and the development or use of the premises and the following circumstances apply:

- The development or use of the premises creates a change to the existing state of the infrastructure network.
- The infrastructure requirement is a reasonable response to the change.

Permissible change

The Planning and Environment Court, in *East Coast Gravel Pty Ltd v Brisbane City Council* [2019] QPEC 15 considered whether, under the SPA, an applicant who had acted on a development approval and complied with conditions requiring the payment of infrastructure charges and the construction of infrastructure, being a bike path, was able to request a "permissible change" under section 367 of the SPA to amended the condition regarding payment of infrastructure charges such that it was reduced to take account of the money spent building the bike path.

The Planning and Environment Court did not accept that the proposed change was outside the scope of the SPA, but found that it was not a "permissible change" under the SPA, as it was likely that it would cause a person, including the local government, to make a properly made submission objecting to the proposed change, if the circumstances allowed.

The case may be decided differently under the Planning Act as the corresponding provision, being in respect of a "minor change", does not require consideration of whether the change would cause a person to make a properly made submission objecting to the proposed change. Whether the change would result in "substantially different development" is however still relevant under the Planning Act, and includes a consideration of whether the change will have impacts on infrastructure provisions; which is likely to be determinative against an applicant if a similar set of circumstances arose.

⁶¹ See section 128(5) of the Planning Act and section 99BRC(2) of the SEQ Water Act.

⁶² See section 65(1) of the Planning Act and section 99BRAJ of the SEQ Water Act.

Conversion applications for non-trunk infrastructure conditions

Conversion application criteria

The current capped framework empowers an applicant for a development approval (or a person in whom the benefit of a development approval vests)⁶³ to apply to convert non-trunk infrastructure to trunk infrastructure (known as a **conversion application**)⁶⁴ if both of the following circumstances apply:⁶⁵

- *Non-trunk infrastructure condition* – The infrastructure is required to be provided under a non-trunk infrastructure condition.
- *Construction not started* – Construction of the non-trunk infrastructure has not started.

A conversion application must be made to the relevant local government within 1 year after the development approval starts to have effect.⁶⁶ It is relevant to note that under the previous capped framework there was no equivalent time limitation for making a conversion application, which continues to apply in respect of distributor-retailers under the SEQ Water Act.

When deciding a conversion application, the local government must consider the criteria for deciding the application in its charges resolution.⁶⁷ In *The Avenues Highfields Pty Ltd v Toowoomba Regional Council* [2017] QPEC 48 (**Highfields Decision**), the Planning and Environment Court considered the predecessor to this requirement, being section 660 of the SPA, which was on slightly different terms, in that it said "*the local government must have regard to the criteria*" rather than "*the local government must consider the criteria*" [emphasis added]. In the Highfields Decision, the Planning and Environment Court held that the requirement to "*have regard to*" the criteria does not mean that the local government must adhere to the criteria. Rather, the local government is to give "*proper, genuine and realistic consideration*"⁶⁸ to the criteria, but is not bound to make a decision that complies with the criteria. That position is made more clear under the Planning Act by the use of the word "*consider*".

Effect of approval of conversion application

Approval of a conversion application has the following effect:⁶⁹

- *Non-trunk infrastructure condition* – The non-trunk infrastructure condition no longer has effect.
- *Necessary infrastructure condition* – The local government may amend the development approval by imposing a necessary infrastructure condition for the trunk infrastructure.
- *ICN* – If a necessary infrastructure condition is imposed, the local government must either give an ICN or amend an existing ICN to state whether an offset or refund applies and, if so, information about the offset or refund, including when the refund will be given.

Power to impose a necessary trunk infrastructure condition

In the Highfields Decision, the Planning and Environment Court also considered whether section 662(3) of the SPA conferred a discretion on the local government to impose a necessary trunk infrastructure condition that changed the form of the infrastructure. The Planning and Environment Court held that there was no requirement under the SPA that a local government impose a necessary trunk infrastructure condition on the same, or substantially the same, terms as the original condition. The Planning and Environment Court so held on the basis that, among other reasons, protections existed under the SPA for the benefit of applicants in respect of the imposition of a necessary trunk infrastructure condition following a successful conversion application. Such protections referred to by the Court included section 649 of the SPA which had the effect of requiring the local government to bear the financial burden where the costs of the necessary trunk infrastructure is greater than the adopted charge for the development. The Planning and Environment Court also referred to section 662(3) of the SPA which required a conversion application to be made before construction commences, which the Court opined would ensure no wasted costs in the event the ultimate form of the infrastructure was changed. Although decided under the SPA, the principles are still applicable under the Planning Act as the relevant provisions under the Planning Act are substantially in the same form.⁷⁰

⁶³ See section 280 of the Planning Act.

⁶⁴ See section 139 of the Planning Act and section 99BRDE of the SEQ Water Act.

⁶⁵ See section 138 of the Planning Act and section 99BRDD of the SEQ Water Act.

⁶⁶ See section 139(2) of the Planning Act.

⁶⁷ See section 140 of the Planning Act and section 99BRDF of the SEQ Water Act.

⁶⁸ *Zhang v Canterbury City Council* (2001) 51 NSWLR 589, 601 [62]; [2001] NSWCA 167

⁶⁹ See section 142 of the Planning Act and section 99BRDH of the SEQ Water Act.

⁷⁰ See relevantly section 129 and section 142 of the Planning Act.

Issues arising from conversion application process

The conversion application process gives rise to the following potential issues:

- *Timing* – A conversion application can only be lodged after a development approval takes effect, by which time the appeal period in respect of the non-trunk infrastructure condition itself will have expired. Accordingly, applicants who decide to pursue a conversion application will not be able to appeal the non-trunk infrastructure condition in the event that the conversion application is refused, although the refusal of the conversion application may itself be the subject of an appeal.⁷¹
- *Financial consequences* – Applicants may seek to design development in such a way that proposed development infrastructure meets the relevant conversion criteria. This may result in additional and unintended financial pressure on local governments if they are forced to fund additional trunk infrastructure to that originally planned for in respect of their LGIP.

⁷¹ See Schedule 1, Table 1, Item 5 of the Planning Act.