

Effect of retrospective approval on prosecution proceedings

By Tim Beckett

Does the grant of retrospective approval for unlawful development prevent prosecution proceedings in respect of the original failure to obtain approval?

Overview

Section 164 of the *Planning and Development Act 2005* (**Act**) plainly recognises that a local authority may retrospectively approve development which was carried out prior to planning approval being granted for the subject development. However, the Act is less clear in establishing the effect of retrospective approval on a prosecution relating to development which was carried out before that approval was granted.

McLeods recently represented a local government in prosecution proceedings in which the Perth Magistrates Court was required to determine the effect of a retrospective approval on a planning prosecution. The Court found that a subsequent grant of retrospective planning approval did not negate or preclude a prosecution which related to development being carried out prior to the grant of development approval.

Facts

The facts of the case were relatively straight forward. A developer was granted planning approval to construct a large office development. After obtaining that approval, the developer proceeded to construct an additional storey on the office building, without applying for or obtaining approval for the additional storey. As the constructed development did not comply with the relevant approval, the local government commenced a prosecution under section 218 of the Act, alleging that development had been carried out without approval.

After the prosecution was commenced, the developer applied for and obtained approval from the local government for the unlawful development. During the prosecution, the developer conceded that the development had been carried out prior to the grant of approval. The Court was asked to determine a question of law – did the subsequent retrospective approval preclude the local government from proceeding with the prosecution?

Interpreting Section 164 of the Act

Sections 164(1) and 164(2) simply state that development can be retrospectively approved. Section 164(3) states that those provisions do not affect the operation of Part 13 of the Act, which comprises the relevant enforcement and penalty provisions under which this particular prosecution was commenced. Those subsections appear to indicate that retrospective approval will not preclude prosecution for prior unlawful development.

However, somewhat ambiguously, section 164(4) of the Act states that:

“Development which was unlawfully commenced or carried out is not rendered lawful by the occurrence of any subsequent event except the approval by the relevant responsible authority of that development.

Section 164(4) appears to contradict or otherwise confuse the operation of section 164(3), by stating that prior unlawful development is ‘not rendered lawful by the occurrence of any subsequent event except the approval by the relevant responsible authority’.

Findings

The developer argued that, by virtue of section 164(4), the unlawful development was rendered lawful by the retrospective approval.

McLeods submitted on behalf of the prosecuting local government that section 164(4) did not contradict section 164(3), on the basis that ‘any subsequent event’ should be interpreted as referring to ‘events’ such as rezoning, planning scheme amendments, or Residential Design Codes amendments. Any of those ‘subsequent events’ could have an effect on whether a certain type of development was exempt from the requirement to obtain planning approval. In each of those cases, a development which would have been unlawful without approval prior to the ‘subsequent event’ would become lawful if commenced without approval after the ‘subsequent event’.

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Accordingly, section 164(4) was intended to operate alongside section 164(3) by stating that, aside from retrospective approval, no other subsequent event (such as rezoning) would cause an unlawful development to become lawful. Once that interpretation of section 164(4) is accepted, then the overall effect of section 164 becomes clear – retrospective planning approval does not interfere with enforcement proceedings arising from development carried out prior to the retrospective approval.

The Act seeks to ensure that no development is carried without planning approval first being obtained. We argued that our interpretation was consistent with the purpose and intent of the Act in this respect.

The Court agreed with the position taken by McLeods, finding that retrospective approval did not negate the prosecution proceedings. The Court convicted the developer under section 218 of the Act and imposed penalties totalling \$400,000. While the development had been retrospectively approved, the Court recognised that carrying out unapproved development constitutes a significant contravention of the Act which must be addressed by a substantial deterrent penalty, as is consistent with the decision of the Supreme Court in *Swan Bay Holdings Pty Ltd v City of Cockburn* [2010] WASC 81.

For further information in regard to the above, contact Tim Beckett on 9424 6212 or tbeckett@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.