

Enforcement options for storage of materials on residential lots.

By Tim Beckett

Local governments frequently receive complaints in relation to residential properties being used for the storage of materials. Depending on the nature and quantity of the materials, and the purpose for which the materials are being stored, there may be a number of options available to local governments when taking enforcement action in relation to these properties.

Section 3.25 Notices

Where a property is considered to be untidy by virtue of the presence of disused materials, a local government can give a notice under section 3.25 of the Local Government Act 1995 (LGA) requiring the materials to be removed within a specific time. A section 3.25 notice can be given irrespective of whether the disused materials are capable of being seen from outside the property¹.

The failure to comply with a section 3.25 notice will constitute an offence which carries a maximum penalty of \$5,000 and a daily penalty of \$500. Furthermore, in the event of non-compliance with the notice, a local government can carry out the requisitions of the notice at the cost of the notice recipient. However, those costs need to be recovered through civil proceedings in a court of competent jurisdiction.

In many cases, giving a notice under section 3.25 of the LGA will be the best and only means of enforcement available to a local government to require disused materials to be removed from a property. However, these notices carry several limitations:

1. The modest maximum penalty of \$5,000 typically results in relatively small penalties being imposed in the event of a prosecution.
2. The notice is reviewable by the State Administrative Tribunal, which can delay the enforcement process.
3. If a person removes the materials specified in the notice from the property and brings new materials to the property, the person cannot be prosecuted in relation to the notice.
4. In some cases, it may be difficult to prove that the materials are in fact 'disused' and not being stored on the

property for a legitimate purpose.

Planning Offences

In some circumstances, the type and extent of materials being stored at a residential property may constitute a use without the approval of the local government, giving rise to a breach of scheme and thereby an offence under section 218(a) of the Planning and Development Act 2005 (PDA).

Where it is possible to take enforcement action in relation to the storage of materials on residential properties under the PDA, there are a number of advantages for local government, namely:

1. The PDA offence carries a far more substantial maximum penalty of \$200,000, which provides a greater deterrent effect.
2. There is no requirement to give a statutory notice before commencing a prosecution for an offence under the PDA – though we would usually recommend that a local government give warnings before commencing a prosecution of that kind.
3. The relevant offence may be committed even if different materials are being stored at the property during an alleged prosecution period. That is, there is no need for the local government to prove that the same materials were being stored at the property during the relevant time.

Requirements for Planning Offences

In order to prosecute a storage use under the PDA, the type and extent of the materials being stored at a property must not be incidental or ancillary to the ordinary residential use of the property. It is a case of fact and degree as to whether the materials being stored at a property can be described as being incidental to the ordinary residential use or, alternatively, can be properly characterised as a separate and distinct use of the property for which planning approval would be required.

In the recent case of *Hunter v City of Joondalup* [2016] WASC 424, Justice Pritchard dismissed an appeal against a conviction

in circumstances where a property owner was fined \$16,000 for using his property for the storage of materials. In that case, the Court upheld the Magistrate's decision, stating that, having regard to the nature and the sheer quantity of the materials, "the use of the property for the storage of those materials was not incidental to its residential use as a dwelling".

That finding was consistent with previous Supreme Court authorities, which have stated that "*whether a use is a distinct and separate use or is merely an incidental part of a permitted use will depend upon the regularity and extent of the activity*"² and "*whether use of a property constitutes a distinct and separate use is a question of fact and degree*".

Evidence of Offences

While the PDA provides a more effective basis for taking enforcement action in relation to the use of residential properties for the storage of materials, it will not be possible in many cases. Many properties may be untidy for the purposes of section 3.25 of the LGA, without being used for a distinct and separate use of storage.

In order for a local government to take action under the PDA, the extent of materials must so far exceed what could ordinarily be described as being ancillary or incidental to the residential use of a property so as to constitute a separate storage use. In making that assessment, a local government should also make contact with the owner(s) of the property to ascertain the purpose for storing the materials and the period of time during which the materials have been stored. Accordingly, a prosecution under the PDA requires multiple inspections to determine the extent of the materials and the period during which the materials have been stored at the property.

Ultimately, the purpose of taking enforcement action is to achieve compliance at these properties and throughout a local government's district generally. Often, that outcome can be achieved without formal enforcement action. However, where formal enforcement action is required, a local government must assess the circumstances and evidence as a whole in order to determine the best approach for achieving that compliance.

For further information in regard to the above, contact Tim Beckett on 9383 3133 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.