

Identification and Investigation of Planning Offences – A Case Study

By Tim Beckett

Overview

It is well established that offences under the *Planning and Development Act 2005* (WA) (**PDA**) can result in substantial penalties being imposed, having regard to the significant maximum penalties and daily penalties that can apply to offences of that kind. While the Supreme Court of Western Australia has repeatedly affirmed the need for deterrent penalties to be imposed to address flagrant planning breaches, there are limited opportunities for very substantial penalties to be imposed by Magistrates Courts in relation to offences of that kind. However, before such a substantial penalty can be imposed, a local government must first investigate the relevant breach and identify the appropriate offence.

In June 2024, the Armadale Magistrates Court imposed penalties totalling \$350,000 in relation to a substantial planning breach in the Shire of Serpentine-Jarrahdale (**Shire**). That decision is instructive for all local governments in a number of respects, in particular:

- navigating potential issues with limitation periods;
- differentiating between land use offences and works offences; and
- understanding sentencing considerations for planning offences.

Details of Offence

The Shire had been dealing with compliance issues at the subject property for a substantial period of time, as the relevant land had been used for large-scale concrete manufacturing without requisite approvals for a period of several years. Furthermore, extremely significant works had been carried out at the subject property prior to the commencement of the prosecution, with the relevant work having been costed at approximately \$10.5m by the accused companies (**Offenders**).

The Offenders had obtained retrospective approval for the relevant works prior to the sentencing of the charges. The Shire prosecuted two separate entities, as the Offenders were the owner of the subject property and the operator of the subject development respectively.

The fact that the prosecution related to a works offence rather than a land use offence is particularly relevant, as it highlights the importance of recognising and acting upon appropriate limitation periods for offences of this kind. That distinction is also relevant to the application of potential limitations for any potential prosecution.

Limitation Periods

Section 21(2) of the *Criminal Procedure Act 2004* provides that a prosecution for a simple offence must be commenced

within 12 months of the date of the offence having been committed, unless other legislation specifies otherwise. The PDA is silent in relation to limitation periods and, accordingly, a prosecution must be commenced within 12 months of the date of the alleged offence. Despite some misconception that may have existed amongst local governments in the past, the relevant trigger for the limitation period is the date(s) of the alleged offence and not the date upon which the local government becomes aware of the alleged offence.

As an aside, other legislation does provide for longer limitation periods, which may be relevant when investigating planning breaches. For example, a prosecution for most offences under the *Building Act 2011* (WA) can be commenced within 6 years of the date of the alleged offence. Therefore, in some cases, the planning component of an unlawful development may not be capable of prosecution – because the development occurred more than 12 months ago. However, a building prosecution can still be commenced if the works were carried out within the preceding 6 years.

Works or Land Use?

From a planning perspective, there is a key distinction between limitation periods which can apply to works or land use. A works offence typically will be a discrete offence which was only committed while those works were being carried out and, therefore, a prosecution needs to be commenced within 12 months of the date of completion of those works. By contrast, a land use offence may be ongoing for a period of many years and it may be possible to commence a prosecution in relation to that land use, irrespective of whether that land use may have commenced some years ago. For example, if a transport depot use commenced in 2010 and has continued unlawfully until the current time, it remains open to a local government to commence a planning prosecution in relation to that unlawful land use, as the relevant offence period relates to the continuation of that land use without approval.

The only potential complication to that position is that, if a land use has occurred for a very substantial period of time without interruption – usually being a period of decades rather than years – it may be possible that a non-confirming use right has attached to that land use, in which case the land use may not be unlawful. Non-confirming use rights give rise to other complicated legal questions which we will not analyse for the purposes of this publication.

Planning Directions

The other consideration for enlivening limitation periods for planning offences is that, where there is no unlawful land use component, there are still enforcement options available to a local government. For example, if unlawful works were commenced without planning approval more than 12 months ago and there is no ongoing unlawful land use component, the local government cannot simply commence a planning prosecution in relation to that work, for the reasons noted above.

However, the local government can serve a direction under section 214 of the PDA, requiring that work to be taken down, or other specified measures to be taken. Where such a direction is given, the failure to comply with a direction will constitute an offence under the PDA and the local government can then commence a prosecution in relation to that offence, as that offence arguably will continue until the direction is revoked or the recipient of the direction has complied with its requirements.

As a matter of general principle, we frequently recommend serving directions for unlawful works. However, because ongoing unapproved land uses are already unlawful and remain capable of prosecution – irrespective of whether a direction is

served, as noted by the Court in this instance – there are limited circumstances in which we would recommend serving directions requiring an unlawful land use to cease.

Sentencing Considerations

As noted above, the works the subject of this prosecution were extremely substantial, as reflected by an application for retrospective development approval which ultimately disclosed a works value of \$10.5m. While the value of the unapproved works is only one component of the sentencing exercise, it does provide some insight as to the scale and, potentially, the commerciality of the relevant offence.

In this case, the Court's attention was drawn to the decision of ***Austrend Constructions Pty Ltd v City of Swan* [2017] WASC 67**, in which the Court identified four relevant criteria for determining penalties for planning offences. In *Austrend*, the Court identified the following criteria:

- (a) whether the breach was flagrant or inadvertent;
- (b) whether the breach was permanent or reversible;
- (c) the scale and impact of the breach; and
- (d) the extent of commercial benefit arising from the breach.

Relevantly, the defence in this case advised the Court that the Offenders had suffered significant financial losses as a result of these works and that the unlawful development was not carried out for commercial gain and, instead, was an exercise in loss mitigation. The prosecution submitted, and the Court agreed, that loss mitigation still necessarily has a commercial element as a determining factor for the motive for the offence. Furthermore, the Court agreed with the prosecution submission that the profitability or success of the relevant business is not a relevant consideration in sentencing. Instead, the Court merely needs to consider whether the offence is commercially motivated.

In that respect, the Court made the following remarks:

"One hopes then that will act as a preventative measure in the context anticipated in Swan Bay Holdings to prevent others from taking similar steps in the future, and of course, in this case, whether it's expressed as a commercial benefit, the fact that there's potentially a significant loss in relation to these matters, overall, is not directly a matter for me. I didn't make the original deal. I did none of it. What I do know is that when one decides to press forward knowing that there are consequences, one, at least at that stage, knowingly, on an informed basis, makes that informed decision, balances competing factors – commercial and otherwise – and moves forward, and one then is held to account in due course, and that's what we're dealing with".

The Court further noted that the Offenders' cooperation with the Shire and the subsequent grant of retrospective approval were relevant sentencing features, which had the effect of reducing the penalties that may have been imposed:

"Balanced against that also... the nature of what was happening in the particular property, the land in which it was occurring was within the range, and appropriately, in due course, retrospectively authorised and permission was

granted, and that's a significant feature".

However, the Court accepted that retrospective approval did not negate the need for a deterrent penalty. Further, the Court noted that the fact that the Shire did not formally direct the Offenders to cease the development did not preclude the commencement of the prosecutions:

"... the Shire did not issue stop work notices...[but] does not remove the responsibility for either [Offender]. It is they who bear the responsibility to comply, not necessarily for the [Shire] simply to issue a notice".

In summary, the Offenders were found to be cooperative and worked with the Shire to obtain the necessary retrospective approvals. However, even those findings did not remove the need for substantial deterrent penalties to be imposed.

Decision

The decision should serve as a reminder that, irrespective of whether retrospective development approval is ultimately obtained, significant planning offences should result in significant planning penalties. When assessing the range of penalties against the potential commerciality that sits behind the offending, it becomes easy to understand why Parliament established extremely significant maximum penalties for offences of this kind.

In the current case, penalties totalling \$350,000 are clearly very substantial and represent a positive and well-deserved outcome for the Shire. That penalty was clearly reduced as a result of the Offenders' cooperation with the Shire and the grant of a retrospective development approval. In any case, in the context of a development of this scale, it is readily conceivable that far more substantial penalties could be imposed for similar prosecutions in the future, especially if the relevant owner or operator fails to engage with the local government prior to sentencing.

The information contained in this article should not be relied upon without obtaining further detailed legal advice in the circumstances of each case. For any comments or questions on this article please contact Tim Beckett (tbeckett@mcleods.com.au) or Madeline Madvad (mmadvad@mcleods.com.au).

Liability limited by a scheme approved under Professional Standards Legislation.