JURISDICTION	**:**	SUPREME COURT OF WESTERN AUSTRALIA
TITLE OF COURT	**:**	THE COURT OF APPEAL (WA)
CITATION	**:**	BRIGHT IMAGE DENTAL PTY LTD -v- CITY OF GOSNELLS [2018] WASCA 134
CORAM	**:**	MARTIN CJ BUSS P MITCHELL JA
HEARD	**:**	14 MAY 2018
DELIVERED	**:**	3 AUGUST 2018
FILE NO/S	**:**	CACR 178 of 2017
BETWEEN	**:**	BRIGHT IMAGE DENTAL PTY LTD Appellant AND CITY OF GOSNELLS Respondent

ON APPEAL FROM:

Jurisdiction	**:**	SUPREME COURT OF WESTERN AUSTRALIA
Coram	**:**	PRITCHARD J
Citation	**:**	BRIGHT IMAGE DENTAL PTY LTD -v- CITY OF GOSNELLS [2017] WASC 229
File Number	**:**	SJA 1093 of 2016

Catchwords:

Planning and Development Act 2005 (WA) - Section 164 - Development carried out without prior planning approval - Whether subsequent approval operates retrospectively to render development lawful from commencement

Town Planning Scheme - Meaning of 'storage' - Whether the presence of a sea container on land constitutes use of that land for 'storage'

Legislation:

Planning and Development Act 2005 (WA)

Result:

Appeal dismissed

Category: B

Representation:

Counsel:

Appellant	:	Mr P McQueen & Mr A McGlue
Respondent	:	Ms A M Wood & Ms C Hamilton

Solicitors:

Appellant	:	Lavan
Respondent	:	Kott Gunning

Case(s) referred to in decision(s):

Australian Unity Property Ltd v City of Busselton [2018] WASCA 38
City of Armadale v Chapman [2012] WASC 423
Commissioner of State Revenue v Abbotts Exploration Pty Ltd [2014] WASCA 211; (2014) 48 WAR 300
Daniele v Shire of Swan (1998) 20 WAR 164
Duperouzel v Cameron [1973] WAR 181
Mocilac v City of Fremantle [2014] WASC 56; (2014) 199 LGERA 405
Mosman Park Town v Esther Investments Pty Ltd (1996) 93 LGERA 38

Re Town Planning Appeal Tribunal; ex parte Environmental Protection Authority [2003] WASCA 248; (2003) 27 WAR 374
University of Western Australia v City of Subiaco (1980) 52 LGRA 360

MARTIN CJ:

Summary

1 Bright Image Dental Pty Ltd (the appellant) was convicted after trial in the Magistrates Court of contravening s 218(a) of the *Planning and Development Act 2005* (WA) (the Act) by contravening the provisions of a town planning scheme by commencing or carrying out development on land (namely using the land for 'storage') without obtaining the prior approval of the responsible authority (the City of Gosnells - the respondent). The appellant applied for leave to appeal from that conviction. A single judge of this court refused leave and the appeal was dismissed. The appellant now applies for leave to appeal from that decision.

2 There are two grounds of appeal. The first asserts that the magistrate and judge erred by concluding that the presence of a number of sea containers on the appellant's land over a number of months constituted use of that land for 'storage'. The second ground asserts that the magistrate and judge erred by not concluding that because the respondent approved the use of the appellant's land for 'storage' after the period in which the appellant was said to have committed the alleged offence, s 164 of the Act had the effect that any prior unlawful conduct was rendered lawful by the grant of approval.

3 For the reasons which follow, I would refuse leave to appeal in respect of the first ground. I would grant leave to appeal in respect of the second ground, but dismiss both grounds, and the appeal.

The Prosecution

4 The respondent commenced proceedings against the appellant in the Magistrates Court at Armadale by lodging a prosecution notice which alleged that the appellant:

> On 28 March 2014 and continuing from that date until 25 August 2014 ('the Offence Period'), at Lot 3 on Diagram 16852 Certificate of Title Volume 1291, Folio 564 also known as 267 Kenwick Rd, Maddington, Western Australia ('the Property') did commence or carry out development of the Property (namely storage) without obtaining the prior approval of the City of Gosnells as is required by clause 9.1 of the City of Gosnells Town Planning Scheme No.6 in contravention of section 218(a) of the *Planning and Development Act 2005* ('the Act').

The facts found by the magistrate

5 Although the appellant challenges the conclusion drawn by the magistrate from the facts which he found, there is no challenge to the magistrate's primary findings of fact. A short summary of those facts follows.

6 The appellant was the owner of the land specified in the prosecution notice at all material times. The land is within the district of the City of Gosnells and is about 1.646 ha in size. Until 7 February 2014, the property was zoned General Rural under Town Planning Scheme No.6 of the City of Gosnells (the Scheme). On 7 February 2014, the property was rezoned from General Rural to Business Development.

7 On 16 March 2011, prior to rezoning, the appellant applied to the respondent for approval to use the land as a truck service centre. The respondent construed the application as an application for approval to use the land as a 'transport depot' and for 'storage' under the terms of the Scheme. The respondent advised the appellant that those uses were not lawful uses within the General Rural zone and the application was refused.

8 As a result of a complaint received by the respondent in July 2013, staff of the respondent, including Mr Jordan McDermott, attended the land and observed the uses to which it was being put. Mr McDermott was the only witness called in support of the prosecution case. His evidence was accepted by the magistrate.

9 On 6 July 2013, Mr McDermott visited the property and observed a large number of trucks and truck trailers, together with scaffolding and crane equipment. He also observed vehicle or truck parts around the yard, a number of sea containers spread apart with a canvas cover of a semi-circular type between the sea containers to create a relatively water-proof area,[1] some forklifts and other machinery on the property.

10 Mr McDermott met with a representative of the appellant onsite on about 8 August 2013. He observed the property to be in much the same condition as it was at the time of his visit on 6 July 2013. Mr McDermott asked the representative of the appellant to advance a proposal to remove items from the property. Such a proposal was later made. The respondent advised the appellant that the timetable proposed

[1] Described in the evidence as a Nissen hut.

was not considered to be reasonable, and advised the appellant that the items were to be removed from the property by 24 September 2013.

11 Mr McDermott visited the property on 4 October 2013. He observed that the property still had trucks, trailers, truck parts, sea containers, crane equipment, and the covered area in much the same position as before. Mr McDermott took a number of photographs of the land at the time of his visit.

12 On 29 October 2013, Mr McDermott again attended the property. He took a number of photographs of the property from the adjoining land. He continued to view the property, and take photographs of the property from the adjoining land over the ensuing months.

13 On 6 May 2014, Mr McDermott again attended the property. He observed truck trailers, dolly trailers, caravans, sea containers, buses, the covered area, a scissor lift, a bobcat, a loading ramp and a concrete pumping truck all on the property. He noticed that the crane, crane equipment and some rigging items had been removed from the property since his previous visit, but they had been replaced by buses and the concrete pumping truck. Some of the sea containers were in a different location. He took a series of photographs at the time.

14 The photographs taken by Mr McDermott were produced into evidence, along with a number of aerial photographs of the property taken on 28 October 2013, 10 November 2013, 9 December 2013, 6 January 2014, 20 February 2014, 28 March 2014, 15 June 2014 and 1 August 2014. The latter three aerial photographs were taken during the offence period.

15 In the course of his evidence, Mr McDermott correlated the items depicted in the aerial photographs to the observations he had made during his various visits to the property. Mr McDermott gave evidence to the effect that the sea containers depicted in the aerial photograph taken on 15 June 2014 were the same sea containers he observed during his visit to the property on 6 May 2014. Further, Mr McDermott identified by circling on the aerial photographs of 28 March 2014, 15 June 2014 and 1 August 2014 four or five sea containers, and some large-framed storage containers that were on the property in much the same location during the entire offence period, as can be seen in the photographs and as was seen by him on 6 May 2014.

16 On 2 May 2014, the appellant applied to the respondent for approval to use the land for a 'transport depot' and/or 'storage'. The

respondent granted that approval on 26 August 2014 (the day after the offence period).

The magistrate's reasons

17 The magistrate rejected the appellant's submission to the effect that the approval granted by the respondent on 26 August 2014 rendered the appellant's use of the land for 'transport depot' and 'storage' prior to that date lawful. The magistrate concluded that, under both s 164 of the Act and cl 9.4 of Scheme, the grant of approval only rendered the development lawful as and from the date of the approval - in other words, the approval had no retrospective effect. In that context, the magistrate observed that the construction of s 164 for which the appellant contended would render s 164(3) of the Act otiose.[2]

18 The magistrate noted that the land use of 'storage' was defined by the Scheme to mean 'premises used for the storage of goods, equipment, plant or materials'. In that context, he noted that the word 'premises' is defined by the Scheme to mean 'land or buildings' with the consequence that a use could come within the definition of 'storage' whether items were stored in a building or on land. The magistrate accepted that storage was the 'action or method of storing something for future use'. He accepted the appellant's submission that the presence on the land of vehicles such as the buses, trucks, trailers and other motor vehicles did not constitute 'storage'.[3]

19 The magistrate also accepted a submission on behalf of the appellant to the effect that, under the Scheme, the use of land within a more specific use class was not to be considered as falling within the use of land under a more general use class. In that context, he observed that use for a 'transport depot' or 'commercial vehicle parking' would be a more specific than use for 'storage' with the result that uses falling within the former categories would not give rise to a use within the latter category.[4]

20 After referring to various dictionary definitions, the magistrate reiterated his earlier conclusion to the effect that the presence of items capable of being moved under their own power did not, of itself, indicate that the land was being used for 'storage'.[5]

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[2] Magistrate's reasons [46] - [48].
[3] Magistrate's reasons [52] - [57].
[4] Magistrate's reasons [58].
[5] Magistrate's reasons [66].

21 The magistrate observed that a sea container could be used for many purposes including storage, transport, building and as a place to live or conduct a business. He considered that the containers which were on the appellant's property during the offence period were 'goods' because they were movable property, although they were not commercial vehicles.[6]

22 The magistrate accepted the respondent's submission that the placement of sea containers on the property constituted development of the land, and therefore required the prior approval of the respondent - relying upon the decision in the ***City of Armadale v Chapman***.[7]

23 The magistrate noted that in closing submissions the appellant submitted that it was exempt from applying for development approval because its use of the sea containers located on the property fell within a number of exemptions contained within a Policy Statement issued by the respondent relating to the placement and use of sea containers on land within the respondent's district. The magistrate considered that these submissions relied upon an 'exception' within the meaning of s 78 of the *Criminal Procedure Act 2004* (WA), with the consequence that the appellant bore the onus of proving, on the balance of probabilities, the applicability of the exception. The magistrate noted that the appellant had adduced no evidence, as was its right, but with the consequence that it had failed to prove the applicability of any of the exemptions within the policy to which it had referred.[8]

24 In conclusion, the magistrate reiterated his earlier finding that a number of sea containers identified by Mr McDermott had been located on the property throughout the entire offence period of 127 days, which constituted 'storage'.

The appeal to the judge at first instance

25 The grounds of appeal to the judge at first instance were, in substance, identical to the grounds pursued on this appeal (following amendment to one of those grounds during the course of the hearing).

26 In relation to the ground alleging that the magistrate erred by concluding that the presence of the sea containers constituted 'storage', the judge considered that the evidence to the effect that a number of sea

[6] Magistrate's reasons [67].
[7] ***City of Armadale v Chapman*** [2012] WASC 423.
[8] Magistrate's reasons [72] - [73].

containers were in the same position on the property throughout the offence period sustained the magistrate's conclusion that the property was being used for the storage of those containers.[9]

27 The judge rejected a submission on behalf of the appellant to the effect that the magistrate erred by not finding that the presence of the sea containers was incidental to the use of the property as a 'transport depot', rather than constituting a separate and distinct use of 'storage'. In that context, she observed that:[10]

> [50] … having regard to the learned magistrate's Reasons in relation to the presence of the trucks, trailers and motor vehicles on the Property, it appears that he accepted that the Property was being used as a transport depot. However, that conclusion does not, of itself, support the conclusion that the location of the sea containers on the Property was merely ancillary or incidental to that use of the Property. While it is not difficult to envisage how a case might be made that the presence of sea containers located on land which is also being used as a transport depot might be regarded as being incidental to that use of the land, there would need to be some evidence to support that conclusion. In this case, there was no such evidence. Bright Image did not adduce any evidence itself. Not one of the photographs tendered in evidence showed a sea container on the back of a truck (notwithstanding that numerous photographs depicted trucks on the Property). Nor was Mr McDermott asked whether he saw trucks carrying sea containers during any of his visits to observe the Property. The only evidence was that sea containers were located on the Property, and that they had been situated in the same locations on the Property, including on three dates spanning just over four months within the offence period.
>
> [51] Consequently, I am not persuaded that the learned magistrate failed to properly consider whether the presence of the sea containers was merely ancillary to the use of the Property for a transport depot, rather than for a separate, use, namely storage.
>
> …
>
> [53] As the cases to which I referred at [46]-[49] have confirmed, determining the use to which land is being put may involve questions of fact and degree. In this case, the evidence given by Mr McDermott - which confirmed that sea containers could be seen in the same locations on the Property in the photographs dated 28 March, 15 June and 1 August 2014 - supported the inference that the sea containers remained in those locations

[9] ***Bright Image Dental Pty Ltd v City of Gosnells*** [2017] WASC 229 [45] (Pritchard J).
[10] ***Bright Image Dental Pty Ltd v City of Gosnells*** [50] - [56].

> throughout that period. That in turn supported the finding that the placement of the sea containers on the Property was more than merely temporary, so that it was open to the learned magistrate to find that the Property was being used to store the sea containers for future use.
>
> [54] Further, the learned magistrate's finding that the sea containers had been on the Property for 127 days excluded any basis for concluding that the sea containers were merely temporarily on the Property, in which case no approval for their presence on the land would have been required, by virtue of cl 9.2(e) of the TPS (see [20] above).
>
> [55] In those circumstances, there was no error of fact or law by the learned magistrate in his finding that the Property was being used for storage, in that the Property was being used for the storage of the sea containers.
>
> [56] For completeness, one further observation should be made. In this case, the charge was that Bright Image had carried out a development of the Property, in that it was used for storage, without approval. The use of the Property for a transport depot was also clearly a 'development' which was not approved. At times in her submissions, counsel for the City appeared to contend that the evidence establishing that the Property had been used for a transport depot was also capable of supporting the Charge. The City did not, however, seek to raise that issue by a notice of contention or cross appeal. Furthermore, the City's case at trial was run entirely on the basis that the unapproved development was the use of the Property for 'storage'. Having run its case on that basis, it is difficult to see how it would have been open to the City to contend that the charge was proved on a different basis, namely that the evidence established that Bright Image had carried out an unapproved development of a different kind. It is, however, unnecessary to explore this issue any further, given that Bright Image has not succeeded in making out ground 2 of its grounds of appeal.

28 For those reasons, the judge considered that this ground had no rational or logical prospect of success with the result that leave to appeal should be refused.

29 In relation to the ground arising from s 164 of the Act, the judge considered that the ordinary meaning of the words in s 164(4) was to the effect that approval was not directed to events in the past, but rather to the future. The judge considered that construction of the provision was supported by the statutory context, including the more specific and general statutory context, the legislative presumption against

retrospective operation, and the legislative history and purpose of the Act.

The grounds of appeal

Ground 1 - Was the magistrate correct to find that the sea containers were being stored?

30 At the commencement of the hearing of the appeal, the first ground of appeal was in the following terms:

> The court erred in law by concluding that the presence of storage containers was not incidental to the use of the premises as a transport depot.

31 Formulation of the ground in this way prompted the respondent to serve a notice of contention to the effect that the judge at first instance was wrong to conclude that the magistrate found that the property was being used as a 'transport depot'. The respondent submits that the error of the judge at first instance in this respect provides another reason for dismissing the appeal from her decision, on the basis that the magistrate did not find that the property was used as a 'transport depot', to which the placement of the sea containers could be incidental.

32 The ground of appeal formulated in this way confronted a number of issues, apart from those raised by the respondent's notice of contention. The first is that the appellant's use of the land as a 'transport depot' had not been approved by the respondent prior to or during the offence period. As formulated, the ground essentially contended that the magistrate should not have concluded that the appellant carried out the unlawful development of 'storage', because he should have concluded that the appellant carried out the unlawful development of 'transport depot'.

33 The provision of the Scheme which the appellant was said to have contravened is cl 9.1 which relevantly provides:

> Subject to cl 9.2, all development on land zoned and reserved under the Scheme requires the prior approval of the local government. A person must not commence or carry out any development without first having applied for and obtained the planning approval of the local government under Part 10.

34 The ground of appeal as originally formulated raises a question as to whether the specification of the particular form of development commenced or carried out without the prior approval of the respondent

(in this case, 'storage') is a material element of an offence contrary to s 218(a) of the Act which must be proven, or merely a particular, which need not be proven. There is much to be said for the proposition that commencing or carrying out any form of development without the prior approval of the respondent involves a contravention of cl 9.1 of the Scheme, and therefore an offence contrary to s 218(a) of the Act, irrespective of the specific class of use within which the relevant development might fall - see ***Mocilac v City of Fremantle***.[11] If that proposition is accepted, the appellant was properly convicted irrespective of whether the development which was found to have been carried out without approval was classified as 'transport depot' or 'storage'.

35 Alternatively, if this ground of appeal had remained as formulated, and had succeeded, a question would have arisen as to whether the court should nevertheless dismiss the appeal on the ground that no substantial miscarriage of justice had occurred (the proviso).[12]

36 If the court had been called upon to consider that question, another question would have arisen as to whether it was open to the respondent to uphold the conviction on some basis other than that the lawful development was 'storage' having regard to the manner in which the case was conducted at first instance. I have set out above the observations made by the judge on that topic.[13] In that context, as I have already noted, cl 9.1 of the Scheme is contravened and in consequence an offence contrary to s 218(a) of the Act committed if any form of unlawful development is commenced or carried out without the prior approval of the respondent. Unless the terms of the Scheme provide that approval is not required for a particular class of use within a particular zone or zones, the classification of the development unlawfully carried out by reference to the use table contained within the Scheme is a distraction from the proper consideration or determination of the charge.

37 Nevertheless, it could be contended that by specifying that the development unlawfully carried out was 'storage', principles of procedural fairness required the respondent to be confined to the charge formulated in that way. Had it been necessary to determine that issue, I would not have thought that the description of the development by reference to a particular class of use, which ultimately had no significance to the essential components of the offence allegedly committed, would have deprived the appellant from knowing the case

[11] ***Mocilac v City of Fremantle*** [2014] WASC 56 [43].
[12] Utilising the powers conferred by s 14 and s 18 of the *Criminal Appeals Act 2004* (WA).
[13] See [27] above; ***Bright Image Dental Pty Ltd v City of Gosnells*** [56].

which it had to meet. There is a cogent argument to the effect that it must have been abundantly clear to the appellant that the various uses to which the land was being put prior to the grant of approval on 26 August 2014 were said to constitute, either singly or in combination, the commencement or carrying out of unlawful development, as the respondent had not granted approval for any use of the land, and it was not contended that the land was being used in such a way that approval was not required.

38 The attention of the parties was drawn to these issues by a letter from the Registry of the court prior to the hearing. In the days before the hearing was due to commence, the appellant gave notice that it would move to amend the ground of appeal so that it read:

> The court erred in law by concluding that the presence of sea containers was a use of the premises for storage.

39 During the course of the hearing, that application was allowed, on condition that the appellant pay any costs thrown away by reason of the amendment, and the further condition that the respondent be given the opportunity to file and serve written submissions responding to the amended ground.

40 Notwithstanding that the amendment deleted specific reference to the use being incidental to the use of 'transport depot', in the course of oral argument counsel for the appellant persisted with the argument based on that proposition.[14] Accordingly, it appears necessary to resolve the respondent's notice of contention. However, that is easily done, because it is, with respect, clear that the magistrate made no finding to the effect that the land was being used as a 'transport depot', as counsel for the appellant conceded.[15]

41 However, for the reasons which she gave, the judge was correct to conclude that there was no evidence to sustain the proposition that the sea containers were being used for purposes incidental to use of the land as a transport depot.[16] As she observed, the evidence suggested that the sea containers were simply placed on the property, that they were not seen regularly coming and going from the property, or, indeed, on the back of trucks coming and going from the property. They were present in large numbers and the evidence established that a number of them remained on the property for months at a time. Accordingly, assuming

[14] Appeal ts 13.
[15] Appeal ts 13.
[16] ***Bright Image Dental Pty Ltd v City of Gosnells*** [50].

for the sake of argument, that the respondent bore the onus of proving that the use to which the land was being put in relation to the sea containers was not incidental to the use of 'transport depot', the evidence adduced by the respondent established that proposition beyond reasonable doubt. It is therefore unnecessary to consider whether the conviction of the appellant could be upheld irrespective of the classification of the form of unlawful development commenced and carried out, or whether the proviso should be applied.

42 As I have noted, the evidence of Mr McDermott, combined with the aerial photographs of the property, established that there were a significant number of sea containers placed on the property throughout the offence period. As E M Heenan J held in ***City of Armadale v Chapman***,[17] the placement of the single sea container on land will generally amount to the development or use of land requiring planning approval - relying upon a series of decisions in the State Administrative Tribunal. Further, in ***Daniele v Shire of Swan***,[18] the Full Court of this court held that the placement of 20 derelict railway carriages on land constituted development for which prior approval was required. Pidgeon J observed:-[19]

> The prime fact on which the prosecutions were based was that the appellant brought onto and stored on her land the bodywork from 20 railway goods wagons. These have been described in the proceedings as "railway carriages". They are stored on the land in a haphazard and untidy manner and would be a visual affront to adjoining owners. The appellant concedes there may well be a wrongful use by her of the land, but claims it is not a development and consequently she could not be convicted of offences requiring a development to be established. In my view this is a development in the ordinary sense of the word. Storing items of this type in the manner that they are stored has perpetuated a change in the character of the land. They have the appearance of buildings and could be used for such. They rest on the land by their own weight. They have no wheels and cannot readily be moved. Regard must be had to the number of items. I consider the appeal must be dismissed on this basis and there is no need to express a view on the other questions raised.

43 Ipp J observed, of the appellant in that case:[20]

> By allowing the land to be used for the storage of the derelict carriages, she is doing two things which in my view are inimical to a passive use of

[17] ***City of Armadale v Chapman*** [2012] WASC 423 [11].
[18] ***Daniele v Shire of Swan*** (1998) 20 WAR 164.
[19] ***Daniele v Shire of Swan*** (1998) 20 WAR 164, 166 (Pidgeon J).
[20] ***Daniele v Shire of Swan*** (1998) 20 WAR 164, 176 (Ipp J).

> land. First, by using the land for storage she is actively using the land. Secondly, by storing the carriages she is perpetuating the change in the character of the land (even though its physical characteristics remain unaltered: …). In my view the appellant's use of the land is not passive.

44 Owen J also considered that the storage of 20 or so railway carriages involved development of the land because it altered or affected the essential character of the use to which the land was being put.[21]

45 Given the number of sea containers placed on the appellant's land throughout the offence period, their inherent immobility, and the fact that a significant number of them were not moved throughout the several months of the offence period, it is impossible to resist the conclusion that the land was being used for the storage of sea containers. Consistently with the authorities to which I have referred, that use constitutes development of the land. Commencing or carrying out that development without the prior approval of the respondent was a contravention of cl 9.1 of the Scheme and, in consequence, an offence against s 218(a) of the Act.

46 For these reasons, the first ground of appeal is without substance. Leave to appeal should be refused.

Ground 2

47 Ground 2 is in the following terms:

> The court erred in law with respect to the construction of s 164 of the *Planning and Development Act 2005* (WA) in finding the provision does not apply retrospectively.
>
> 2.1 the ordinary and natural meaning of the words in s 164(4) are unambiguous in that this provision provides that planning approval may be granted for a development already commenced and the grant of that approval will render development lawful from the date it commenced.
>
> 2.2 section 164(5) speaks prospectively, whereas s 164(4) operates retrospectively.
>
> 2.3 the correct construction of s 164(3) is not to enable enforcement proceedings to be commenced, after an approval under s 164(4) has been obtained.

[21] ***Daniele v Shire of Swan*** (1998) 20 WAR 164, 177 (Owen J).

2.4 further, the effect of s 164(3) is that if enforcement proceedings are underway at the time and approval under s 164 is granted, such an approval will give rise to a defence to such proceedings.

2.5 the parliamentary intention of s 164(4) is to enable authorisation of developments commenced unlawfully from which it follows that the provision was intended to have retrospective application.

2.6 the court inappropriately, with respect, used a public policy objective, grounded in s 164(3), to remove the plain and ordinary meaning of the words in s 164(4).

48 The particulars of the ground are, in effect, argument, rather than a statement of the ground. However, they provide a convenient précis of the arguments advanced on behalf of the appellant with respect to this ground.

Section 164 of the Act

49 Section 164 of the Act provides:

Development commenced or carried out, subsequent approval of

(1) A responsible authority may grant its approval under a planning scheme or interim development order for development already commenced or carried out.

(2) The Commission may grant its approval under section 116 for development already commenced or carried out in a planning control area.

(3) Subsections (1) and (2) do not affect the operation of the provisions of Part 13 in respect of development commenced or carried out before approval has been granted.

(4) 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.

(5) The continuation of development unlawfully commenced is to be taken to be lawful upon the grant of approval for the development.

Clause 9.4 of the Scheme

50 Clause 9.4 of the Scheme contains provisions which are substantively similar to s 164. It provides:

> **9.4 Unauthorised existing developments**
>
> 9.4.1 the local government may grant planning approval to a use or development already commenced or carried out regardless of when it was commenced or carried out, if the development conforms to the provisions of the scheme.
>
> 9.4.2 development which was unlawfully commenced is not rendered lawful by the occurrence of any subsequent event except the granting of planning approval, and the continuation of the development unlawfully commenced is taken to be lawful upon the grant of planning approval.

51 Clearly the purpose of each of s 164 and cl 9.4 of the Scheme is to authorise a planning authority (in the case of s 164), including the respondent (in the case of cl 9.4), to approve a development which was commenced or carried out without prior approval. To that extent, the provisions appear to address the decision in ***Mosman Park Town v Esther Investments Pty Ltd***,[22] in which Wheeler J held that the Metropolitan Region Scheme did not authorise the grant of approval for development work which had been completed.[23]

Ground 2 - disposition

52 Ground 2 should be dismissed essentially for the reasons given by the judge at first instance, with which I respectfully agree. However, in order to assure the appellant that specific consideration has been given to each proposition advanced in support of the ground, I will respond to those propositions in the order in which they are presented.

Ground 2.1

53 The appellant asserts that the ordinary and natural meaning of the words in s 164(4) are unambiguous and clearly mean that the grant of approval for development already commenced will render that development lawful from the date upon which it commenced. In support of that proposition, the appellant points out that s 164(4) only applies to development which has been commenced or carried out in the past, with the result that it should be given a retrospective construction. The first part of that proposition must be accepted, but not the second.

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[22] ***Mosman Park Town v Esther Investments Pty Ltd*** (1996) 93 LGERA 38.

[23] Although it was accepted that in some circumstances approval could be granted during the course of carrying out development works.

54 Clearly s 164(4) refers to development which has taken place prior to the grant of approval. That is the subject of the section. The section would have no operation if no development had been unlawfully commenced or carried out before approval was given. However, it does not follow from that fact that the section should be construed as rendering previously unlawful development lawful from the date it commenced. Indeed, contrary to the appellant's submissions, there are no words in the section which convey that meaning.

55 The appellant relies upon the words 'rendered lawful' for its proposition. However, as the judge noted, the word 'render', when used as a verb, means 'to make or cause (a person or thing) to be or become as specified'.[24] Therefore, while it is clear that the effect of the section is to provide that the grant of approval in respect of work unlawfully commenced or carried out causes or makes the 'development' to be lawful, the section does not specifically address the question of the time from which the development will become lawful.

56 That which is rendered lawful by s 164(4) is 'development' not the actions or conduct which may have constituted development. 'Development' is defined by s 4(1) of the Act to mean 'the development or use of any land'. Where 'development' occurs only by use, there will be no material distinction between the 'development' and the actions or conduct constituting it. However, 'development' also includes such things as the construction of a building on land. Therefore, in s 164(4), that which is rendered lawful may be a building which was unlawfully constructed, or a use which is continuing.

57 The subsection does not render lawful the past conduct which resulted in the construction of the building, or the past unlawful use, but only the 'development' which has been approved, being either, say, a building, or the future use of the land. If it had been the intention of the legislature to provide that conduct which was unlawful, and which constituted a criminal offence at the time it was carried out, should be retrospectively legitimised, so that it never was unlawful, it would be reasonable to expect clear and unequivocal language to have been used.

58 For these reasons, contrary to the appellant's primary submission, the plain and ordinary meaning of s 164(4) is that if approval for 'development', which was unlawfully commenced or carried out, is granted, the 'development' is thereafter rendered lawful, whether it be

[24] ***Bright Image Dental Pty Ltd v City of Gosnells*** [75].

development in the form of physical alteration to the land, or use of the land.

Ground 2.2

59 The appellant contends that s 164(5) speaks prospectively, whereas s 164(4) operates retrospectively. Once again, the first part of this proposition must be accepted, but not the second. Section 164 (5) reinforces the construction arising from the natural and ordinary meaning of the words in s 164(4). It provides that the continuation of development unlawfully commenced is to be taken to be lawful upon the grant of approval for the development. By its terms, it clearly distinguishes between conduct which takes place after the grant of approval ('continuation'), and conduct which took place before the grant of approval. The former is lawful, whereas implicitly, the latter is not.

60 If, as the appellant contends, the natural and ordinary meaning of s 164(4) is that development is retrospectively deemed to have been lawful from the date of its commencement, s 164(5) would be entirely otiose and serve no purpose whatever, contrary to established principles of statutory construction. Accordingly, the fact that s 164(5) speaks prospectively means that s 164(4) cannot be construed to operate retrospectively.

Ground 2.3

61 The appellant asserts that the correct construction of s 164(3) is to prevent enforcement proceedings being commenced after approval has been granted in respect of development which was unlawfully commenced or carried out. This proposition draws no support from the terms of s 164(3). To the contrary, s 164(3) provides strong support for the construction of s 164(4) which I have enunciated. It provides that the previous subsections, which authorise the grant of approval in respect of development already commenced or carried out, do not affect the operation of the provisions of pt 13 in respect of development commenced or carried out before approval has been granted. The sub-section, like s 164(5), clearly distinguishes between conduct constituting development which occurs prior to the grant of approval, and conduct which occurs after the grant of approval. That structure is entirely inconsistent with the construction of s 164(4) for which the appellant contends.

62 The purpose of s 164(3) is clear from the natural and ordinary meaning of its terms. As pt 13 of the Act is concerned with enforcement

of planning controls and regulation, and includes within its provisions the offences created by s 218, its purpose is to provide that in cases in which approval is granted in respect of development already commenced or carried out, enforcement action may be taken in respect of development commenced or carried out prior to the grant of approval. In that respect, it is entirely consistent with s 164(5) and the proper construction of s 164(4).

63 The appellant submits that the legislative purpose evident in the language of s 164(3) is to provide that the mere existence of the power to grant approval does not prevent enforcement action being taken. In support of that proposition, the appellant contends that the subsection should be construed as if a comma was inserted prior to the reference to the grant of approval, so that the subsection read:

> Subsections (1) and (2) do not affect the operation of the provisions of Pt 13 in respect of development commenced or carried out, before approval has been granted.

64 The obvious objection to this proposition is that the legislature has not included the comma and should not be taken to have intended that the subsection be read as if it were included. Further, the appellant's basic proposition suffers from the fundamental flaw that s 164(3) will only have any effect or operation if and when approval has been granted. Accordingly, it is not possible to attribute to the legislature an intention that it operate in circumstances where no approval has been granted after development has commenced, in respect of development previously commenced or carried out.

Ground 2.4

65 The appellant further contends that the effect of s 164(3) is to confer a defence in respect of proceedings under way at the time an approval under s 164 is granted. That proposition is directly contrary to the clear and unequivocal terms of the words used in the subsection. They provide that the grant of approval has no effect upon enforcement in respect of development commenced or carried out prior to the grant of approval.

Ground 2.5

66 The appellant contends that the intention of s 164(4) is to enable authorisation of developments commenced unlawfully, from which it follows that the provision was intended to have retrospective application. Once again, the first part of the proposition must be accepted, but not the

second. For reasons I have already developed, the fact that s 164(4) only applies to development which was unlawfully commenced or carried out tells one nothing of the legislature's intention with respect to its retrospective application.

Ground 2.6

67 The appellant asserts that the judge at first instance inappropriately relied upon the broader statutory context and the public policy implicit in that broader context to 'remove the plain and ordinary meaning of the words in s 164(4)'. The first problem with this proposition is that the plain and ordinary meaning of the words in s 164(4) are not consistent with the appellant's propositions. More fundamentally, however, the judge at first instance was correct to construe s 164 in the broader context of the Act as a whole, and in the light of the public policies evident in the provisions of the Act as a whole.

68 Section 162 of the Act provides that where a planning scheme provides that development is not to be commenced or carried out without approval being obtained upon the making of a development application, a person must not commence or carry out that development unless the approval has been obtained and is in force. This provision reinforces, in statutory form, provisions to be found in many planning schemes, including this Scheme.

69 The evident scheme of the Act is to require applications for approval to be made prior to the commencement or carrying out of development. There are obvious reasons for that requirement. The consideration of applications for development approval prior to the commencement or carrying out of development enables proper and ordinary planning of development in the area the subject of the relevant planning control, the imposition of conditions upon any development, the monitoring of development as it takes place, and the collection of fees necessary to support the regulatory scheme. Those objectives are enhanced and supported if the offence provisions of the Act are construed as applicable to conduct which constitutes the commencement or carrying out of development prior to the grant of approval, irrespective of whether or not approval is subsequently granted. The evident scheme of the Act would be significantly undermined by the construction for which the appellant contends which would, in effect, provide retrospective immunity to those who had flouted the scheme of the Act.

Section 214 of the Act

70 In the course of argument, an issue arose as to the manner in which the provisions of pt 13 relating to the removal of development undertaken unlawfully[25] are to be reconciled with the proper construction of s 164.

71 Section 214(3) of the Act provides:

> If a development has been undertaken in contravention of a planning scheme or interim development order or in contravention of planning control area requirements, the responsible authority may give a written direction to the owner or any other person who undertook the development -
>
> (a) to remove, pull down, take up, or alter the development; and
>
> (b) to restore the land as nearly as practicable to its condition immediately before the development started, to the satisfaction of the responsible authority.

72 Failure to comply with a direction given pursuant to this provision is an offence.[26] Further, if a person upon whom a notice is served pursuant to s 214(3) fails to comply with the direction, the responsible authority may itself, do the work necessary to give effect to the direction, and recover the expense of that work from the person to whom the direction was given.[27] A person to whom a direction is given under s 214 of the Act may apply to the State Administrative Tribunal for a review of the decision to give that direction.[28]

73 During the hearing questions arose as to whether s 164 of the Act, if construed in the manner I have suggested above, would have the effect that a responsible authority could give a direction under s 214(3) requiring, for example, the removal of a physical development erected in contravention of a scheme, notwithstanding that the development had subsequently been approved. It was observed that, read literally, s 214(3) applies to any circumstance in which a development has been undertaken in contravention of a scheme. As s 214 is within pt 13, pursuant to s 164(3) its operation is not affected by the grant of subsequent approval in respect of development commenced or carried out before approval has been granted.

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[25] Section 214.
[26] Section 214(7).
[27] Section 215.
[28] Section 255.

74 However, it seems most inappropriate to attribute to the legislature an intention that a planning authority could direct the removal of a physical development carried out in contravention of a scheme after the development had been approved by that authority.

75 A common sense construction of s 214(3) is that it only applies in circumstances where the development had not been approved at the time the direction was issued. Alternatively, it may be that the legislature could be assumed to have intended that the safeguard against abuse of the power conferred by s 214(3) is provided by the right of review to the State Administrative Tribunal. In the further alternative, it might be assumed that legislature was proceeding on the reasonable assumption that a direction to remove a development which had been approved would be so perverse or unreasonable, in the legal sense, as to fall outside the scope of the powers conferred by s 214(3).

76 In my view, the determination of this issue should await a case in which it is an issue which must be decided by the court, and in which the issue has been addressed by considered argument presented by the parties. This is not such a case. For the purposes of this case, it is sufficient to observe that any hypothetical difficulty in the operation of s 214(3) arising from the construction of s 164 I would adopt is not so clear or of sufficient weight to displace the natural and ordinary meaning of the words used in s 164(4), reinforced by the indicators of meaning to be derived from the remainder of s 164 and the Act as a whole.

77 As the proper construction and operation of s 164 of the Act is not without its difficulties, and may involve issues of some general application, I would grant leave to appeal in respect of ground 2. However, for the reasons I have given, I would dismiss the ground.

Conclusion

78 Leave to appeal should be granted in respect of ground 2, but refused in respect of ground 1. Both grounds of appeal, and the appeal, should be dismissed.

BUSS P & MITCHELL JA:

79 Martin CJ has set out the relevant background. For the following reasons, we agree that, while leave to appeal should be granted on ground 2, the appeal must be dismissed.

Ground 1: Categorisation of the unlawful use as 'storage'

80 The appellant was charged with a continuing offence, which was alleged to have been committed between 28 March 2014 and 25 August 2014. The offence was carrying out development on its Maddington property without the prior approval of the respondent.

81 The prosecution notice particularised the development as 'storage'. The prosecutor's opening at trial clearly indicated that the 'storage' alleged involved the placement and keeping of various items, including sea containers, on the Maddington property between those dates.[29] There was clear and uncontested evidence establishing that items, including the sea containers, were present at the Maddington property, owned and occupied by the appellant, during that period. There was no suggestion that the appellant was taken by surprise by the opening because it did not understand or anticipate that the location of those items, including the sea containers, on the Maddington property was the subject of the charge.

82 The offence with which the appellant was charged is created by s 218(a) of the *Planning and Development Act 2005* (WA) (**Act**). Section 218(a) provides that a person who contravenes the provisions of a planning scheme commits an offence.

83 The planning scheme in this case is the *City of Gosnells Town Planning Scheme No 6* (**Scheme**). The Scheme is continued as a local planning scheme, having effect as if enacted by the Act, by s 68(1) of the Act, and is a 'written law' for the purposes of the *Interpretation Act 1984* (WA). Clause 9.1 of the Scheme provides:

> Subject to clause 9.2, all development on land zoned and reserved under the Scheme requires the prior approval of the local government. A person must not commence or carry out any development without first having applied for and obtained the planning approval of the local government under Part 10.

[29] Trial ts 19 - 20.

84 Clause 9.2 of the Scheme identifies uses which do not require the planning approval of local government.

85 The term 'development' is defined in s 4(1) of the Act. We will return to that definition in greater detail when dealing with ground 2. For present purposes, it is sufficient to note that 'development' is defined to include the 'use of any land'.

86 The elements of the offence with which the appellant was charged were that:

(1) The Maddington property was zoned or reserved under the Scheme;

(2) The appellant used the Maddington property;

(3) The appellant's use of the Maddington property was not a permitted use identified by cl 9.2 of the Scheme; and

(4) The appellant carried out that use without first having applied for and obtained the planning approval of the respondent under pt 10 of the Scheme.

87 It is common ground that the evidence established that the Maddington property was zoned under the Scheme. Counsel for the appellant accepted, quite properly, that placing and leaving sea containers on the Maddington property constituted a use of the land which was not a permitted use identified in cl 9.2 of the Scheme.[30] The uncontested and unchallenged evidence was that no planning approval under pt 10 of the Scheme was obtained for that use before an approval was granted on 26 August 2014.[31] Therefore, subject to the appellant's contention in ground 1, as amended, and its argument about the retrospective effect of the planning approval granted on 26 August 2014, the evidence clearly proved, beyond reasonable doubt, the appellant's guilt of the offence against s 218(a) of the Act.

88 In this context ground 1, as amended, contends that the magistrate and the primary judge erred by concluding that the presence of sea containers was a use of the Maddington property for 'storage'.

[30] Appeal ts 4. See ***Mocilac v City of Fremantle*** [2014] WASC 56; (2014) 199 LGERA 405 [40] - [41]; ***City of Armadale v Chapman*** [2012] WASC 423 [11]; ***Daniele v Shire of Swan*** (1998) 20 WAR 164.
[31] Trial ts 111; exhibit 8.

89 In our view, the issue which that ground seeks to raise is simply irrelevant to the appellant's criminal liability for the charged offence. The appellant accepts that placing and leaving the sea containers on the Maddington property was a use of land zoned under the Scheme that was not a permitted use, within the scope of the charge as opened at trial. It is common ground that no planning consent was granted or obtained during the offending period. For the reasons that we explain in considering ground 2, the approval that was subsequently granted did not have retrospective effect. It is not suggested that the manner in which the case was opened took the appellant by surprise and denied it a fair trial.

90 Against that background, it is unnecessary to enter into an unedifying debate about which use category defined in the Scheme was constituted by the offending conduct. In our view, the reference to 'storage' in the prosecution notice was no more than a particular which the prosecution did not need to establish in order to prove that the appellant committed the charged offence. Even if the magistrate erred in concluding that the use of the Maddington property was for 'storage' as that term was defined in the Scheme, either:[32]

(1) the error was not a relevant 'error of law',[33] because it was immaterial to the question of the appellant's guilt; or

(2) in the circumstances of this case (where the guilt of the appellant has been proved and any error could not have affected the outcome) there can have been no substantial miscarriage of justice.[34]

91 Therefore, the error alleged by ground 1 is, in the circumstances, incapable of leading this court to set aside the appellant's conviction.

92 Further, to any extent that it might be material, we agree with the primary judge and with Martin CJ that the appellant's activities on the land constituted storage of the sea containers.

93 In our view, there is no merit to ground 1. We would refuse leave to appeal on that ground.

[32] See s 8(1)(a) and s 14(2) of the *Criminal Appeals Act 2004* (WA).
[33] Section 8(1)(a)(i) read with s 14(1)(b) of the *Criminal Appeals Act*, as applied by s 18 of that Act.
[34] Section 14(2) of the *Criminal Appeals Act*, as applied by s 18 of that Act.

Ground 2: Did the subsequent approval have retrospective operation?

94 It is common ground that, on 26 August 2014, the respondent granted a planning approval under pt 10 of the Scheme. Ground 2 in effect contends that the magistrate and primary judge erred in finding that the planning approval did not operate retrospectively, so as to immunise the appellant from conviction of the offence.

Statutory context

95 Section 162(1) of the Act relevantly provides:

> Subject to this Act, where a planning scheme … provides that development referred to in the planning scheme … is not to be commenced or carried out without approval being obtained upon the making of a development application, a person must not commence or carry out that development on land to which the planning scheme … applies unless:
>
> (a) the approval has been obtained and is in force under the planning scheme …

The term 'development application' is defined in s 4(1) to mean, relevantly, 'an application under a planning scheme … for approval of development'. By s 162(2), nothing in s 162 limits or otherwise affects a right or entitlement under any other written law.

96 Section 162 of the Act does not provide for the legal consequences of a failure to comply with that section. Part 13 of the Act provides for three legal consequences of a failure to adhere to the legal rule provided for in s 162.

97 **First**, s 214 of the Act provides for certain consequences where a development is or has been undertaken 'in contravention of a planning scheme'. For this purpose, development is relevantly undertaken in contravention of a planning scheme if the development:[35]

> (i) is required to comply with the planning scheme … ; and
>
> (ii) is commenced, continued or carried out otherwise than in accordance with the planning scheme …

98 Under s 214(2) of the Act, if development 'is undertaken' in contravention of a planning scheme, the responsible authority (here the respondent) may give a written direction to a relevant person to 'stop, and

[35] Section 214(1)(a) of the Act.

not recommence, the development'. Under s 214(3), if development 'has been undertaken' in contravention of a planning scheme, the responsible authority may give a written direction to a relevant person:

> (a) to remove, pull down, take up, or alter the development; and
>
> (b) to restore the land as nearly as practicable to its condition immediately before the development started, to the satisfaction of the responsible authority.

Such a direction is subject to review by the State Administrative Tribunal.[36] There is a temporal distinction between s 214(2) and s 214(3). Section 214(2) applies where development is being undertaken at the time when the direction to stop, and not recommence, the development is given. Section 214(3) applies where development has already been undertaken at the time when the direction to remove etc is given.

99 Failure to comply with a written direction under s 214(2) or s 214(3) may constitute an offence against s 214(7) of the Act. It may also lead the responsible authority to exercise its power under s 215(1) of the Act to:

> itself remove, pull down, take up or alter the development, [or] restore the land as nearly as practicable to its condition immediately before the development started … as it directed that person.

Under s 215(2), any expenses incurred by a responsible authority under s 215(1) may be recovered from the person to whom the direction was given as a debt due in a court of competent jurisdiction.

100 **Secondly**, s 216 of the Act gives the Supreme Court power to grant injunctive relief where, relevantly, a person contravenes a provision of the Act (which would include s 162) or a planning scheme. In such a case, relevantly, the court may, on application by the responsible authority, grant an injunction restraining the person from:[37]

> engaging in any conduct or doing any act, that constitutes or is likely to constitute a contravention of this Act … or the planning scheme.

101 **Thirdly**, the person may commit an offence against s 218 of the Act, which relevantly provides:

[36] Section 255 of the Act.
[37] Section 216(1)(c) of the Act.

A person who:

(a) contravenes the provisions of a planning scheme; or

(b) commences, continues or carries out any development in … any part of an area the subject of a local planning scheme … otherwise than in accordance with the provisions of the planning scheme;

…

commits an offence.

Section 164 of the Act

102 In this statutory context, s 164 of the Act relevantly provides:

(1) A responsible authority may grant its approval under a planning scheme … for development already commenced or carried out.

…

(3) [Subsection (1) does] not affect the operation of the provisions of Part 13 in respect of development commenced or carried out before approval has been granted.

(4) 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.

(5) The continuation of development unlawfully commenced is to be taken to be lawful upon the grant of approval for the development.

103 The following points may be noted about s 164 of the Act:

(1) Section 164 is a legislative response to the decision of the court in ***Mosman Park Town v Esther Investments Pty Ltd***,[38] in which Wheeler J held that provisions of the *Metropolitan Region Scheme* did not allow for development to be approved subsequent to its completion. ***Esther Investments*** was decided in a context where approval of aspects of the construction of dwellings was sought after completion of the buildings.

(2) Section 164(3) does not say that the grant of approval under s 164(1) for development already commenced or carried out has no effect on the operation of pt 13 of the Act. If it did then the grant of approval under s 164(1) would have no effect upon the

[38] ***Mosman Park Town v Esther Investments Pty Ltd*** (1996) 93 LGERA 38.

legal status of the development or the legal consequences for a relevant person, as all of those matters arising from commencing or carrying out development without approval are provided for in pt 13. Relevantly, s 164(3) provides that s 164(1) does not affect the operation of the provisions of pt 13. It does not say that s 164(4) and s 164(5), or the grant of approval under s 164(1), has no effect on the operation of pt 13. Rather, the manner in which the grant of an approval under s 164(1) affects the operation of pt 13 is provided for in s 164(4) and s 164(5) of the Act. Section 164(3) simply makes it clear that the mere existence of the power to grant approval, conferred by s 164(1), does not affect the operation of pt 13 of the Act.

(3) Section 164(4) is concerned with development which 'was unlawfully commenced or carried out', while s 164(5) is concerned with the 'continuation of development unlawfully commenced'. In that manner, s 164(4) operates in respect of development which has been undertaken prior to the grant of approval under s 164(1). By contrast, s 164(5) is concerned with the continuation, after the grant of approval, of development that was commenced prior to the grant of approval.

(4) Section 164(5) provides that the continuation of development unlawfully commenced is to be taken to be lawful upon the grant of approval under s 164(1). By that means, s 164(5) ensures that the unlawful status of the development does not derogate from the lawful authority to continue the development once approval is granted. Section 164(5) makes lawful the activity of continuing, after the grant of approval, a development that was unlawfully commenced prior to the grant of approval.

(5) Under s 164(4), development which has been commenced or carried out prior to the grant of approval is 'rendered lawful' by the subsequent grant of the approval under s 164(1) of the Act.

104 The question of statutory construction raised by ground 2 concerns the legal effect of development commenced or carried out prior to the grant of approval being 'rendered lawful' under s 164(4) of the Act. That exercise in statutory construction is to be undertaken in a manner which

gives primacy to the statutory text, and that has regard to the objectively ascertained legislative purpose.[39]

'Development' for the purposes of the Act

105 In our view, the key to understanding the operation of s 164(4) of the Act is to appreciate the two different senses in which the term 'development' is employed in pt 10 and pt 13 of the Act.

106 'Development' is defined in s 4(1) of the Act in the following terms:

> ***development*** means the development or use of any land, including -
>
> (a) any demolition, erection, construction, alteration of or addition to any building or structure on the land;
>
> (b) the carrying out on the land of any excavation or other works;
>
> (c) in the case of a place to which a Conservation Order made under section 59 of the *Heritage of Western Australia Act 1990* applies, any act or thing that -
>
> (i) is likely to change the character of that place or the external appearance of any building; or
>
> (ii) would constitute an irreversible alteration of the fabric of any building.

107 'Development', in its defined sense, denotes an activity rather than the product of an activity. That is clearly the case in respect of the 'development' limb of the definition and the inclusive examples given in par (a) - (c) of the definition. Further, in ***University of Western Australia v City of Subiaco***,[40] Burt CJ noted that an equivalent definition of the term 'development' in the *Town Planning and Development Act 1928* (WA):

> makes use of and it encompasses two ideas. The first is the 'use' of the land which 'comprises activities which are done in ... or on the land but do not interfere with the actual physical characteristics of the land' and the second being 'activities which result in some physical alteration to the land which has some degree of permanence to the land itself'. (citation omitted)

[39] ***Australian Unity Property Ltd v City of Busselton*** [2018] WASCA 38 [79] - [85].
[40] ***University of Western Australia v City of Subiaco*** (1980) 52 LGRA 360, 363 - 364.

Both of the ideas identified by Burt CJ concern an activity rather than the product of an activity. By way of example, when a house is constructed on land, the 'development' in the defined sense is the activity of constructing the house, rather than the house itself. The product of the activity is the partly or fully constructed house. When the house is 'used' as a dwelling, the 'development' in the defined sense is the activity of 'using' the house rather than the house itself.

108 By the chapeau to s 4(1) of the Act, the term 'development' is used in its defined sense 'unless the contrary intention appears'. As the history reviewed by Ipp J in ***Daniele*** illustrates,[41] the term 'development' has not always been used consistently in the predecessors to the Act. In our view, that is a feature of the Act.

109 A written direction issued under s 214(3) of the Act may require the relevant person to 'remove, pull down, take up, or alter *the development*'. When the power in s 215(1) is activated, the responsible authority may itself 'remove, pull down, take up or alter *the development*'. In these provisions, the term 'development' is not used to denote an activity but rather to identify the product of an activity. In the example of the construction of a house, what may be removed etc is not the activity of constructing the house, but rather the house itself.

110 It is then necessary to consider whether the particular context in which the word 'development' is used in s 164(4) of the Act evinces a 'contrary intention' to use that defined term other than in its defined sense.[42]

Proper construction of s 164 of the Act

111 In our view, what is 'rendered lawful' by operation of s 164(4) of the Act is the product of the activity rather than the activity itself. To continue with the example of constructing a house, what is rendered lawful by the grant of an approval is the house rather than the activity of constructing the house. Once the development comprising the house is 'rendered lawful', it is implicit that the responsible authority cannot exercise its powers in s 214(3) or s 215(1) to direct the removal etc of the house, or to do so itself. However, the person who constructed the house may still be prosecuted for commencing or carrying out the construction

[41] ***Daniele*** (168 - 173).
[42] See ***Duperouzel v Cameron*** [1973] WAR 181, 182 - 183, applied in ***Re Town Planning Appeal Tribunal; ex parte Environmental Protection Authority*** [2003] WASCA 248; (2003) 27 WAR 374 [66], [126] and ***Commissioner of State Revenue v Abbotts Exploration Pty Ltd*** [2014] WASCA 211; (2014) 48 WAR 300 [117] - [127].

of the house without *prior* approval. The person may also be subject to an injunction under s 216(1)(c) restraining the person from the future undertaking of development without prior approval. The granting of such an injunction could be based on the person's past contravention of the Act and relevant planning scheme.

112 That is to say, the legal effect of development being 'rendered lawful' by s 164(4) of the Act is that the responsible authority may not exercise its powers under s 214(3) or s 215(1) of the Act in respect of the approved development. The legal effect is not to immunise the person who committed the offence of commencing or carrying out development without the required approval from prosecution for the offence created by s 218 of the Act.

113 We reach that conclusion as to the proper construction of s 164(4) of the Act for the following reasons.

114 **First**, that construction is more consistent with the statutory language than that advanced by the appellant. Section 164(4) does not expressly provide for an approval to have retrospective effect, or deem an approval to be operative from an earlier time than it is given. The prohibition contained in s 162(1) of the Act read with s 218 of the Act and cl 9.1 of the Scheme, is against undertaking, commencing or carrying out development without prior approval. The fact that approval is subsequently granted does not take the appellant outside the scope of that prohibition. That strongly counts against s 164(4) operating to remove the liability to conviction which a person has accrued by the commission of an offence against the Act.

115 **Secondly**, the structure of s 164 counts against the appellant's construction of s 164(4) of the Act. The effect of the appellant's construction would be that the grant of approval under s 164(1) would, through s 164(4) and s 164(5), render pt 13 of the Act entirely nugatory in relation to the approved development. Such an operation is inconsistent with the terms of s 164(3) of the Act. Further, the overall structure of s 164 is consistent with the grant of approval under s 164(1) having a more limited effect on the operation of pt 13 of the Act. If the objective intention was to prevent any enforcement action once approval was granted, or to give the approval an entirely retrospective operation, then that could have been achieved in a single subsection. Also, if that was the objective intention, it is to be expected that provision would have been made for cases where a person is convicted of an offence against s 218 before approval under s 164(1) is granted.

116 **Thirdly,** the construction which we prefer advances the express object of the Act to provide for an efficient and effective land use planning system in the State.[43] It would be inimical to such a system if a person could undertake development without required approval with impunity, so long as permission might be obtained after the event. Further, there is no purpose of the Act which would be advanced by construing s 164(4) as immunising a developer from criminal liability which accrued when development was undertaken in contravention of the requirements of the Act. The Act cannot be read as endorsing the philosophy that it is better to ask for forgiveness than permission.

117 The better view is that s 164 was enacted for the purpose of avoiding an impractical outcome which followed from the decision in ***Esther Investments***. On the view taken in ***Esther Investments***, the only way in which the building constructed without approval would not be subject to a power to require its removal etc is if it were demolished and then reconstructed after approval was obtained. Given that context in which s 164(4) was enacted, it is to be inferred that the purpose of the provision is to provide a less wasteful means of regularising the status of buildings and other improvements constructed without approval if it is appropriate to grant an approval. That context does not suggest that the objective purpose was to immunise from criminal conviction persons who had committed an offence by commencing or carrying out development without the required prior approval.

118 **Fourthly**, the effect of the appellant's construction would be to give to executive bodies (principally the Western Australian Planning Commission and local governments) the power to immunise a person undertaking development without the required approval from conviction of that completed offence. It is inherently unlikely that Parliament would confer on the executive such an extraordinary dispensing power except by the clearest of language.

119 When the language of s 164(4) of the Act is considered in its statutory context, having regard to the objectively ascertained legislative purpose, an intention to use the term 'development' other than in its defined sense appears. The 'development' which is rendered lawful by s 164(4) is not the activity referred to in the definition in s 4(1), but the alteration to the land or any existing building or structure on the land which is the product of that activity.

[43] Section 3(1)(b) of the Act.

120 The structure of s 164 of the Act is therefore relevantly as follows:

(1) Section 164(1) gives a responsible authority power to grant approval for development already commenced or carried out.

(2) Section 164(3) ensures that the mere existence of the power to grant approval in s 164(1) does not affect the operation of pt 13 of the Act.

(3) Section 164(4) prevents the responsible authority from exercising powers under s 214(3) or s 215(1) of the Act, after approval is granted under s 164(1), to require the removal etc of alterations to the land or any existing building or structure on the land, whether or not those alterations were complete at the time approval was granted.

(4) Section 164(5) prevents a responsible authority from exercising its powers under pt 13 of the Act in respect of the activity of continuing, after the grant of approval under s 164(1), a development that was unlawfully commenced prior to the grant of approval.

(5) None of the provisions of s 164 have the effect of immunising from criminal conviction a person who, before approval was granted, committed an offence by commencing or carrying out development without first having applied for and obtained planning approval required under the relevant planning scheme.

121 Therefore, in our view, the planning consent granted by the respondent on 26 August 2014 did not have the legal effect of removing the appellant's criminal liability for the offence which it had committed against s 218(a) of the Act read with cl 9.1 of the Scheme. Section 164(4) did not produce that effect, and the primary judge was correct to so hold. Nor did cl 9.4 of the Scheme, which materially reflects the language of s 164 of the Act, have that effect.

122 For these reasons, although we would grant leave to appeal on ground 2, that ground is not established.

Orders

123 For the above reasons, we agree with Martin CJ that the following orders should be made in the appeal:

(1) Leave to appeal on ground 1 is refused.

(2) Leave to appeal on ground 2 is granted.

(3) The appeal is dismissed.

I certify that the preceding paragraph(s) comprise the reasons for decision of the Supreme Court of Western Australia.

MV
ASSOCIATE TO THE HONOURABLE CHIEF JUSTICE MARTIN

3 AUGUST 2018