CITATION:	*Nazbuck Pty Ltd v Development Consent Authority; Stanes Transport Pty Ltd v Development Consent Authority; Stanes v Development Consent Authority* [2019] NTSC 14
PARTIES:	NAZBUCK PTY LTD v DEVELOPMENT CONSENT AUTHORITY
FILE NO:	LCA 8 of 2018 (21815353)
PARTIES:	STANES TRANSPORT PTY LTD v DEVELOPMENT CONSENT AUTHORITY
FILE NO:	LCA 10 of 2018 (21754980)
PARTIES:	STANES, Mark v DEVELOPMENT CONSENT AUTHORITY
FILE NO:	LCA 11 of 2018 (21754975)
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL from LOCAL COURT exercising Territory jurisdiction
DELIVERED ON:	12 March 2019

HEARING DATE: 25 February 2019

JUDGMENT OF: Grant CJ

CATCHWORDS:

CRIMINAL LAW – PLANNING OFFENCES – JUDGMENT AND PUNISHMENT

Whether fines imposed manifestly excessive – whether extension of time should be granted to lodge appeal – lay appellant advised during currency of appeal period against filing appeal – given contrary advice after expiry of appeal period – appeal lodged – delay of short duration – arguable grounds – considerations relevant to the determination of penalty – maximum penalty for corporate offenders has application to a range of entities – sentencing court has a discretion to apply an additional default penalty – ordinary principles of proportionality and totality apply to ensure penalty is not disproportionate – care must be taken not to impose double punishment where convicted of two offences with common elements – first offenders – no wilful disobedience of the law – genuine attempts to comply with planning scheme – no significant commercial gain by reason of breach – corporate defendants single director entities – pleas of guilty entered – fines imposed manifestly excessive – appeals allowed – appellants resentenced.

Local Court (Criminal Procedure) Act 1928 (NT) s 163, s 165, s 171
Planning Act 1999 (NT) s 75, s 76, s 79
Sentencing Act 1995 (NT) s 17, s 18

Able Lott Holdings Pty Ltd v City of Fremantle [2011] WASC 87, *Austrend Construction Pty Ltd v City of Swan* [2017] WASC 67, *Bara v The Queen* [2016] NTCCA 5, *Brown v O'Neill* [2017] NTSC 84, *Federal Commissioner of Taxation v Arnhem Air Engineering Pty Ltd* (1987) 90 FLR 140, *GT Homes Pty Ltd v Shire of York* [2010] WASC 312, *Isles v Lyons* (2016) 36 NTLR 161, *Markarian v The Queen* (2005) 228 CLR 357, *OzTran Aust Pty Ltd v Town of Port Hedland* [2017] WASC 28, *Paolucci v Town of Cambridge* [2013] WASC 50, *Pearce v The Queen* (1998) 194 CLR 610, *Potter v Neave* (1944) SASR 19, *R v* Dennison [2011] NSWCCA 114, *R v Hilton* (2005) 157 A Crim R 504, *SB v Heath* [2017] NTSC 13, *Swan Bay Holdings Pty Ltd v City of Cockburn* [2010] WASC 81, *Swann v Mosel* [2014] NTSC 43, *Yusup v The Queen* [2005] NTCCA 19, referred to.

REPRESENTATION:

Counsel:

Appellants:	C Jacobi
Respondents:	A Phillis

Solicitors:

Appellants:	Ward Keller
Respondents:	Povey Stirk

Judgment category classification:	B
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT ALICE SPRINGS

Nazbuck Pty Ltd v Development Consent Authority; Stanes Transport Pty Ltd v Development Consent Authority; Stanes v Development Consent Authority [2019] NTSC 14

LCA 8 of 2018 (21815353)

BETWEEN:

NAZBUCK PTY LTD
Appellant

AND:

DEVELOPMENT CONSENT AUTHORITY
Respondent

LCA 10 of 2018 (21754980)

BETWEEN:

STANES TRANSPORT PTY LTD
Appellant

AND:

DEVELOPMENT CONSENT AUTHORITY
Respondent

LCA 11 of 2018 (21754975)

BETWEEN:

MARK STANES
Appellant

AND:

DEVELOPMENT CONSENT AUTHORITY
Respondent

CORAM: GRANT CJ

REASONS FOR JUDGMENT

(Delivered 12 March 2019)

[1] On 3 July 2018 the Local Court imposed fines on Nazbuck Pty Ltd (**Nazbuck**) in the amounts of $270,116 and $99,792 respectively for the offences of using land as a transport terminal contrary to s 75(1) of the *Planning Act 1999* (NT) (***Planning Act***) and contravening or failing to comply with a notice contrary to s 76(5) of the *Planning Act*. The land in question is Lot 4997 Town of Alice Springs.

[2] On 26 September 2018 the Local Court imposed aggregate fines for those same offences on Stanes Transport Pty Ltd (**Stanes Transport**) in the amount of $280,000 and on Mark Stanes (**Stanes**) in the amount of $30,000. The land in question in that matter is Lot 7105 Town of Alice Springs.

[3] All three parties have brought appeals pursuant to s 163(1) of the *Local Court (Criminal Procedure) Act 1928* (NT). Nazbuck's grounds of appeal are that:

(a) the sentencing judge erred in deriving the amount of the fine as a proportion of the maximum penalty contrary to the process of instinctive synthesis;

(b) the sentencing judge failed to take account of the fact that Nazbuck and its director were first offenders, that the maximum penalties prescribed by the *Planning Act* incorporate components for specific deterrence for corporate defendants, and that the two offences involved common elements and/or conduct;

(c) the sentencing judge erred by taking into account the appellant's explanation for the delay as a circumstance of aggravation; and

(d) the fine imposed was manifestly excessive in all the circumstances.

[4] The grounds asserted by Stanes and Stanes Transport are that:

(a) the sentencing judge erred in imposing sentence on the aggravated factual basis that they were still operating a transport terminal on the subject land at the time the plea was entered; and

(b) the fine imposed was manifestly excessive in all the circumstances, including in the identification of the relevant starting point.

Nazbuck – application for extension of time

[5] Nazbuck has also made application for an extension of time within which to lodge the appeal. The order subject to appeal was made on

3 July 2018. Section 171 of the *Local Court (Criminal Procedure) Act* requires that an appeal shall be instituted within 28 days. That period expired on 31 July 2018. The Notice of Appeal was lodged on 13 August 2018.

[6] Section 165 of the *Local Court (Criminal Procedure) Act* provides that this Court may dispense with compliance with any condition precedent to the right of appeal if the appellant has done whatever is reasonably practicable to comply with the Act. That power of dispensation comprehends the grant of an extension of the time within which to lodge an appeal.[1] The relevant test is whether the prospective appellant has done what is "capable of being done or accomplished with the available resources whatever they may be" such that it is "demonstrated as unreasonable to expect in the particular circumstances that exact compliance should be insisted on".[2]

[7] On the day the fines were imposed Nazbuck was advised by its solicitor that it had 28 days within which to lodge an appeal. The transcript of the sentencing remarks was not received until 19 July 2018. Nazbuck's director consulted further with its solicitor after receipt of the transcript and was advised that an appeal would likely be unsuccessful and that prosecuting one would be prohibitively

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1 *Swann v Mosel* [2014] NTSC 43 at [3]; *SB v Heath* [2017] NTSC 13 at [10], citing *Federal Commissioner of Taxation v Arnhem Air Engineering Pty Ltd* (1987) 90 FLR 140 at 142; *Brown v O'Neill* [2017] NTSC 84 at [4].

2 *Potter v Neave* (1944) SASR 19 at 21.

expensive. It was not until eight days after the expiry of the appeal period that Nazbuck's solicitor advised that the company had reasonable prospects of success on appeal. Nazbuck instructed new solicitors the following day to prepare and file the Notice of Appeal. That was done on 13 August 2018.

[8] In circumstances where a lay appellant is advised during the currency of the appeal period against filing an appeal against a sentence imposed for what is a technical and regulatory offence, is then given contrary advice once the appeal period has expired, and on receipt of that advice instructs solicitors to lodge an appeal without delay, this is sufficient in my opinion to establish that an appellant has done whatever was reasonably practicable to comply with the Act. That being so, I have determined to dispense with compliance on the basis the delay was of brief duration and the grounds of appeal are arguable.[3]

[9] I would also note in this respect that the Northern Territory Government's Model Litigant Policy provides that the Territory will not rely on technical arguments unless its interests would be prejudiced by a failure to comply with a particular requirement. The Development Consent Authority is an agency of the Territory in the broad sense of that term, and as such is properly bound to compliance with the model litigant principles. In the ordinary course government agencies should

3 *SB v Heath* [2017] NTSC 13 at [13]; *Isles v Lyons* (2016) 36 NTLR 161.

not take a limitation point unless the delay has led to some real prejudice. It is difficult to see what prejudice the delay of 13 days in filing the Notice of Appeal might have caused.

The planning legislation

[10] Section 75(1) of the *Planning Act* provides:

> A person must not use or develop land in contravention of the planning scheme that applies to the land, except in accordance with a permit.
>
> Maximum penalty: In the case of a natural person – 200 penalty units and 4 penalty units default penalty.
>
> In the case of a corporation – 1000 penalty units and 20 penalty units default penalty.

[11] Section 76 of the *Planning Act* provides relevantly:

> (1) If:
>
> (a) land is being used or developed in contravention of the planning scheme that applies to the land; and
> (b) the development is not otherwise permitted by or under this Act,
>
> the consent authority in respect of the planning scheme may, by notice in writing, require:
>
> (c) the owner or occupier of the land; or
> (d) the person apparently using or developing the land in contravention of the planning scheme or interim development control order,
>
> to cease using or developing the land in contravention of the planning scheme.
>
> ....

(6) A person specified in a notice under this section must not contravene, or fail to comply with, the notice.

Maximum penalty: In the case of a natural person – 200 penalty units and 4 penalty units default penalty

In the case of a corporation – 1000 penalty units and 20 penalty units default penalty.

[12] Section 3(2) of the *Planning Act* provides:

> If in this Act the expression ***default penalty*** appears in or at the foot of a section or subsection, section 79 applies in relation to the section or subsection.

[13] Section 79 of the *Planning Act* provides:

> If:
>
> (a) in this Act the expression default penalty appears in or at the foot of a section or subsection; and
> (b) a court is satisfied on finding a person guilty of an offence against the section or subsection that the person continued to contravene, or to fail to comply with, the section after the date when he or she was notified of the alleged offence,
>
> the Court may, in addition to the penalty, if any, specified for the offence, impose the default penalty in respect of each day during which the offence continued to be committed after the first day on which it was committed.

[14] At the material times a penalty unit was $154.

Sentencing for planning breaches

[15] The purpose of planning legislation is to benefit the community as a whole. That is reflected in s 2A of the *Planning Act*, which provides

that the objects of the Act are "to plan for, and provide a framework of controls for, the orderly use and development of land". Those objects are to be achieved by, amongst other things, effective controls and guidelines for the appropriate use of land, minimising adverse impacts of development on existing amenity, and ensuring as far as possible that planning reflects the wishes and needs of the community.

[16] The imposition and enforcement of significant penalties for offences such as those found in ss 75 and 76 of the *Planning Act* is directed to ensuring the general observance of and respect for that underlying communal purpose.[4] The primary sentencing purposes for this type of offending are general and specific deterrence.[5] The penalties imposed must be substantial enough to discourage offenders, and particularly corporate offenders, from treating the penalty "as an unfortunate, but acceptable, operating expense".[6]

[17] The following considerations will be relevant in determining the nature and seriousness of the offending and the penalty properly imposed for breaches of this nature:

(a) whether the breach is inadvertent or properly characterised as contumelious, premeditated or blatant;

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4 See, for example, *Swan Bay Holdings Pty Ltd v City of Cockburn* [2010] WASC 81 at [74].

5 *Able Lott Holdings Pty Ltd v City of Fremantle* [2011] WASC 87 at [48].

6 Ibid.

(b) whether there is some credible explanation for the breach, including any continuing breach, of the planning scheme;

(c) the period of non-compliance and the offender's response to warnings from the regulatory authority;

(d) efforts made to rectify the breach, and whether there were valid logistical or other reasons for any delay in doing so;

(e) the scale of the breach in terms of its impact on the amenity of neighbouring bodies and the general location;

(f) whether the breach results in some permanent alteration to the property and some permanent impact on the amenity of neighbouring properties, or whether the breach is temporary and reversible in nature and capable of full rectification;

(g) whether the breach gives rise to some danger to the health and safety of the community;

(h) whether the breach was instigated and continued for commercial reasons and, if so, the extent of the commercial benefit derived by the offender;

(i) the offender's capacity to pay any fine imposed, and the financial significance of the imposition of the pecuniary penalty having regard to the offender's circumstances;

(j) whether a plea of guilty was indicated at an early opportunity; and

(k) whether the offender has previous convictions for offences of the same nature.

[18] It is necessary then to say something about the maximum penalties provided for these offences. Those maxima are relevant sentencing yardsticks to be taken and balanced with all other factors. However, that assessment must be undertaken in recognition of the fact that the offence provisions comprehend a wide range of offending conduct and the maximum penalties invite comparison between the worst possible case and the offending under consideration.[7] There will be circumstances in which the maximum penalty may not necessarily be a reliable guide as to the seriousness of the conduct involved. In discussing those circumstances, the High Court in *Markarian*[8] referred to an extract from Stockdale and Devlin, *Sentencing* in the following terms:

> A maximum sentence fixed by Parliament may have little relevance in a given case, either because it was fixed at a very high level in the last century ... or because it has more recently been set at a high catch-all level ... At other times the maximum may be highly relevant and sometimes may create real difficulties ....[9]

[19] The more general the provision the broader the range of offending conduct it will capture. The maxima fixed under ss 75 and 76 of the *Planning Act* are very much set at "catch all level". As the appellants have submitted, that maximum penalty for corporate offenders has application to a range of entities from publicly listed multinational

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7 *Markarian v The Queen* [2005] HCA 25; 228 CLR 357 at [31] (***Markarian***).

8 *Markarian* at [30].

9 Stockdale and Devlin, *Sentencing* (1987), pars 1.16-1.18.

corporations right down to single director corporations of the type implicated in these appeals. The maximum penalty has application to intentional and contumelious conduct with severe and irreversible economic, environmental, aesthetic and/or heritage consequences.

[20] Further, that catch-all setting may tend to be exaggerated by an arbitrary or artificial extrapolation and application of the default penalty. By way of example, in the Nazbuck matter the sentencing judge proceeded on the basis that the maximum default penalty for the first offence was in excess of $2.5 million, and for the second offence was in the order of $850,000. In the Stanes Transport matter, the sentencing judge proceeded on the basis that the maximum penalty for the first offence was in excess of $3 million and for the second offence was in the order of $900,000.

[21] Those calculations are apt to provide a distorted yardstick or starting point for the assessment of the objective seriousness of the conduct involved and the penalties appropriately fixed, and to obscure the fact that the sentencing court has a discretion to apply an additional default penalty which must be exercised having regard to the objective circumstances of the offending and the subjective circumstances of the offender. Even where it is determined to apply an additional default penalty, a proper consideration of those circumstances may militate against its application over the whole period. In making that determination, the ordinary principles of proportionality and totality

will apply to ensure that the penalty is not disproportionate to the criminality involved.

[22] The fact that penalties were imposed in these matters for offences against both s 75(1) and s 76(5) of the *Planning Act* also draws attention to the principle expressed by the High Court in *Pearce v The Queen*.[10] That principle is that where two offences of which an offender stands convicted contain common elements, it would be wrong to punish that offender twice for the commission of the elements that are common. In that respect, McHugh, Hayne and Callinan JJ observed (footnotes omitted):

> [40] To the extent to which two offences of which an offender stands convicted contain common elements, it would be wrong to punish that offender twice for the commission of the elements that are common. No doubt that general principle must yield to any contrary legislative intention, but the punishment to be exacted should reflect what an offender has done; it should not be affected by the way in which the boundaries of particular offences are drawn. Often those boundaries will be drawn in a way that means that offences overlap. To punish an offender twice if conduct falls in that area of overlap would be to punish offenders according to the accidents of legislative history, rather than according to their just deserts.
>
> [41] …
>
> [42] … The identification of a single act as common to two offences may not always be as straightforward. It should, however, be emphasized that the inquiry is not to be attended by "excessive subtleties and refinements". It should be

10 (1998) 194 CLR 610.

> approached as a matter of common sense, not as a matter of semantics.[11]

[23] In the application of that principle, it is not only the commonality of the legal elements of the offences which are to be considered, but also the commonality of the relevant facts and circumstances.[12] The rationale and the sentencing process has been described in the following terms:

> As explained in *R v Elphick* [[2010] NSWCCA 112 at [29]] when an offender is being punished for more than one offence arising out of the same set of facts, the need to avoid punishing an offender twice does not require that elements which are common to any overlapping offences with which the offender is charged be ignored. Rather, it is necessary to consider, independently, the facts and circumstances relevant to the sentence imposed for the first offence and to sentence accordingly. Then, when turning to deal with the second offence, 'any necessary step in assessment of punishment for that crime to avoid that which would amount to double punishment can be taken'.[13]

[24] This Court has adopted the same approach in the context of the offences of using a boat for commercial fishing and possessing a foreign boat under the *Fisheries Management Act 1991* (Cth)[14], and in the context of dual charges of armed robbery and unlawful entry in possession of an offensive weapon[15].

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11 *Pearce v The Queen* (1998) 194 CLR 610 at [40], [42] per McHugh, Hayne and Callinan JJ.

12 *R v Hilton* [2005] NSWCCA 317; 157 A Crim R 504; *R v Dennison* [2011] NSWCCA 114.

13 *R v Dennison* [2011] NSWCCA 114 at [95] per Schmidt J (Whealy JA and McCallum J concurring).

14 *Yusup v The Queen* [2005] NTCCA 19 at [12] per Riley J (Mildren and Southwood JJ concurring).

15 *Bara v The Queen* [2016] NTCCA 5 at [53]-[55].

[25] The separate charges under s 75(1) and s 76(5) of the *Planning Act* have both a commonality of legal elements and a commonality of relevant facts and circumstances. The elements of the offence under s 75(1) are the intentional or reckless use or development of land in contravention of a planning scheme. The elements of the offence under s 76(5) are: (a) the intentional or reckless use or development of land in contravention of a planning scheme; (b) the receipt of a notice from the consent authority requiring the user or developer to cease that use or development; and (c) a failure to comply with that notice. While there is no doubt that the failure to comply with a notice is a separate act of criminality, in the cases subject to these appeals the use of the land in contravention of a planning scheme was the primary element, fact and circumstance of both offences. The sentences imposed are required to recognise that commonality in order to avoid double punishment.

[26] It is common ground between the parties that neither the Supreme Court nor the Court of Appeal in this jurisdiction has had occasion to consider the imposition of sentences under ss 75 and 76 of the *Planning Act*, and that there has only been one previous prosecution under those provisions dealt with by the Local Court. In those circumstances, recourse to decisions concerning analogous offences in other Australian jurisdictions may be instructive.

[27] A distinction is often drawn in these matters between conduct involving the extensive development of land or the destruction of buildings without a planning approval or contrary to a planning scheme, and conduct involving the use of or storage on land in breach of a planning scheme. Construction and demolition cases are generally regarded as more serious. That distinction is drawn on the basis that unapproved use can cease and the mischief is brought to an end, whereas with construction and demolition the mischief might not be capable of being undone so readily. The conduct is under consideration in these appeals falls within the former category.

[28] By way of example, in *Swan Bay Holdings Pty Ltd v City of Cockburn*[16], the offending company had undertaken extensive earthworks, the construction of five separate lots or yards and the construction of a roadway, all without planning approval and contrary to the planning scheme. Moreover, the company had refused to comply with a formal stop work direction. A fine of $150,000 was imposed for that conduct, and an appeal asserting manifest excess was dismissed. At the other end of the range of activity, in *GT Homes Pty Ltd v Shire of York*[17], fines totalling $50,000 were imposed for two offences of using land for the purpose of storing in excess of 1,500 tonnes of waste material without planning consent, in circumstances where that bore on

16 [2010] WASC 81.

17 [2010] WASC 312.

the amenity of neighbouring properties. Fines in that amount for that type of conduct were not considered by the appeal court to be manifestly excessive.

[29] In *Austrend Construction Pty Ltd v City of Swan*[18], McGrath J conducted a review of penalties imposed in Western Australia for cases involving use of or storage on land in breach of a planning scheme. That review was in the following terms:

> 42 A storage type case in respect to individuals is *Callan v City of Fremantle* [[2008] WASC 197] where the appellants used a shed on their property to store building materials which were not being used at the residence. There was no approval for the storage of the building material. Upon being convicted of a breach of the PD Act a fine of $18,000 was imposed on both offenders. On appeal the fines were reduced to $4,000 on each appellant. This case involved individuals and involved a breach that may be described as at the very lower end of this type of offending.
>
> 43 Turning to corporate offenders, in *Dodd and Dodd Pty Ltd v Shire of Mundaring* [(2010) 199 A Crim R 83] the offender, operating a substantial commercial business, used land as a salvage/wrecker's yard. The appellant had two previous convictions for offences of an identical nature. The second of the convictions occurred in circumstances where the Shire permitted the appellant 12 months to move the business without prosecution. The appellant did not do so. Rather, the appellant continued to conduct the business. Further, the appellant was found to have advanced an untenable defence for the purpose of delaying conviction. An appeal against a fine of $120,000 with a daily penalty of $100 per day for 288 days (a total fine of $148,800) was dismissed.
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> 44 The case of *Dodd and Dodd Pty Ltd v Shire of Mundaring* involves much more serious offending than the present case. The antecedents of the offender were poor and the breach was serious.

18 [2017] WASC 67.

> 45 In *Peat Resources of Australia Pty Ltd v City of Cockburn* [[2002] WASCA 342] the offender was convicted for using land without planning consent for the stockpiling and storage of soil. The offender, whilst entering a plea of guilty, had three prior convictions for breaching the planning laws. The appeal determined that the magistrate's sentence of $50,000 and a daily penalty of $200 per day for 362 days (a total fine of $122,400) was not manifestly excessive. This case involved much more serious offending and the offender had prior convictions.
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> 46 In *Basso-Brusa v City of Wanneroo* [[2003] WASCA 103] the appellants had been granted approval to use a site for storage of timber and logs but used the location for chainsaw operations as a continuing method of operation rather than isolated instances. The three individuals were each fined $10,000 whilst the corporate offender was fined $20,000. The offender had two previous convictions. An appeal against the quantum of those fines was dismissed. This case involved offending at the lower end and the fine was imposed prior to the increase in penalties.
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> 47 In *Pavlinovich Bulk Transport Pty Ltd v Shire of Kalamunda* [[2011] WASC 234], the offender breached the PD Act by using land for parking commercial vehicles without approval. The company had shown no remorse for a breach that was characterised as a 'largescale operation...conducted with a flagrant disregard' and with no remorse. An appeal against a fine of $100,000 plus daily penalties (total fine being $116,900) was dismissed.
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> 48 In *Taylor v City of Kwinana* [[2015] WASC 252] the offender breached planning laws by clearing and levelling property and using property to store heavy machinery without the required planning approval. The period of the breach was five months. The offender was given notice to cease but ignored the requests for 12 to 15 months. The offender pleaded guilty and was fined $30,000 with a daily penalty at $50 per day (total fine being $38,100). The appeal was dismissed. There are similarities with the present case being that the plea of guilty after not ceasing was due, in part, to commercial reasons. The offending involved, in part, storage which could be rectified.[19]

[30] That review was conducted in the context of an appeal against the imposition of a $250,000 fine for a breach of the planning scheme.

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19 *Austrend Construction Pty Ltd v City of Swan* [2017] WASC 67 at [42]-[48].

The appellant operated a business supplying stone, granite and marble benchtops on a site within an area zoned General Industry. The appellant used the car parking area of the site to store large sheets of stone, granite and marble for the construction of the benchtops. This was contrary to the planning scheme. The appellant was requested by the regulatory authority to remove the stored items but the breach was not rectified for at least nine months after notice was served despite repeated warnings. The offending continued for 340 days. The appellant had no prior convictions and had pleaded guilty at the first opportunity. The fine was reduced on appeal to $40,000.

[31] The prosecutions in the cases under consideration in that review were brought under s 223 of the *Planning and Development Act 2005* (WA). The maximum penalties under that legislation for corporate offenders who commit the offence of carrying out development in breach of a condition of a planning scheme, which includes use of or storage on land in breach of conditions, are $1 million and a further $125,000 for each day during which the offence occurs (the default penalty), and for individuals $200,000 and a further $25,000 for each day during which the offence occurs.[20] Those penalties may be compared with the maxima under the *Planning Act*, which are $154,000 and a further

20 The penalties applicable to individual offenders were increased were increased from $50,000 to $200,000 and the daily penalty increased from $5,000 to $25,000 by operation of the *Heritage and Planning Legislation Amendment Act 2011* (WA). The penalties for corporate offenders remained unchanged.

$3080 per day for corporate offenders, and $30,800 and a further $616 per day for individuals.

[32] In the matter of *OzTran Aust Pty Ltd v Town of Port Hedland*[21] the Supreme Court of Western Australia considered circumstances the obverse of those arising in the present appeals, in that the offender had been convicted and fined for the residential use of industrial zoned land. The corporate offender had placed six transportable units on the land for use by employees for residential purposes. The land was not sealed as required for residential use. A septic system was constructed without approval. The units did not comply with the cyclone code. The offender failed to remove those units when given notice to do so and refused to engage with the regulatory authority. The magistrate who heard the charge imposed a fine of $600,000, largely on the basis that this was the amount of the commercial benefit derived by the company by reason of the breach.

[33] Although the Supreme Court accepted that commercial benefit is a factor to be taken into account in assessing the seriousness of the offence, an assumed commercial benefit could not be taken into account as the starting point for assessing a suitable penalty. In addition, the fixing of penalty could not properly take into account the assumed effects of the offence on the town's economy or on legitimate

21 [2017] WASC 28.

providers of accommodation. The Supreme Court adopted a starting point of $400,000 and then reduced that sum by 25 percent because of the early plea of guilty and by a further sum to reflect a lack of relevant offending history. Taking into account these discounts, the substituted penalty was a fine of $280,000. That fine must be seen in the context that the corporate offender had an annual turnover in excess of $30 million.

[34] In the absence of any established sentencing range for offences of this nature in the Northern Territory, it is difficult to see why any consideration of prevalence, local conditions or matters of principle would call for the adoption of some approach markedly different to that taken by the courts of Western Australia. That consideration must also take into account the fact that the maximum penalties prescribed under the Western Australian provision are significantly higher than those under the *Planning Act*.

[35] This focus on the Western Australian cases reflects the similarities between the offence provision and penalties prescribed in that jurisdiction and the provisions under consideration in this appeal, and the fact that the Supreme Court of Western Australia has most recently and frequently had occasion to consider the penalties imposed for these types of offences. The sentences imposed in other jurisdictions disclose a similar approach, making allowance for differences in the

offences created under the various legislation and in the maximum penalties prescribed.

[36] Even in those other Australian jurisdictions, it cannot be said that there is an established range of penalties for planning offences. This may be attributed to the vastly different circumstances in which the offending can occur, the variation in the antecedents and profiles of different offenders, the different periods over which the offending can occur and the accelerating effect of default penalties. In addition, variations in the value of building work conducted at different times and the effect of inflation give rise to difficulties in comparing penalties which have been imposed at different times in the life of a particular offence provision.[22]

[37] It falls to consider the offending under consideration in these appeals and the fines imposed against that background.

Facts and circumstances concerning the Nazbuck appeal

[38] Nazbuck was charged by complaint taken on 27 March 2018 with the following counts:

(a) that on or between 27 March 2016 and 27 March 2018 at 45 Heenan Road, Ross it used land in contravention of the Planning Scheme that applies to the land by using part of Lot 4997 Town of Alice Springs in the Zone RL (Rural Living) as a

22 *Paolucci v Town of Cambridge* [2013] WASC 50 at [99].

transport terminal in breach of the Northern Territory Planning Scheme and s 75(1) of the *Planning Act*; and

(b) that on or between 1 October 2017 and 27 March 2018 at the same property having been served with a Notice pursuant to s 76(1) of the *Planning Act* it contravened and/or failed to comply with the Notice by using part of the land as a transport terminal in breach of s 76(5) of the *Planning Act*.

[39] The matter came on for a plea of guilty before the Local Court on 2 July 2018. The substance of the agreed facts for the purposes of the plea was as follows.

(a) Nazbuck used the land as a transport terminal between 27 March 2016 and 27 March 2018 as part of its business hauling freight from the Alice Springs railyards and to and from Adelaide and the Tanami region.

(b) The premises were used to garage up to seven prime movers, and for conducting maintenance for those prime movers, including pressure washing, oil and tyre changes and basic repairs using angle grinders, hammers and handtools. The area of the site used for the transport terminal exceeded 200 m².

(c) On 27 May 2016 the Development Consent Authority served a notice under s 76(1) of the *Planning Act* ordering Nazbuck to

cease the unlawful use within 60 days. Nazbuck failed to comply with the notice to desist within that period.

(d) By email dated 11 September 2016 Nazbuck advised the Development Consent Authority that it intended to apply for an Exceptional Development Permit for consent to continue the established but unapproved transport terminal use.

(e) By letter dated 4 October 2016 the Chairman of the Development Consent Authority (**the Chairman**) advised that it would not commence proceedings for failure to comply with the notice prior to 14 December 2016 on condition that an Exceptional Development Application was lodged on or before that date, and that the use of the property was managed in a manner that did not cause undue impact on the amenity of adjoining properties.

(f) On 14 December 2016 Nazbuck applied for an Exceptional Development Permit to allow use of the property as a transport terminal to garage and maintain up to 7 prime movers.

(g) On 5 June 2017 the Acting Minister for Infrastructure, Planning and Environment refused the application for an Exceptional Development Permit.

(h) On 14 June 2017 the Chairman met with Nazbuck and staff of the Department of Infrastructure, Planning and Logistics (**the Department**) and discussed the Authority's intention to proceed with the prosecution in light of the refusal of the application and

the prior issue of the notice to cease; the practicalities of relocating Nazbuck's operations within a certain timeframe; and the implementation of interim measures with the aim of reducing adverse impacts on the amenity of the area. The director of Nazbuck agreed to send a letter to the Chairman outlining potential measures for the purpose of reducing adverse impacts on neighbouring properties.

(i) From late September 2017 Nazbuck garaged its vehicles at an alternative location, but continued to use the premises for the purpose of basic maintenance of its fleet vehicles.

(j) On 23 March 2018, the Chairman wrote to Nazbuck requesting compliance with the notice to cease within 14 days. The letter was received by Nazbuck on 4 April 2018.

(k) Nazbuck had continued to use the premises or allow the use of the premises for the basic maintenance of fleet vehicles. The use is defined under the Northern Territory Planning Scheme as "transport terminal" which is a prohibited use in Zone RL. The unlawful use of the premises as a transport terminal is detrimental to the amenity of adjacent properties due to noise, dust and visual appearance.

[40] During the course of submissions on the plea, Nazbuck's counsel advised the court that the unlawful use had ceased on or about 30 June 2018. The reason for the delay was said to be that it had taken

Nazbuck some time to identify a suitable industrial property, to undertake negotiations for the purchase of that property, to acquire the property, and then to make improvements to the property necessary for the conduct of the business. In particular, the alternative property did not have sheds and other structures that were compliant with the building regulations. During the course of that process Nazbuck had been in communications with the Department in relation to the development of the alternative property.

[41] Counsel for Nazbuck went on to explain that Nazbuck's directors had purchased Lot 4997 in August 2005. The shed extension on the property was constructed and approved in or around January 2015. Nazbuck's directors first became aware of complaints in relation to the business operation when they met with employees of the Department in April 2016. As a result of that meeting, Nazbuck determined to make an application for an Exceptional Development Permit and began that process in December 2016. It was said that in a subsequent meeting with the Chairman and employees of the Department, Nazbuck was encouraged to make application for an Exceptional Development Permit. That submission was not put as a criticism of the regulatory authorities, but as an explanation for at least part of the period over which the offence continued.

[42] At the same time Nazbuck was endeavouring to locate a suitable alternative industrial property to house its operations. Nazbuck leased

alternative premises on an interim basis to garage some of the prime movers used in its operations. After the application was refused in June 2017, Nazbuck leased additional and different alternative premises, and began to negotiate for the purchase of those premises. Those negotiations culminated in the purchase of the property on 23 February 2018 for a purchase price of $950,000. It then became necessary for Nazbuck to undertake the improvements to which its counsel had first referred. During the period between September 2017 and 30 June 2018 any work on the vehicles undertaken at Lot 4997 had largely been limited to maintenance work.

[43] Counsel for Nazbuck made reference to the fact that there was a shortage of commercial and industrial land in Alice Springs, and that affordable properties of that type did not often come onto the market. The ultimate submission was that the immediate cessation of the unlawful use upon service of the Notice would have had the consequence of causing Nazbuck's business to cease operations completely.

[44] To the extent those submissions traversed or included matters of fact, counsel for the informant took no issue with those matters.

[45] So far as Nazbuck's financial capacity to pay a fine was concerned, its counsel advised the court that the profitability of its business had fallen substantially in the last year. He said he was instructed that the

company made a net profit of approximately $100,000 per annum, but subject to the qualification that he did not have access to audited accounts to confirm that estimate or to present to the court. The vehicles used by Nazbuck in its business were subject to hire purchase arrangements.

[46] In the hearing of the appeal Nazbuck sought to adduce further evidence. The receipt of that evidence was not pressed under s 176A of the *Local Court (Criminal Procedure) Act* for the purpose of establishing error on the part of the sentencing judge. Rather, it was provided in support of the application for an extension of time within which to lodge the Notice of Appeal, and on the basis that if error was found the material would properly inform any re-sentencing process.[23]

[47] In large part, Nazbuck's additional evidence was an expansion and elaboration of the matters recorded in the agreed facts for the purposes of the plea and/or put in submission by its counsel during the sentencing proceedings. It also traversed a number of matters which were not in dispute, including that Nazbuck and its director had no prior criminal history. The evidence discloses the following matters concerning the course of events.

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23 The Court in this appeal also received evidence from the respondent in the event that it became necessary to embark on a resentencing process. That evidence concerned the process by which the application for the Exceptional Development Permit was notified, considered and determined.

(a) At the time Nazbuck purchased Lot 4997 in August 2005 the property had previously been used to store and maintain plant and equipment, and had been used as the base for a road train business. Nazbuck's director assumed on that basis that the use of the property for the purposes of his business was a permissible use. He spoke to neighbouring residents about his intentions at the time of purchase and they expressed no concerns. At no time was the property used for the loading and unloading of materials or supplies. Rather, it was used to garage the prime movers when not in use and to undertake maintenance on them. Nazbuck's director first became aware that there may be some potential breach of the *Planning Act* on 13 April 2016 when he received a letter from the Development Consent Authority.

(b) Officers of the Department then attended the property on 27 April 2016 and advised that although "Home Based Contracting" was a permitted use, the current use was properly characterised as a "Transport Terminal". Nazbuck's director continued his engagement with the Department and the Development Consent Authority from that time. The Development Consent Authority met on 11 May 2016 and served Nazbuck with a Notice to Cease on 29 May 2016. Nazbuck's director advised the Department that he would draft an application for an Exceptional Development

Permit. He spoke with officers of the Department about that on a number of occasions in June 2016 and again in September 2016.

(c) On 4 October 2016 Nazbuck's director received a letter from the Development Consent Authority noting that the 60 day period stipulated in the Notice to Cease had lapsed, and advising that they would not commence any proceedings for breach prior to 14 December 2016 on the proviso that an application for an Exceptional Development Permit was lodged by that date. The application was duly lodged by that date, and subsequently refused on 4 June 2017 after an extensive notification and submission process.

(d) In March 2017 Nazbuck identified an alternative property in Kidman Street to garage six of its prime movers. Nazbuck entered into a lease of the property for $33,157 per annum. The prime movers were thereafter stored largely at that property rather than on Lot 4997.

(e) On 14 June 2017 Nazbuck's director met with the Chairman and staff of the Department. During the course of that meeting the options of the Brewer Estate and land near the airport were considered and rejected for various reasons. During the course of that meeting Nazbuck's director advised that identifying a suitable alternative property and moving the business would take in the order of 12 months. There was then some discussion of measures

which might mitigate the impact of the business on the amenity of neighbouring properties.

(f) The day after that meeting, Nazbuck's director wrote to the Chairman confirming the lack of suitable industrial land and confirming that it had taken and would take further steps in relation to the impact on amenity. The Chairman replied by letter dated 4 July 2017 reiterating a request that Nazbuck engage an acoustic engineer to advise on noise mitigation measures and seeking some commitment to fixed working hours. Nazbuck's director took these dealings to mean that he would be allowed time to relocate.

(g) Nazbuck engaged a local real estate agent to find suitable alternative premises. On 14 July 2017 a property at Kennett Court was identified as potentially suitable. On 10 August 2017 Nazbuck entered into a six month lease for that property with a rental price of $58,080 per annum, and at the same time entered into negotiations for the purchase of the property. The prime movers were thereafter garaged at that property, and at Kidman Street, but the maintenance of the vehicles was still undertaken at Lot 4997 until necessary improvements had been made at the Kennett Court property.

(h) On 1 September 2017 Nazbuck was served with a further Notice to Cease. Nazbuck sought an extension of the time for compliance

with the Notice to six months given that it was engaged in negotiations for the purchase of the Kennett Court property. There followed some communications with the solicitors for the Development Consent Authority in relation to Nazbuck's attempts to find suitable alternative premises, but no extension of time was granted.

(i) Contracts for the purchase of the property were exchanged on 6 December 2017, but settlement was delayed until 23 February 2018 due to the need to obtain certificates of occupancy. Immediately following settlement Nazbuck engaged a contractor to make the required alterations to the buildings on the property to enable the operations of the business to be wholly transferred there.

(j) There followed exchanges of correspondence between Nazbuck and the Development Consent Authority (or its solicitors) in relation to the timeframe for the completion of the required works. Nazbuck was served with the complaint and summons on 23 April 2018. All operations of the business were relocated to the Kennett Court property by 30 June 2018.

(k) Nazbuck had spent $200,000 in April 2015 constructing approved extensions to the existing storage shed on Lot 4997 to facilitate the operations of the business. That money was effectively thrown away. Nazbuck also spent approximately $20,000 following the

service of the first Notice in April 2016 undertaking renovations and repairs to alleviate the impact on the amenity of neighbouring properties.

(l) In the 2015 and 2016 tax years Nazbuck's net profits were $228,189 and $292,849 respectively. In the 2017 tax year the company made a loss of $43,317. In the 2018 tax year the company made a loss of $136,785. Those losses are attributed by Nazbuck to the work involved in identifying and retaining suitable alternative premises for the transfer of business operations. The total cost of the purchase of the Kennett Court property including stamp duty was $1,001,735.06. Of that, $900,000 was borrowed attracting repayments of $7165.32 per month. The improvements to the Kennett Court property cost $57,000. Given the size of the Kennett Court property, Nazbuck will be required to continue leasing the Kidman Street property at a rental cost of $33,157 per annum.

[48] At the conclusion of submissions in the Local Court the matter was adjourned to the following day. When the matter resumed the sentencing judge delivered reasons and imposed sentence. Those reasons include the following findings.

(a) Nazbuck was made aware of the breach of the *Planning Act* by service of a notice to cease on 27 May 2016, but continued in that

breach. That constituted two years of continuing breach, although the Development Consent Authority allowed a stay of prosecution on 4 October 2016 subject to lodgement of an application for an Exceptional Development Permit by 14 December 2016. That application was refused on 5 June 2017 and Nazbuck had continued in the breach since that date.

(b) Nazbuck had continued to receive a commercial benefit from the illegal use of the land. The continuation of the breach for commercial gain was an aggravating factor.

(c) Reference to economic conditions and the availability of industrial land in Alice Springs was an attempt to deflect blame for the offending behaviours.

(d) Nazbuck, through its guiding mind, must have always been aware that its activities were in breach of the planning laws.

(e) The purposes of specific and general deterrence were to be accorded particular weight in the sentencing exercise.

(f) Nazbuck's financial capacity to pay a fine was informed by the fact that it was able to purchase the alternative property for a purchase price of $950,000, and that it made a net profit of approximately $100,000 per annum.

(g) The fines were calculated on the basis of 100 penalty units for each offence and two penalty units per day for each offence,

yielding a fine of $270,116 for the first offence and $99,792 for the second offence, in the total amount of $369,908.

(h) In addition, the sentencing judge imposed a fine of $10,000 on Nazbuck's director in respect of the same offending.[24]

[49] The fine imposed on Nazbuck in respect of Count 1 was constituted by a standard penalty of $15,400 and a default penalty of $254,716 over a period of two years and 97 days from 27 March 2016. The fine imposed on Nazbuck in respect of Count 2 was constituted by a standard penalty of $15,400 and a default penalty of $84,392 over a period of 274 days from 1 October 2017.[25]

Facts and circumstances concerning the Stanes appeals

[50] Stanes and Stanes Transport were charged separately by complaints taken on 23 November 2017 with the following counts:

(a) that on or between 5 September 2012 and 17 November 17 and continuing at 330 Ross Highway, Ross he/it used land in contravention of the Planning Scheme that applies to the land by using part of Lot 7105 Town of Alice Springs in the Zone RL (Rural Living) as a transport terminal in breach of the Northern Territory Planning Scheme and s 75(1) of the *Planning Act*; and

24 That matter is not the subject of appeal.

25 The default penalties are calculated to the date sentence was imposed on 3 July 2018 rather than to the date the unlawful use ceased on 30 June 2018, but that is not a matter of significance which the appellant seeks to pursue in this appeal.

(b) that on or between 16 December 2015 and 17 November 2017 at the same property having been served with a Notice pursuant to s 76(1) of the *Planning Act* he/it contravened and/or failed to comply with the Notice by using part of the land as a transport terminal in breach of s 76(5) of the *Planning Act*.

[51] Stanes and Stanes Transport indicated the intention to plead guilty to the charges in March 2018. The matters came on for pleas of guilty before the Local Court on 25 June 2018. The substance of the agreed facts for the purposes of the pleas was as follows.

(a) Stanes was the director of Stanes Transport, which had its principal place of business at Lot 7105 Ross Highway, Town of Alice Springs.

(b) Since the commencement of the Northern Territory Planning Scheme in 2007 Lot 7105 has been zoned "Rural Living". The operation of a Transport Terminal on Rural Living land is prohibited by the Northern Territory Planning Scheme.

(c) On 17 January 2013 the owners of Lot 7105 applied for consent to use a shed on the land for home-based contracting. On 13 October 2013 the Development Consent Authority refused the application.

(d) On 30 June 2014 the owners of Lot 7105 applied for an Exceptional Development Permit to use part of the land as a Transport Terminal. On 5 June 2015 the application was refused by the Minister for Lands and Planning.

(e) Between 23 November 2015 and 17 November 2017 and continuing, Stanes and Stanes Transport used the land as a Transport Terminal by operating a business on the land which carried freight to remote Aboriginal communities and pastoral properties; by using the premises for the loading, discharge and storage of goods for that purpose; by using the premises for the garaging of up to five trucks, several trailers and a forklift; and by using the premises for the maintenance of vehicles including washing trucks using an industrial pressure cleaner and using power tools for the purpose of maintaining the trucks and other vehicles.

(f) On 16 October 2015, the Development Consent Authority served Stanes with a Notice pursuant to s 76(1) of the *Planning Act* ordering the cessation of the unlawful use within 30 days. On 27 September 2017 the Development Consent Authority served Stanes Transport with a Notice in the same terms.

(g) Stanes and Stanes Transport failed to cease the unlawful use within 30 days or at all.

(h) The unlawful use of Lot 7105 is detrimental to the amenity of adjacent properties due to occasional noise, dust, artificial light and the visual appearance of the transport terminal.

[52] The materials received on the plea included a statutory declaration by Stanes made on 24 June 2018. That declaration included the following relevant matters.

(a) Stanes is the sole director and shareholder of Stanes Transport.

(b) Lot 7105 was purchased by his parents in the late 1970s. The tenure at that time was an agricultural lease.

(c) Neither Stanes nor Stanes Transport has a prior criminal history.

(d) Stanes purchased his first truck in 2007, commenced operation as a sole trader in 2008, and established Stanes Transport in 2009. His early use of Lot 7105 for the purposes of that business was casual, in that between trips he would park the truck he was driving in the yard of the property until the next trip.

(e) In 2011, Stanes was invited to tender for a contract to provide freight services to Outback Stores and was awarded the contract. As the work under the contract increased over the years the company acquired additional prime movers and trailers. The contract expires in 2020 with an option for extension in favour of Outback Stores.

(f) As the business expanded, Stanes's parents permitted him to park trucks, trailers and other equipment on the property. At the time that practice commenced Stanes was unaware that this was a prohibited use. Trucks had often been parked on the property from the time of its purchase in the late 1970s, the property had

been used as a hobby farm, and a tractor, forklift and other equipment were housed there for that purpose.

(g) In June 2012, Stanes's parents applied for and were granted a building permit to construct a new shed on the land to replace the existing sheds to garage the trucks and other equipment used in the transport business and the tractor and equipment used for the purpose of the hobby farm. The construction was finished in late 2012 at a cost to Stanes Transport of approximately $750,000.

(h) Stanes first became aware that the use of the property for that business was potentially in breach of the *Planning Act* on 7 September 2012, when his parents received a letter from the Department advising that a complaint had been received about the development and use of the property. Stanes's parents wrote back to the Department on 19 September 2012 expressing the understanding that the use fell within the definition of "Home Based Contracting".

(i) There followed a series of communications with the Department which culminated in the Department advising that the use did not fall within the definition of Home Based Contracting and that permission for the use was required from the Development Consent Authority.

(j) On 23 November 2012 Stanes's parents engaged a building certifier to make the application. The application was lodged in January 2013.

(k) On 1 May 2013 employees of the Department attended at the property and took details and photos of the business use. At the meeting of the Development Consent Authority on 8 May 2013 the application was deferred to the next meeting on 9 September 2013. In that interim period Stanes engaged a planning consultant to prepare further information and submissions. Those materials were submitted to the Development Consent Authority on 12 August 2013.

(l) At the meeting of the Development Consent Authority on 9 September 2013 consideration of the application was again deferred to the meeting on 9 October 2013. The application was refused at that time, and on 9 October 2013 an employee of the Department advised of the outcome and suggested that Stanes meet with another employee of the Department to discuss options. The options identified in that email were to lodge an appeal against the decision or to make application for an Exceptional Development Permit.

(m) Stanes engaged lawyers and lodged an appeal against the decision on 19 November 2013. Stanes participated in a mediation process on 15 January 2014 as part of the appeal process. That mediation

was unsuccessful, the appeal was withdrawn, and an application for an Exceptional Development Permit was lodged on 30 June 2014. That application took almost 12 months to resolve, and on 5 June 2015 Stanes was advised that the application had been refused. The letter advising of the determination acknowledged that time might be required to find another site for the conduct of the business.

(n) On 16 October 2015 Stanes and his parents were served with Notices to Cease. On 13 November 2015 Stanes's solicitors wrote to the Development Consent Authority requesting an extension of time to comply with the Notices. That was refused. It was only from that time that Stanes commenced looking for alternative premises. In November 2015 he provided three real estate agents with a list of requirements for the premises that were necessary to accommodate the business. He was prepared to either purchase or lease alternative property. Only two properties were identified. The purchase price of the first was $2.5 million and the second was in excess of that amount. The improvements on the first property were unsuitable and the location of the second property was unsuitable.

(o) At a meeting with an officer of the Department on 26 November 2015, the officer acknowledged that there was a shortage of industrial land. The officer made reference to a potential site near

the Arid Zone Research Institute which was under development. Stanes made contact with the Department of Primary Industries and Resources and was advised that expressions of interest would be called at some time in the future. That did not occur until March 2017. Stanes participated in that process and was successful, but was subsequently advised that a transport terminal would not be permitted to operate from that land because it was to be zoned agricultural/horticultural only.

(p) Stanes's solicitors wrote to the Development Consent Authority again on 10 December 2015 seeking a reconsideration of the request for an extension of time to comply. That request was refused on 3 March 2016, but in making that refusal officers of the Development Consent Authority offered to meet in relation to the matter and mediate. That did not come to pass.

(q) Throughout the course of 2016 Stanes continued to look for suitable alternative premises, but could not find anything. The real estate agents were also unable to find a property which was suitable in terms of size, access and vacant possession.

(r) On 25 August 2017, Stanes Transport was served with a Notice to Cease. Stanes and his parents were served with further Notices on 29 September 2017. Stanes was served with the summons on complaint on 1 December 2017. Stanes continued in his efforts to find alternative premises. Amongst other enquiries, he was told

that there was no timeframe on the release of new land behind the Transport Museum; that the application process for land at the Brewer Estate would take three years; and that the old drive-in theatre site and another potentially suitable property were not for sale.

(s) Towards the end of March 2018 Stanes took up a licence agreement to share a property at Ghan Road. The business was completely relocated to those premises by 8 April 2018. The licence fees for those premises were approximately $60,000 per annum. The site did not have water available and was unsuitable for the conduct of maintenance and repairs. For that reason, Stanes continued bringing the prime movers back to Lot 7105 for safekeeping and occasional washing. After the receipt of complaints, a change that practice to ensure that washing took place only during business hours between Monday and Friday.

(t) At the same time as he was taking up the licence agreement, Stanes commenced negotiations for the purchase of the old drive-in site, whose owners had reconsidered and were prepared to sell. Contracts were exchanged on 6 April 2018, subject to the condition that Stanes obtained planning approval for the use of the site as a Transport Terminal. The Development Application was lodged on 21 May 2018.[26] The purchase price of the land was in

26 Although the application had not been determined at the time of the plea hearing, by the time of the hearing of this appeal it had been approved.

the order of $2.5 million exclusive of stamp duty and professional costs. Most of those funds have been secured by a loan with interest expenses at approximately $110,000 per annum. The cost of constructing facilities on the land for the operations of the business will be in the order of $4 million.

(u) The shed built on Lot 7105 cost $750,000. It was lawfully constructed, but cannot be used for the business operations. Stanes was unaware of that matter at the time it was constructed.

(v) The company's annual operating expenses are in the order of $1.6 million and the company made a profit of $349,000 in the 2017 financial year. Although audited accounts have yet to be prepared, the company made a similar profit in the 2018 financial year. That profit is reinvested in the business. Stanes is paid a net salary of $60,000 per annum.

[53] At the conclusion of submissions the matter was adjourned to 26 September 2018 for decision. When the matter resumed the sentencing judge delivered reasons and imposed sentence. Those reasons contain the following findings.

(a) The defendants engaged with the relevant government agency and were not deliberately ignoring their obligations, but unfortunately it took a long time for the business to be transferred to another location. It also took a long time for the discussions that were

taking place between the relevant government agency and the defendants.

(b) General deterrence was the most significant sentencing factor in the matter.

(c) There is no established sentencing standard in the Northern Territory for this type of offending.

(d) While the pleas of guilty were not indicated at the earliest possible opportunity, they had significant value and the penalties would be reduced by 20 percent to take account of that matter.

(e) The loss sustained by the company in the construction of the shed on Lot 7105 was not a matter which operated in mitigation. It was incumbent on the company to ensure compliance with the planning scheme before it embarked on any development on the property. It was that failure to do so which had caused the financial burden.

(f) The conduct of the business on Lot 7105 did cause a significant reduction to the amenity of the neighbouring properties.

(g) The maximum penalty applying to Stanes Transport for the offence under s 75(1) of the *Planning Act* is $3,064,600, and for the offence under s 76(5) of the *Planning Act* is $896,280. An aggregate fine of $280,000 was imposed.

(h) The maximum penalty applying to Stanes for the offence under s 75(1) of the *Planning Act* is $612,920, and for the offence under

s 76(5) of the *Planning Act* is $599,368. An aggregate fine of $30,000 was imposed.

(i) An aggregate fine of $6000 was imposed on Stanes's father, who was the owner of the property.[27]

Resentencing considerations

[54] Having regard to those circumstances and the relevant sentencing principles, I have come to the conclusion that the fines imposed in these cases were manifestly excessive. That finding of implied error makes it unnecessary to consider the various process errors asserted in the other grounds of appeal, but necessary to resentence the appellants.

[55] Where a court imposes a fine on an offender, in determining the amount of the fine it must take into account as far as practicable the financial circumstances of the offender and the nature of the burden that its payment will impose on the offender.[28] In fixing the amount of the fine, the court may have regard to any damage to property suffered by a person and the value of any benefit derived by the offender as a result of the offence.[29] Where the offender is found guilty of two or more offences founded on the same facts or of a similar character, the court may impose an aggregate fine in respect of those offences.[30] I consider that the imposition of aggregate fines is the appropriate

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27 That matter is not the subject of appeal.

28 *Sentencing Act 1995* (NT), s 17(1).

29 *Sentencing Act 1995* (NT), s 17(5).

30 *Sentencing Act 1995* (NT), s 18.

disposition in these cases in order to avoid double punishment for the common circumstances and elements involved.

[56] Before turning to consider the penalties appropriately imposed, it is useful to put these matters into their broader context. As is apparent from the further evidence tendered by the respondent, the circumstances in which these breaches came to attention and became the subject of enforcement action arose out of a confluence of events. Historically, larger lots in what might be described as the "rural" areas of Alice Springs were used for a variety of purposes, including residential and commercial. Many landowners lived on acreage and ran businesses from that same land. Some of those businesses might properly have been characterised as light industrial. In the Stanes's case, for example, the original tenure was as an agricultural lease before it was zoned as "Rural Living" under the Northern Territory Planning Scheme in 2007.

[57] In earlier days, the conduct of commercial or light industrial operations on acreage in the rural areas of Alice Springs was usual and expected, or at least tolerated. So much is apparent from the fact that when Nazbuck's director was considering purchasing the land in question he declared his intentions for the use of that land to the owners of neighbouring properties and received no objection. However, as more people moved onto acreage in the rural areas for purely residential purposes, they carried an expectation that the amenities of those

properties would not be affected by the various incidents of commercial and light industrial usage other than in accordance with the relevant planning scheme.

[58] While that was no doubt a reasonable and lawful expectation, it had the consequence that landowners who had previously been conducting activities on the property in the understanding that they were not objectionable, and who had structured their businesses around that use, became subject to action to enforce the provisions of the planning scheme. Even then, there was a division of public opinion about the appropriateness of those activities. So much is apparent from the wide range of responses to the applications for the Exceptional Development Permits.

[59] It is in that context that I turn first to deal with the penalties properly imposed on Nazbuck.

[60] The initial breach in this case cannot properly be characterised as contumelious or premeditated. Before its purchase by Nazbuck the property had been used for similar purposes. Nazbuck then used the property for the purpose of conducting its business for in excess of 10 years without apparent complaint.

[61] The explanation proffered by Nazbuck for the failure to rectify the breach immediately cannot properly be characterised as an attempt to deflect blame or otherwise avoid responsibility for the breach. That

delay was attributed to the difficulties finding a suitable property in an appropriately zoned area, and then completing the improvements necessary to enable the business to be conducted from those premises. It may be accepted that this decision was commercially motivated in that it involved a balancing of the cost of purchasing alternative premises against the continuing viability of the business. That motivation must be balanced against the fact that the alternatives were either to cease operations (with the financial effect that would necessarily have on the principal and employees), or to purchase alternative premises at a commercially prohibitive cost.

[62] While it is correct to observe that the breach was instigated and continued for commercial reasons, the extent of the commercial benefit derived by Nazbuck was relatively modest. The value of that benefit may be roughly calculated by reference to the fact that the cost of renting the alternative premises before entering into an agreement to purchase those premises was in the order of $60,000 per annum. On the charges particularised in the complaint, that benefit was received from 27 March 2016 for a period of a little more than two years. On this characterisation, the commercial benefit presents as a saving of rent. This contrasts with more serious examples of this category of offence, such as the commercial exploitation of land by unauthorised demolition or a large scale commercial development from which a developer is expecting significant profits from on-sale.

[63] It may also be accepted that the period of non-compliance in this case was an extended one. The reasons for that may be attributed in part to Nazbuck's hope that it would be successful in procuring an Exceptional Development Permit, and in part due to the difficulties involved in securing alternative premises after that application was rejected (which have already been described). It is relevant that during that process Nazbuck remained engaged with the regulatory authority and did not treat its approaches and warnings with contumelious disregard. During that period of delay Nazbuck expended moneys in seeking to ameliorate the impact of its operations on the amenity of neighbouring properties.

[64] The period which ran from the time at which Nazbuck first became aware of the breach up until June 2017 may be characterised as one during which Nazbuck harboured some hope or expectation that it might be successful in securing an Exceptional Development Permit. During that period its communications with the regulatory authority were measured, and in no way demonstrated contempt for the requirements of the planning scheme, disregard for the interests of neighbouring property owners, or a refusal to accept the characterisation of its operations as a Transport Terminal. While the respondent is no doubt correct in submitting that the conduct remained unlawful despite the agreement by the consent authority to exercise its discretion not to commence prosecution action during that period, and

that forbearance did not constitute acquiescence, those circumstances do operate substantially in mitigation.

[65] So far as the delay in compliance with the notice was concerned, as the charge is particularised in the complaint that delay commenced on 1 October 2017. It was common ground for the purpose of the sentencing proceedings that compliance with the notice was effected on 30 June 2018. Again, Nazbuck explains that delay by reference to the fact that throughout that period it was negotiating for the purchase of the alternative premises, undertaking the improvements necessary to take lawful occupation of those premises, and moving its business operations to those premises. Those efforts and the difficulties encountered by Nazbuck in that respect had been the subject of communications during that period with the consent authority and its solicitors.

[66] The breach was not one which resulted in some permanent alteration to the property and some permanent impact on the amenity of neighbouring properties. Rather, it was temporary (albeit extended), reversible in nature and capable of full rectification. That rectification had taken place by the time of the sentencing proceedings. This contrasts with many construction cases where irreparable damage is done by demolition or renovations, or circumstances where there are established health and safety risks or such wider impact.

[67] The breach was not one which gave rise to some danger to the health and safety of the community. The scale of the breach, whilst no doubt inconvenient to and annoying for some residents of neighbouring properties, was not great in a relative sense in terms of its impact on the amenity of neighbouring properties and the general location. It may be noted in this respect that the owners of the properties on either side of Lot 4997, and the property directly across the road, expressed support for Nazbuck's application for an Exceptional Development Permit. To make this observation is not to disregard the objections made by other owners in the area. It is only to contextualise the nature and scale of the breach.

[68] None of this is to suggest that the offending was anything other than serious. It is only to place the nature of this offending in its proper place on the scale of seriousness.

[69] Nazbuck is a single director corporation with a relatively modest turnover. It has made substantial losses in the last two taxation years. It has expended in excess of $1 million in securing alternative premises for the conduct of its business, the vast bulk of which was borrowed with a substantial mortgage repayment obligation.

[70] Both Nazbuck and its director were first offenders and indicated a plea of guilty at an early opportunity. They are entitled to be given credit for those matters in the sentencing calculus. The assessment of penalty

must also take into account the fact that Nazbuck's director is the *alter ego* of the company, and will ultimately bear the full burden of both fines and any attendant diminution in the company's assets.

[71] Similar observations may be made in relation to the position and conduct of Stanes and Stanes Transport. Throughout the period of the offending conduct they undertook significant activity directed to conforming with the scheme. That activity included making an application for an Exceptional Development Permit once the breach had been brought to their attention. They had a genuine intention to comply with their obligations, but the steps necessary to transfer the business to a new location involved a lengthy process.

[72] There was no wilful disobedience of the law. There were ongoing attempts to bring the activity within the law or to find a feasible way to operate the business from another site. The company's director worked with the Department and the regulatory authority in those efforts. There was a common sense recognition by those agencies that it would take time for the business to relocate. The business activity on the property had all but ceased as at April 2018. It is not established that whatever activity continued after that time could be characterised as operations as a Transport Terminal.

[73] Neither Stanes nor the company made any significant financial gain from the breach. If anything, the company suffered loss from the

unwitting (but lawful) expenditure on the construction of the shed on the property. While that matter does not operate in mitigation, it does operate to address the suggestion that the appellants made a financial gain from the breach. To the extent that the breach afforded any commercial benefit, that is most accurately reflected in the $60,000 per annum licence fee that was ultimately paid for the new premises.

[74] Both the company and its directors indicated an intention to plead guilty at a relatively early stage. Both the company and its directors are of good character. Both were first offenders rather than recidivists in relation to planning offences. Stanes was genuinely remorseful for the breach and everything that flowed from that, including the impact on his parents.

Disposition

[75] Having regard to those considerations, at the conclusion of the hearing of the appeal I made the following orders with reasons to be published at a later date.

[76] In LCA 8 of 2018 (proceedings No 21815353):

1. Time within which to Lodge the Notice of Appeal is extended to 13 August 2018.

2. The appeal is allowed and the sentence imposed by the Local Court on 3 July 2018 for the offences against s 75(1) and s 76(5) of the *Planning Act* is quashed.

3. For those offences, the appellant is convicted and an aggregate fine of $40,000 is imposed.

4. It is recorded that a levy of $1000 is imposed for each offence by operation of s 61(2) of the *Victims of Crime Assistance Act 2006* (NT).

[77] In LCA 10 of 2018 (proceedings No 21754980):

1. The appeal is allowed and the sentence imposed by the Local Court on 26 September 2018 for the offences against s 75(1) and s 76(5) of the *Planning Act* is quashed.

2. For those offences, the appellant is convicted and an aggregate fine of $50,000 is imposed.

3. It is recorded that a levy of $1000 is imposed for each offence by operation of s 61(2) of the *Victims of Crime Assistance Act 2006*.

[78] In LCA 11 of 2018 (proceedings No 21754975):

1. The appeal is allowed and the sentence imposed by the Local Court on 26 September 2018 for the offences against s 75(1) and s 76(5) of the *Planning Act* is quashed.

2. For those offences, the appellant is convicted and an aggregate fine of $10,000 is imposed.

4. It is recorded that a levy of $150 is imposed for each offence by operation of s 61(2) of the *Victims of Crime Assistance Act 2006*.

[79] I will hear the parties in relation to costs if need be.
