

PL403

PLANNING AND DEVELOPMENT ACT 2005

PLANNING AND DEVELOPMENT (LOCAL PLANNING SCHEMES) REGULATIONS 2015

CLAUSE 78H NOTICE OF EXEMPTION FROM PLANNING REQUIREMENTS DURING STATE OF EMERGENCY

Schedule 2 of the Planning and Development (Local Planning Schemes) Regulations 2015 (LPS Regulations) contains Deemed Provisions which have effect and may be enforced as part of each local planning scheme to which they apply, whether they are prescribed before or after the scheme comes into force. If a Deemed Provision that has effect as part of a local planning scheme is inconsistent with another provision in the scheme, the Deemed Provision prevails and the other is, to the extent of the inconsistency, of no effect.

Part 10B of Schedule 2, made by the Planning and Development (Local Planning Schemes) Amendment Regulations 2020, enables the Minister for Planning to issue notices exempting the need for compliance with one or more requirements of a local planning scheme.

On 16 March 2020, a State of Emergency Declaration was made in relation to the State of Western Australia. On 8 April 2020, the Minister for Planning issued a notice under clause 78H(1), Schedule 2 of the LPS Regulations (the Original Notice), gazetted on 17 April 2020, required for the purpose of facilitating a response to, or recovery from, the emergency occasioned by the COVID-19 pandemic. The Original Notice was amended under clause 78H(6)(a) on 30 April 2020 (gazetted on 5 May). This notice is issued under clause 78H(6)(a) (this Notice) and provides exemptions, to reflect what is set out in this instrument.

Accordingly, I, Rita Saffioti MLA, Minister for Planning, pursuant to the powers vested in me under Part 10B, Schedule 2 of the LPS Regulations, HEREBY—

- A. ISSUE an exemption from the planning requirements identified in column 1 of the attached Schedules, for the local planning schemes specified in column 2 of the attached Schedules (to which the Deemed Provisions apply), subject to the direct conditions specified in column 3, and applicable as a right to the persons identified in column 4 of the attached schedules, together with any accompanying and applicable explanatory conditions, unless augmented by the declarations below.
- B. DECLARE both the direct conditions and explanatory conditions form part of this Notice, except where there is an inconsistency, in which case the direct conditions prevail over the explanatory conditions.
- C. DECLARE that any exemption listed within Schedule 5 is only available during the period of a Lockdown, as defined within the explanatory conditions.
- D. RECORD that this Notice is signed by me at 11am upon this 4th day of March 2022

SCHEDULES

Column 1 Requirements	Column 2 Schemes	Column 3 Direct Conditions	Column 4 Discretion To
Schedule 1—Exemption from requirement to obtain approval			
1.1 Proponents are exempted from the requirement to obtain development approval for the use of, or undertaking of works on, land, where such use or works relate to medical or health related activities associated with a response to the COVID-19 Pandemic.	All local planning schemes.	<ol style="list-style-type: none"> 1. Provided that a Public Authority or local government advises or identifies the medical or health related activities as necessary in response to the COVID-19 Pandemic. 2. An exemption under this clause will expire 90 days after the date upon which the State of Emergency Declaration ceases to have effect, or is revoked. 	Proponents
1.2 Proponents are exempted from the requirement to obtain development approval to the use of, or undertaking of works on, land, where such use or works concern temporary workers' accommodation.	All local planning schemes.	<ol style="list-style-type: none"> 1. Provided that the temporary workers' accommodation applies to a workforce necessary for the installation of, or construction of, and maintenance of, essential services such as (but not limited to) power stations, water, desalination plants or sewer treatment facilities. 2. Provided that the proponent notifies the local government within 7 days of commencing the use, that the use is being undertaken. 	Proponents

Column 1 Requirements	Column 2 Schemes	Column 3 Direct Conditions	Column 4 Discretion To
		3. An exemption under this clause will expire 90 days after the date upon which the State of Emergency Declaration ceases to have effect, or is revoked. 4. Despite any other condition, this exemption does not apply to workers' accommodation connected with agriculture, which is dealt with in 1.3.	
1.3 Proponents are exempted from the requirement to obtain development approval to the use of, or undertaking of works on, land, where such use or works concern agricultural workers' accommodation.	All local planning schemes.	1. Provided that the temporary workers' accommodation applies to a workforce necessary for ongoing operation of agricultural activities. 2. Provided that: <ol style="list-style-type: none"> a) the land to be used is located in the Rural zone; b) the use is capable of being approved under the scheme; c) if the land can be connected to all reticulated utility services, is so connected; and d) no new permanent buildings or structures are required. 3. Provided that the proponent notifies the local government within 7 days of commencing the use, that the use is being undertaken. 4. An exemption under this clause will expire 90 days after the date upon which the State of Emergency Declaration ceases to have effect, or is revoked. 5. Despite any other condition, this exemption does not apply to temporary workers' accommodation connected with the essential services dealt with in 1.2.	Proponents
1.4 Proponents are exempted from the requirement to obtain development approval for the following uses, and temporary works associated with these— <ol style="list-style-type: none"> i. commercial vehicle parking. 	All local planning schemes	1. Provided that the proponent notifies the local government within 7 days of commencing the use, that the use is being undertaken. 2. An exemption under this clause will expire 90 days after the date upon which the State of Emergency Declaration ceases to have effect, or is revoked.	Proponents
Schedule 2—Exemptions relating to non-conforming uses			
2.1 Any approval for a non-conforming use, is exempt from a provision that annuls the approval because of a discontinuance of that non-conforming use.	All local planning schemes.	1. The period during which the State of Emergency is declared shall be excluded from any calculation of the period for which a non-conforming use ceases to exist. 2. An exemption under this clause will expire on the day after the date upon which the	Proponents

Column 1 Requirements	Column 2 Schemes	Column 3 Direct Conditions	Column 4 Discretion To
		State of Emergency Declaration ceases to have effect or is revoked.	
Schedule 3—Exemption from requirements regarding time limits / conditions of approval			
3.1 In relation to an approved development application, proponents are exempted from the requirement to substantially commence development.	All local planning schemes	<ol style="list-style-type: none"> 1. Provided that— <ol style="list-style-type: none"> a. the development application was not approved by a Development Assessment Panel, as defined by the Planning and Development (Development Assessment Panels) Regulations 2011; b. the original deadline for substantial commencement is exempted; and c. a new deadline for substantial commencement is substituted, being the day which is 2 years after the day on which, but for this exemption, the development approval would have ceased to be valid. 2. The exemption under this clause will only be available for development applications decided on, or before, the date upon which the State of Emergency Declaration ceases to have effect, or is revoked. 	Proponents
3.2 Proponents are exempted from any restriction upon loading or unloading times, related to the delivery of goods and/or petroleum products.	All local planning schemes.	<ol style="list-style-type: none"> 1. Confined to premises with an existing approval, or the benefit of an exemption under this Notice, to sell goods and/or petroleum products. 2. Provided that the proponent notifies the local government within 7 days of commencing the use, that the use is being undertaken. 3. An exemption under this clause will expire 90 days after the date upon which the State of Emergency Declaration ceases to have effect, or is revoked. 	Proponents
Schedule 4—Exemptions of a type that may fall within multiple categories			
4.1 Exemption from any requirement under a scheme that would ordinarily apply to development required to implement a direction or authorisation issued under the <i>Emergency Management Act 2005</i> or the <i>Public Health Act 2016</i> .	All local planning schemes.	<ol style="list-style-type: none"> 1. An exemption under this clause will expire 90 days after the date upon which the State of Emergency Declaration ceases to have effect or is revoked. 	Proponents

Column 1 Requirements	Column 2 Schemes	Column 3 Direct Conditions	Column 4 Discretion To
Schedule 5—Exemptions that are only applicable during a Lockdown			
5.1 Proponents are exempted from the requirement to obtain development approval for a home business use, and temporary works associated with this use.	Local planning schemes applicable to the land / geographic locations to which the Lockdown applies.	2. Provided that the land to be used is located in— (a) a residential zone; or (b) where a dwelling, grouped dwelling or multiple dwelling is a permitted use.	Proponents
5.2 Where premises are approved for use as an hotel, tavern, restaurant/café or other similar venue, proponents are exempted from— i. any condition of approval, or designation in the approved use, requiring the food prepared at the premises to be consumed on the premises; ii. any requirement to obtain approval for food to be prepared for consumption off premises; and iii. any requirement to obtain approval to minor, temporary, works that are necessary to adapt existing premises to use the exemption contemplated under (i) or (ii) above.	Local planning schemes applicable to the land / geographic locations to which the Lockdown applies.	1. Provided that no new permanent buildings or structures are required (with the exception that car parking bays are permitted). 2. Despite any other condition, this exemption does not apply to a Heritage Protected Place where works are required.	Proponents
Schedule 6—Exemptions that expire 90 days after the signing of this Notice			
6.1 Proponents are exempted from the requirement to obtain development approval for the following uses, and temporary works associated with these: i. shop; ii. restaurant/café; iii. convenience store (excluding those selling petroleum products); iv. consulting rooms; v. office.	All local planning schemes.	1. Provided that— (a) the land to be used is located in a commercial, centre and/or mixed use zone; (b) the use is capable of being approved under the scheme; (c) no new permanent buildings or structures are required (with the exception that car parking bays are permitted); (d) for shop uses, once the proposed use is in place, the net lettable area for the land use does not exceed 400m ² ; and (e) if the land can be connected to all reticulated utility services, is so connected, and does not depend on any onsite effluent disposal. 2. Provided that the proponent notifies the local government within 7 days of commencing	Proponents

Column 1 Requirements	Column 2 Schemes	Column 3 Direct Conditions	Column 4 Discretion To
		<p>the use, that the use is being undertaken.</p> <p>3. Despite any other condition, this exemption does not apply to a Heritage Protected Place.</p> <p>4. An exemption under this clause will expire 90 days after the date upon which this Notice is signed.</p>	
<p>6.2 Proponents are exempted from the requirement to obtain development approval for the following uses, and works associated with these—</p> <ul style="list-style-type: none"> i. industry; ii. industry-light; iii. trade supplies; iv. warehouse/storage; v. transport depot. 	<p>All local planning schemes.</p>	<p>1. Provided that—</p> <ul style="list-style-type: none"> (a) the land to be used is located in an industrial zone; (b) the use is capable of being approved under the scheme; (c) if the land can be connected to all reticulated utility services, is so connected, and does not depend on any onsite effluent disposal; and d) either— <ul style="list-style-type: none"> i. no new permanent buildings or structures are required; or ii. any buildings or structures required to facilitate the use are deemed temporarily approved for a period of no more than 2 years, from the date the use commences, after which the buildings or structures must be removed. <p>2. Provided that the proponent notifies the local government within 7 days of commencing the use, that the use is being undertaken.</p> <p>3. Despite any other condition, this exemption does not apply to a Heritage Protected Place.</p> <p>4. An exemption under this clause will expire 90 days after the date upon which this Notice is signed.</p>	<p>Proponents</p>

EXPLANATORY CONDITIONS

1. In this Notice a generous, broad interpretation is to be given to terms.
2. ‘Deemed Provisions’ means Schedule 2 of the Planning and Development (Local Planning Schemes) Regulations 2015.
3. The term “all local planning schemes” relates to those schemes to which the Deemed Provisions apply.
4. The term “proponent” should be interpreted broadly and includes any owner or occupier of land, and also includes any applicant or agent acting on their behalf. A proponent may also include any local government, if acting as an owner or occupier of land.
5. Unless otherwise stated, a reference to a clause in this Notice is to a clause in the Deemed Provisions.
6. Heritage Protected Place has the same definition as contained within the Planning and Development (Local Planning Schemes) Regulations 2015.

7. “State of Emergency Declaration” means the State of Emergency declared by the Minister for Emergency Services, as effective from 12am, 16 March 2020. This was made under section 56 of the *Emergency Management Act 2005*.
 - a) When the State of Emergency Declaration is no longer required, the declaration will expire on either a date specified in a—
 - i. notice issued under section 58 of the *Emergency Management Act 2005*, by the Minister for Emergency Services; or
 - ii. revocation notice issued by the said Minister.
 - b) Information relating to this will be available on websites such as—
<https://www.wa.gov.au/government/document-collections/covid-19-coronavirus-state-of-emergency-declarations>
8. “Public Authority” has the same definition as “public authority” in section 4, *Planning and Development Act 2005*.
9. For the purpose of this Notice, a “Lockdown”
 - (a) occurs when the Police Commissioner issues directions under section 72A (or other relevant section) of the *Emergency Management Act 2005*, which has the either one, or more, of the following effects—
 - i. to mandate the closure to the public of one or all of the following premises:
 1. restaurants or cafe;
 2. businesses characterised as a pub, bar or club that supplies alcohol under a licence granted under the *Liquor Control Act 1988 (WA)*;
 3. gyms.
 - or
 - ii. to restrict 2 or more persons from gathering in an indoor space, where there is not at least 4 square metres of space for each person at the gathering.
 - (b) Is in place from the time stipulated in the direction and ends upon the revocation of such restrictions by the Police Commissioner.
10. For the avoidance of doubt, while the definition of a Lockdown provided under explanatory condition 9 refers to closure of certain premises, this does not negate the service of takeaway food enabled under temporary exemption 5.2.
11. For the avoidance of doubt, this Notice provides temporary exemptions from planning requirements. Consistent with clause 78J(2) of the Deemed Provisions. This Notice cannot provide a permanent exemption from a planning requirement under a scheme.
 - (a) For example, in clauses 1.2 to 1.3 of this Notice the exemption is generally limited to “temporary works” and “no permanent buildings or structures”. That is, at the expiration of the exemption period set out under this Notice, if new development approval is not otherwise obtained, a proponent must remove, pull down, take up, or otherwise alter any development and cease any unauthorised use, and return the land as nearly as practicable to its condition immediately before any development activity relied upon under this Notice started. Failure to do so may result in enforcement action by the responsible authority, including prosecution or a separate take-down notice under section 214 of the *Planning and Development Act 2005*.
 - (b) For example, in clause 1.3 references to “the use is capable of being approved under the scheme” generally includes, but is not limited to, uses that are not a “X” use, or equivalent concept, as set out in zoning table. Moreover, to avoid doubt and reflective of clause 78J(5), if an exemption is relied upon because at the time of such reliance a use was capable of being approved, but is no longer capable at the time of a future development application due to a change in the scheme, no non-conforming use rights apply. That is, the proponent in such a situation, not being able to obtain development approval, must remove, pull down, take up, or other alter any development and cease any unauthorised use, and return the land as nearly as practicable to its condition immediately before any development activity relied upon under this Notice started.
12. An exemption provided for under this Notice only relates to planning requirements applicable pursuant to a local planning scheme (including under the Deemed Provisions), and does not exempt any other requirement that might apply under any other law. For example, a proponent seeking to rely upon an exemption set out in this Notice may still require approvals under health, building, environment, liquor licencing and other statutory requirements.
13. In interpreting both this Notice and different local planning schemes to which this Notice applies, including but not limited to land use terms and zoning classification descriptions, words can express the same idea in a different form of words and ideas are not to be taken as different just because different forms of words were used. For example, a reference to a “residential” zone and uses includes all such zones and uses substantively of this type or genus, whatever nomenclature is used by a local government in their particular local planning scheme.
14. The ‘Rural’ zone as referred to in the direct conditions of clause 1.3 regarding agricultural workers accommodation, refers to rural zones and other zones substantively of this type or genus, such as general farming or general agriculture zones, but not special rural or rural residential zones where agricultural workers accommodation is generally not required or appropriate.

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15. To avoid any doubt, the exemption in clause 2.1 operates to “stop the clock” on the period of discontinuance for a non-conforming use, which is usually 6 months or other longer period approved by the local government, and will be paused for such time as the State of Emergency Declaration is in force.
 16. An exemption relied upon by a local government or proponent under this Notice does not preclude a local government or proponent from relying upon any other exemption, if applicable, including but not limited to clause 61 of the Deemed Provisions.
 17. An exemption under this Notice is a discretionary right afforded to the person designated in column 4 of the Notice—it is not an obligation imposed on that person.
 - a) A local government afforded an exemption under this Notice may exercise their discretion not to rely upon that exemption. Likewise, a proponent afforded an exemption under this Notice may likewise exercise their discretion not to rely upon that exemption.
 - b) To avoid doubt, a local government cannot prevent or prohibit the free exercise of an exemption afforded to a proponent in accordance with the conditions of the exemption.
Likewise, proponents and other members of the community cannot prevent or prohibit the free exercise of an exemption afforded to a local government in accordance with the conditions of the exemption.
 18. In clause 1.1, the exemption does admittedly permit the construction of permanent works and permanent buildings or structures, and not merely temporary development. The clause also is not bound by the limitations of exclusions relating to any Heritage-Protected Place. This is due to the extraordinary need for any use or works in connection with medical or health related activities necessary to respond to the COVID-19 Pandemic. In many circumstances, any works involved with such a need will in any event be a public work, already exempted from development approval. Nonetheless, to the extent any development is not a public work and clause 1.1 is relied upon by a proponent, the clause remains only temporary.
 19. The exemptions contained within Schedule 6 cease to have effect 90 days after the signing of this Notice. The exemptions identified have either been superseded by the amended Regulations or are now unnecessary based on the relaxation of restrictions. A period of 90 days has been provided to enable landowners who previously relied on these exemptions to obtain development approval should they wish to continue operating the land use.