

Draft Planning and Development (Local Planning Schemes) Regulations – Model and Deemed Provisions

By Andrew Roberts

Draft Planning and Development (Local Planning Schemes) Regulations – model and deemed provisions

In November 2014, a discussion paper and consultation draft were released for the proposed *Planning and Development (Local Planning Schemes) Regulations (LPS Regulations)*. The LPS Regulations are an initiative from phase 1 with the State Government's planning reform agenda.

The LPS Regulations will replace the *Town Planning Regulations 1967* which are widely recognised as needing updating and improvement. The introduction of the LPS Regulations was facilitated by amendments to the *Planning and Development Act* in 2010 which provided for regulations to be made containing model and deemed scheme provisions. These provisions appear in Schedules 1 and 2, respectively, of the LPS Regulations.

While the LPS Regulations cover a range of matters, it is the introduction of the model and deemed provisions that are likely to have the most significant impact on existing and future local planning schemes.

The model provisions

The model provisions will provide a template for schemes much like the current Model Scheme Text does presently. New schemes will be required to include the model provisions, although variations and exclusions will be possible with Ministerial approval. The model provisions will apply when local governments review or amend their current schemes.

While the LPS Regulations contain many provisions similar to the Model Scheme Text provisions, they also contain some interesting additions. Without being exhaustive, these additions include the following:

“it is the introduction of the model and deemed provisions that are likely to have the most significant impact on existing and future local planning schemes”

1. A model provision is to be introduced permitting schemes to specify additional uses for which local reserves can be used.
2. Incidental uses are to be a standard permissibility designation (the others are P, D, A and X uses).
3. The *Residential Design Codes (Codes)* are to be read as part of local planning schemes. Presently, the standard scheme

provision requires conformity with the Codes but this is not generally regarded as incorporating them into schemes.

4. The model provisions allow local governments, with the approval of the Commission, to agree to the discharge and modification of any restrictive covenant affecting development in a scheme area. Presently, the restrictive covenant provision in most schemes is concerned with restrictive covenants limiting the number of residential developments which can be constructed. The model provision is much broader in scope.

5. There are a number of amendments, additions and deletions to the general and land uses definitions presently found in the Model Scheme Text. Of particular note is the introduction of a definition for 'site and development standards', which generally does not exist in most current schemes.

6. Part 7 of the model provisions introduces standard provisions for scheme map legends including the names of zones and reserves, visual appearance, description and objectives for reserve and zones.

Deemed provisions

As the deemed provisions will take effect when the LPS Regulations become operative, they will immediately form part of existing schemes. Consequently, the deemed provisions will become operative for each existing scheme without the need for local governments to amend or review their schemes.

The deemed provisions cover a broad range of matters including local planning policies, heritage protection, structure plans, local development plans, development contributions, development applications and approvals, enforcement and administration. The LPS Regulations also make provision for the inclusion of bush fire risk management provisions, although these are presently unavailable.

Where there is inconsistency between a deemed provision and an existing scheme provision, the deemed provision will prevail. Local governments will need to identify the inconsistencies between their schemes and the deemed provisions so they know whether to apply a scheme or a deemed provision.

"New definitions of general terms and expressions are introduced which will apply to the exclusion of existing scheme definitions"

The scope for inconsistency between the deemed provisions and existing scheme provisions is considerable. The deemed provisions are detailed with respect to many of the subjects with which they deal. Such is the detail of the deemed provisions that they appear to deal with these subjects exhaustively so there may be little room, if any, left for existing scheme provisions to operate in relation to these subjects.

The deemed provisions may introduce some significant changes under some schemes. For example, under most existing schemes structure plans require a local government's approval. Under the deemed provisions, it is only the Commission's approval that is required. This would arguably be an instance of inconsistency where the deemed provision would prevail. Consequently, an effect of the deemed provisions would be to remove the requirement for local government approval of structure plans under their schemes. It is possible for the Commission to delegate this approval power to local governments, but this would be a discretionary matter for the Commission.

Without being exhaustive, the deemed provisions have the following interesting elements:

1. New definitions of general terms and expressions are introduced which will apply to the exclusion of existing scheme definitions for the same terms and expressions if they are inconsistent. A definition of 'substantial commencement' is provided, which is missing from many current schemes. A definition of 'works' is included to more clearly identify the two aspects of development, namely physical development (ie works) and use.
2. The heritage protection provisions introduce 'heritage conservation notices' which can be given to an owner or occupier requiring specified repairs for a place on a heritage list or in a heritage area which is not being 'properly maintained'. The Cities of Stirling and Fremantle recently amended their schemes to introduce comparable provisions. Whether these provisions would have any ongoing operation after the Regulations came into effect is a matter requiring consideration.
3. Where the Commission refuses to approve or unacceptably modifies a structure plan presented by a landowner, a right of review to the State Administrative Tribunal will exist. However, no review rights will exist for local governments who prepare a structure plan which is then refused or unacceptably modified by the Commission.
4. There are substantial provisions relating to local development plans, but it is not clear whether these are intended to replace the detailed area plan provisions which exist in many current schemes.
5. Planning approval will be required for 'works' (a defined term) or the use of land.
6. Single houses will be exempt from the need for approval where they comply with the deemed-to-comply provisions of the Codes.
7. After an application is approved, subsequent applications can be made to a local government to amend the substantial commencement period, amend or delete conditions and amend the approved development.

While the model provisions will not present local government with any difficulties immediately following the LPS Regulations coming into effect, it is a different story for the deemed provisions which will take immediate effect. To ensure a smooth transition, local governments would be advised to undertake some analysis of the inconsistencies between their existing schemes and the deemed provisions to ensure it is clear which will apply once the LPS Regulations come into operation.

For further information in regard to the above, contact Andrew Roberts on 9424 6210 or andrew.roberts@mcleods.com.au. The information contained in this article should not be relied upon without obtaining further detailed legal advice in the circumstances of each case.