

Expansion of development approval exemptions under the deemed provisions

By Peter Wittkuhn

Introduction

A significant number of uses including shops, small gyms and martial arts studios, restaurants, and some liquor premises are poised to become exempt in many circumstances from the requirement of development approval under planning reforms currently in consultation-draft stage.

The draft *Planning Regulations Amendment Regulations 2020 (Amendment Regulations)* are proposed to extensively amend the *Planning and Development (Local Planning Schemes) Regulations 2015 (LPS Regulations)*. There are many amendments meriting discussion, however this publication highlights some proposed new exemptions from the requirement of development approval.

It is argued that the intended cutting of red tape is going too far and land use conflicts are likely for uses that move into existing 'mixed use' residential/commercial buildings. Moreover, it would seem that for uses which are already operating, and which fall into the categories covered by the exemptions, their existing development approvals would basically become irrelevant and can be disregarded in so far as they apply to those uses.

Deemed Provisions

As most planners would be aware, the existing Schedule 2 to the *Planning and Development (Local Planning Schemes) Regulations 2015*, are generally referred to as the 'deemed provisions' because they are deemed to form part of every planning scheme in Western Australia. Clause 61 of the deemed provisions currently sets out a number of exemptions from the requirement for development approval. By way of example, R-Code-compliant single houses generally do not require development approval. The deemed provisions prevail over any inconsistent provision in the local government's planning scheme.

Amendment to expand categories of exempt development

The Amendment Regulations are proposed to substantially add to the categories of exempt developments. Under proposed sub-clauses (2) and (2A) of clause 61, certain 'D' uses i.e. discretionary in the zone (in question) will no longer require development approval if:

- They have no works component, or the works component would itself be exempt from the requirement of

- development approval; and
- The use would be established within what the drafters of the Regulations regard as compatible zones; and
- Certain other conditions are satisfied.

Two of the exemptions apply to light industry zones, and one exemption (home occupation) applies to all zones in which it is a 'D' use. All other new exemptions apply to 'commercial', 'centre' or 'mixed use' zones. The zone names used under individual schemes are not determinative. Thus, for example, if a particular zone is named as something other than a 'centre' zone but it has objectives that correspond with the Amendment Regulations' definition of a 'centre zone', then it is deemed to be a 'centre zone' for clause 61 purposes.

Potential land use conflicts

Within many 'commercial', 'centre' or 'mixed use' zones are an increasing number of established, approved, mixed use buildings. It is suggested that these buildings are apt to demonstrate the potential for land use conflicts arising from the proposed exemptions, although the potential for land use conflicts is by no means confined to mixed use buildings.

Nevertheless, if the Amendment Regulations are passed as proposed, then a person who wishes to set up any of the following uses (merely by way of example) could do so without development approval, and furthermore without any compulsory parking requirements or restrictions as to hours imposed by virtue of the planning system:

- A shop up to 400m² NLA anywhere within an existing mixed use (residential/ commercial) building;
- A restaurant or café of any size anywhere within a mixed use (residential/commercial) building;
- A convenience store (provided no sale of petroleum products) of any size anywhere within an existing mixed-use (residential/commercial) building;
- A small liquor store anywhere within an existing mixed-use (residential/commercial) building – metropolitan or Peel region only;
- A small bar anywhere within any mixed-use (residential/commercial) building – metropolitan or Peel region only – lot must not adjoin a residential zone;
- Hotel – up to 400m² NLA anywhere within an existing mixed-use (residential/commercial) building – metropolitan or Peel region only, lot not to adjoin a residential zone;
- Tavern [!] up to 400m² NLA anywhere within a mixed-use (residential/commercial) building – metropolitan or Perth region; not to directly adjoin a residential zone;
- Gym, cross-fit studio, martial arts studio etc up to 400m² NLA anywhere within a mixed-use (residential/commercial) building, *except* on the ground floor – metropolitan region only.

Although the exemptions are not confined to establishing within an existing mixed-use building, we have highlighted this instance because land use conflicts seem inevitable. State planning has long promoted the benefits of mixed-use development – the benefits of various commercial and residential uses being co-located within the same building – but the idea of having a tavern or a kick-boxing studio (for example) establish within the strata lot adjacent to a residential apartment in the same building would seem, with respect, to introduce a lot more 'vibrancy' and 'activation' than a residential household in that building would have ever bargained for.

It could be said that some of the potential land use conflicts might be addressed by other fields of legal regulation. In the case of liquor premises, an appropriate category of liquor licence is required, and, to some extent, this might take into account amenity issues and operating hours. Uses still need to comply with the *Environmental Protection (Noise) Regulations 1997*. Strata by-laws might also represent a degree of constraint to proponents and a degree of protection for existing occupants. However, these aspects of legal regulation can be somewhat hit-and-miss.

The reforms included in the Amendment Regulations were initiated prior to the COVID pandemic. The original justifications for the exemptions had no connection with COVID, and the exemptions are not proposed to be temporary only.

A bridge too far?

On the face of things, it is argued that the cutting of red tape is extending a little too far in this instance, at least as regards exemptions from the requirement of development approval which are proposed to be introduced by the Amendment Regulations. If I bought an apartment in a mixed use residential/commercial building, I would not have expected a kick-boxing studio to move into the apartment next to mine, in the same building, without the need for development approval. That is, however, an example of what would become lawful as of right, and it is only one example. It is suggested that the Amendment Regulations will lead to land use conflicts which will be extremely difficult to resolve. If the exemptions were ever to be reversed, non-conforming use rights would attach to uses that were established in the meantime in reliance on the exemptions. The consultation draft is open for submissions to the DPLH until 18 September 2020.

For further information, please contact Peter Wittkuhn at pwittkuhn@mcleods.com.au. The information contained in this update should not be relied on without obtaining further detailed legal advice in the circumstances of each case.