

State Emergency Over Local Government Planning Ministers Notice

By Denis McLeod

A McLeods Update on 6 April 2020 closely followed the coming into effect on 4 April of the amendments to the *Planning and Development (Local Planning Schemes) Regulations 2015 (LPS Regulations)*. That Update explained how the new deemed provisions empowered the Minister to issue a Notice exempting compliance with planning requirements under local planning schemes throughout the State.

The 6 April Update explained the written law framework for the issuing and operation of a Ministerial Notice under the new deemed provisions, and discussed the possible direction the exemptions might take. The Update also noted that local governments would need to wait for the Notice to be issued in order to gain an understanding of its effect on local government planning functions.

The cl.78H(1) Notice was issued by the Minister to take effect on 11 April, and the purpose of this Update is to provide insight into the possible impact of its exemptions from planning requirements under local planning schemes. This Update supplements the McLeods urgent newsletter issued on 11 April.

Issue of Notice

The cl.78H Notice of Exemption from Planning Requirements, having been issued on 11 April, is declared to remain in effect until midnight 1 May 2023 '*... unless otherwise stated in this Notice*'. In the case of many exemptions, the conditions of the exemptions *otherwise state* an earlier expiry date, being 90 days after the date upon which the 16 March 2020 State of Emergency Declaration (**SOED**) for the COVID-19 pandemic, ceases to have effect. The SOED ceases to have effect if it is not extended by the Minister for Emergency Services every 14 days, or if it is revoked. The duration of the exemptions in the Notice is discussed in more detail below.

Form of the Notice

The Notice itself is contained in three brief paragraphs to the following effect:

1. ISSUING the exemptions by reference to six Schedule(s), covering the six categories of planning requirements in cl.78H(3)(a);
1. DECLARING the duration of the Notice; and
1. RECORDING the signing of the Notice at 5.00pm on 8 April 2020.

The Schedules of exemptions

The Schedules to the Notice have three columns: Column 1 is headed '**Requirements**'; Column 2 is headed '**Schemes**'; and Column 3 is headed '**Conditions**'.

It is sufficient to say in regard to Column 2 that all local planning schemes are covered.

The details of the Requirements in Column 1 and the details of the Conditions in Column 3 are expressed in plain terms, and on their face should be easy to understand. To assist in understanding, the Minister has issued Explanatory Notes which were prepared to assist planners, though the Explanatory Notes are not part of the Notice and have no legal status. The same applies to the Frequently Asked Questions, and their answers, which were issued at the same time as the Notice.

Interpretation and Guidance notes

17 paragraphs of Interpretation and Guidance notes (**Guidance notes**) are set out at the end of the Schedules. They are not referred to in the cl.78H Notice, and their status is not clear. Some of the Guidance notes give rise to issues which will be discussed below.

It is likely that local governments and their planning and compliance officers will be most concerned with Schedule 1 which deals with **exemptions from the requirement to obtain planning approval**, and Schedule 2 which deals with **exemptions from requirements under a condition of development approval**. However all six Schedules need careful attention.

The exemptions in the six Schedules of the Notice are not necessarily the full picture, as Guidance note 16 draws attention to the fact that the exemptions in the Notice do not preclude a local government or proponent from relying upon some other exemption, and reference is made there to cl. 61 of the deemed provisions (in Schedule 2 of the LPS Regulations). That is presumably intended as a reference to deemed cl.61(1)(i) under which a local government may in a Local Planning Policy (**LPP**), or an applicable Local Development Plan (**LDP**) specify works that do not require development approval.

Frequently Asked Questions

Not only are the Schedules of exemptions and their conditions simply and clearly expressed, and not only do the Explanatory Notes to Planners provide further assistance in understanding the exemptions and conditions in the Notice, but furthermore, to assist in understanding, the Minister has provided a set of Frequently Asked Questions and their answers, which give further assistance in comprehension and application of the exemptions. But notwithstanding the explanatory material, there are still issues which local governments and their officers may need to consider and resolve in dealing with the Notice. No doubt further issues will arise as the exemptions are applied in practice, but we offer the following comments in an effort to assist.

Comments on interpretation and practical application issues

1. Discretionary nature of exemptions

There are comments made in connection with the exemptions to the effect that the exemptions are purely discretionary, and

are not binding on local governments. For instance one of the Frequently Asked Questions provided by the Minister is the question 'Are local governments and proponents bound by the exemptions in the Notice?' The answer given is as follows –

'No, the exemptions are discretionary. There is no obligation for a local government or proponent to use an exemption if they do not wish to do so. However, if they wish to rely upon an exemption, all relevant conditions must be complied with.'

That answer does not appear consistent with the way in which the exemptions are introduced through the deemed clauses incorporated in every LPS. Deemed cl.78H appears to incorporate the exemptions by reference into each LPS, in which they have effect as 'exemptions from planning requirements under this scheme'.

The true position seems to be more clearly explained by Guidance note 17, which refers to the fact that an exemption under the Notice 'is a discretionary right afforded to the person designated in the Notice – it is not an obligation imposed on that person'. Note 17 goes on to say –

'A local government afforded an exemption under this Notice may exercise their discretion not to rely upon that exemption. A proponent afforded an exemption under this Notice may likewise exercise their discretion not to rely upon that exemption.'

The proper conclusion from that seems to be that where a proponent seeks to rely on an exemption, then it is obligatory on the LG to recognise and apply the exemption. However where there is an exemption afforded to a LG, such as a relaxation in formalities otherwise binding a local government, such as making documents available for public inspection or advertising, then the LG can take advantage of that exemption or not in its discretion.

2. Enforcement

An exemption may allow a proponent to bypass formalities in the planning control process, such as the obligation to obtain planning approval for a development or use covered by the exemptions. Such an obligation on a proponent corresponds with an enforcement obligation on the LG, such as under s.211 of the *Planning and Development Act 2005*, a person aggrieved by the failure of a LG to enforce or implement effectively the observance of a local planning scheme may make representations to the Minister, whereupon the Minister may inquire into the matter, and ultimately may order the LG to do all things necessary for enforcing the observance of the scheme (s.211(4)). Clearly then, the exemption of an obligation granted to a proponent carries with it an exemption of a corresponding obligation on the LG to enforce the observance of its scheme in that regard.

3. Interpretation of exemptions and conditions

Guidance note 1 states that in the Notice, '... a generous, broad interpretation is to be given to terms'. It is not clear that the same generous approach must be taken generally in the interpretation of the exemption provisions and conditions. It is our recommendation that the exemptions and conditions be treated as if they were provisions of the scheme. The generous approach applies to the meaning of terms, and Guidance note 13 explains further that in interpreting both the Notice and different local planning schemes, it is likely that there will be variations between land use terms and zoning classification descriptions, and it is explained that as words can express the same idea in a different form of words, ideas are not to be taken as different just because different forms of words were used, and an example of that is given in the Guidance note.

We suggest that indicates the extent to which a generous and broad interpretation is to be given to individual words and terms in the exemptions and conditions, but otherwise the exemptions and conditions are to be interpreted and applied in the same way as provisions in the scheme.

4. Duration of exemptions

The Notice is declared to remain in effect until midnight on 1 May 2023. The exemptions in the Notice will therefore not expire until that time, **'unless otherwise stated in this Notice'**. In many cases, the conditions of an exemption do **'otherwise state'** an earlier exemption expiry date. In most cases, the earlier exemption expiry date is given in the conditions as being 90 days after the date upon which the COVID-19 SOED ceases to have effect. However, an earlier expiry date is given in Schedule item 4, where the conditions terminate the exemption from the advertising requirements for a LPP on the day after the cessation of the SOED. A similar termination date is given in regard to Schedule items 4.3, 4.4 and 4.6.

5. Removal of works or structures

There may be issues for planners and compliance officers of LGs in regard to the removal of works or structures erected under the authority of an exemption in the Notice. For instance, under exemption 1.1, proponents are exempted from the requirement to obtain development approval for the undertaking of works on land where such works relate to medical or health-related activities associated with the response to the COVID-19 pandemic. Under the conditions, the exemption expires 90 days after the date upon which the SOED ceases to have effect or is revoked. The question for the proponent and the compliance officers of the LG is whether works carried out under that exemption need to be removed at all, and if so, whether a planning approval for the demolition, and a demolition permit, are required. In the case of other exemptions permitting works to be carried out, they are generally referred to as 'temporary works'. The distinction between temporary works and other works is further underlined by condition 1(c) for Schedule item 1.2, which clarifies that exemption item 1.2 applies only where 'no new permanent structures are required'. The effect of exemption 1.1 may therefore later be argued as applying to authorise the provision of new permanent structures, and the termination of the exemption only prevents any new permanent structures from being provided, but doesn't remove the authorisation for the original construction, so long as it was constructed in the period of the operation of the SOED and 90 days after its expiry or revocation.

The exemption Notice also does not clarify what is required for the removal of temporary works erected under the authority of an exemption. The proponent in most cases has 90 days after the cessation of the SOED to remove temporary works, but it is not clarified whether a development approval for the demolition, and a demolition permit, are required.

It seems clear that works authorised under an exemption as temporary works, at the expiry of the exemption period, will either be required to be removed, or will need to have an approval to continue as permanent works, or otherwise to have the temporary exemption extended. It is only where the temporary exemption is extended, or planning approval for the works to remain permanently does not occur, that there will be a question as to whether demolition planning approval and/or a demolition permit are required.

It may be argued by a proponent that where temporary works are provided under an exemption, the fact that they have effectively been approved as temporary carries with it the assumption that upon the expiration of the exemption period, the temporary works will be removed. On that basis, no planning approval or permit for the demolition would be required. Without at this time accepting that argument, it may at least in most cases be the sensible and reasonable approach to the

issue.

6. The meaning of ‘temporary works’

The meaning of the term ‘temporary works’ is attempted in a Frequently Asked Question and answer which explains that a reference to ‘temporary works’ in the Notice refers to a temporary structure or building that is able to be removed at the end of the Notice period. An example is given of works involving a traditional bricks and mortar building on a concrete pad, and the comment is made that such a building would not be regarded as ‘temporary work’, as it could not easily be removed at the end of the exemption period. To the extent that the questions and answers can be used in interpreting provisions in the Notice, that answer may provide some assistance. Otherwise the interpretation of the term ‘temporary works’ is likely to be problematic.

7. Notice to adjacent residential landowners

Some exemptions from the requirement to obtain approval require notice to be given to adjacent residential landowners or occupiers (e.g. exemptions 1.2, 1.3 and 2.1). The notification to residential neighbours is a somewhat superficial requirement, in that neighbours so notified are given no right of objection.

8. Negatively affect amenity

In the case of the requirement to give notice to adjacent residential landowners or occupiers, a judgment is required by the proponent as to whether the proposed use or works may negatively affect the amenity of the area.

Whether a use or works may negatively affect amenity is a difficult question even for trained planners, but it becomes problematic for non-qualified persons, and an obvious answer to the complaint that notification was not given to adjacent residential owners may simply be that the proponent did not consider that the proposed works and/or use would negatively affect the amenity of the area. There may be no easy way to contradict such a claim. But the consequence of non-compliance with that condition is problematic in any event.

9. Adjacent residential landowners

What is meant by the term ‘adjacent’ in the phrase ‘adjacent residential landowners’ should be given a flexible meaning. The term ‘adjacent’ in this context should not necessarily mean just directly adjoining lots, but should perhaps include places merely close to or near a place as explained in the case *Freeman and City of Subiaco* [2008] WASAT 303 at [59].

10. Notification to local government within 7 days of commencing use

Some exemptions stipulate that the proponent commencing a use without approval is required to notify the LG within 7 days of commencing the use, that the use is being undertaken (e.g. exemptions 1.2, 1.3, 1.4, 1.5 and 2.1). If the use is commenced under the authority of the exemption, but effective notification is not given to the LG within 7 days of commencement, the question arises as to whether in that case the exemption is disapplied, and the commencement of the use becomes unlawful. There is a further problem that the method of notification to the LG is not clearly stated. It is common for LGs in prosecution proceedings to encounter defendants who claim that they gave notice of their intentions to the relevant LG, and under cross-examination, it turns out that the notice they are relying on may have been given by

comment to an officer at the reception counter of the LG, or to some other officer or person who the defendant is not able to identify with certainty. What is sufficient for the 7 days notification in the case of those exemptions? Clarification on that point would have been beneficial, but it is a matter that will need to be dealt with on a case by case basis by LGs and their officers, as matters presently stand under the Notice.

11. Exemption from the requirement of public inspection

Exemption 4.6 exempts a LG, during the emergency, from the obligation to publish documents for public inspection, otherwise than on the LG's website. There may be sound arguments for applying that change generally, and beyond the cessation of the COVID-19 emergency.

12. Cash-in-lieu of parking

Exemption 5.2 excuses a proponent (only of non-residential development) from a requirement to provide cash-in-lieu as an alternative to providing car parking facilities, during the period of the exemption. Condition 2 states that the exemption will expire 90 days after the date on which the SOED ceases to have effect or is revoked. Does that mean that upon the expiration of the exemption, the cash-in-lieu becomes payable?

So far as the intent of the Minister is concerned, in regard to the exemption for cash-in-lieu of parking, some assistance may be provided by Guidance note 11(a) and by the answer to the Frequently Asked Question 'What happens after the exemptions in the Notice expire?'. The explanation given is that 'Any requirements that were exempt from applying, such as cash-in-lieu of the provision of car bays, are not permanently waived'. Guidance note 11(a) is even clearer and states that at the conclusion of the timeframe under the exemption, 'payment must be made'. The conclusion that must be drawn from that comment is that the Minister in the exemption intended that the cash-in-lieu obligation would be reinstated upon the cessation of the exemption period. There may however be doubt as to whether the intention of the Minister given by those means is conclusive or even relevant in the interpretation of an exemption which arguably has effect as a provision of a scheme, and therefore should be interpreted according to ordinary principles of statutory interpretation. Whether the explanation in a Guidance note, and in a question and answer form, can be used to interpret the provision is a question that LGs may need to face later, unless the point, and other points of concern, are clarified by the Minister in a subsequent or amending Notice.

Ongoing interpretation issues

It is likely that there will continue to be interpretation problems in applying the exemptions and the conditions in the Notice, but hopefully the above comments will assist. It is important to note however that the above comments are intended only as informal comments, and are not intended as legal advice. If issues of interpretation, or other issues arise under the exemptions and conditions in the Notice, then independent legal advice should be sought.

Enquiries regarding any matter touching on this Bulletin may be made to the writer, Denis McLeod, or to the following:

- On planning issues - Denis McLeod (0408 929 009), Craig Slarke (0400 240 593), Peter Wittkuhn (0400 123 501) or David Nicholson (0410 619 971).



- On compliance or enforcement – Peter Gillett (0403 302 974) or Tim Beckett (0466 656 074).

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