

State of Emergency Controls Over Local Government Planning Powers and Functions

By Denis McLeod

By gazettal on 3 April 2020, the Minister for Planning published an amendment to the *Planning and Development (Local Planning Schemes) Regulations 2015 (WA) (LPS Regulations)* in the form of the *Planning and Development (Local Planning Schemes) Amendment Regulations 2020*, which came into effect on 4 April 2020. The amendment inserts in Schedule 2 of the LPS Regulations a new Part 10B containing deemed clauses 78H, 78I and 78J which, as deemed provisions, take effect in every local planning scheme (**LPS**) in the State.

The effect of the amendment is to allow the Minister for Planning to issue a notice exempting compliance with planning requirements under local planning schemes. There is potential for a notice to have the beneficial effect of assisting local governments (**LGs**) in the performance of their planning functions during the current COVID-19 emergency. Equally there is potential for a notice to seriously restrict the planning control functions of LGs during and for a significant period after the emergency. The direction taken will not be known until a notice is issued which may occur in the near future.

This article is intended to provide insight into the written legal framework for the issuing and operation of a Ministerial notice under the new deemed provisions.

Clause 78H - Issuing of a clause 78H(1) notice

By clause 78H(1), if a state of emergency declaration (**SOED**) is in force under the *Emergency Management Act 2005 (WA) (EM Act)*, the Minister for Planning may, by notice in writing, issue one or more exemptions from planning requirements under the local planning scheme (**LPS**) of each LG in the State.

Subclause (2) limits the power of the Minister to issue a clause 78H(1) notice to a situation where the Minister considers it is necessary to do so **for the purpose of facilitating response to, or recovery from, the emergency to which the SOED relates**. A clause 78H(1) notice thus cannot be issued by the Minister at will, or for a non-emergency purpose.

What is meant by a 'planning requirement' in subclause (1) is clarified in subclause (3) as including -

1. a requirement to obtain development approval; and
1. a requirement under a condition of development approval; and
1. a requirement relating to the permissibility of uses of land; and

1. a requirement relating to works; and
1. a provision having the effect that a non-conforming use of land is no longer permitted because of a discontinuance of that non-conforming use; and
1. a requirement in relation to consultation, advertisement, applications, time limits or forms.

A notice may relate to one or more of the planning requirements referred to in clause 78H(3).

Clause 78H(4) permits a notice to be issued whether or not the SOED applies in relation to any part of the scheme area of a particular LG, **but only if it is necessary for the purpose referred to in subclause (2)**. It seems to be the intent that, so long as an SOED is in force at the time the clause 78H(1) notice is issued, the notice may continue to have effect in part of the scheme area of an LG which is not directly the subject of the SOED.

Clause 78H(5) allows for exemptions in a notice to apply differentially the land according to location, and the exemption may be subject to conditions or not. Much will depend upon the scope of the notice issued by the Minister, and the extent of the land affected by the notice. It seems possible for instance that the notice may apply to some LG districts and not to others, and may apply to parts of some LG districts and not to other parts.

Clause 78H(6) sets out the circumstances in which the Planning Minister may amend or revoke a notice.

Clause 78I - Process for issuing deemed clause 78H(1) notice

The process for issuing a clause 78H(1) notice is set out in deemed clause 78I.

Under clause 78I(3), before issuing a clause 78H(1) notice, the Minister for Planning must, unless the Minister considers it impracticable to do so because of the urgency of the circumstances, make reasonable endeavours to consult with the WAPC and WALGA in relation to the notice. WALGA in that regard is taken to be representative of all the LGs whose LPSs will be affected by a clause 78H(1) notice.

Under clause 78I(4), the Minister must ensure that a copy of the notice is sent to the LG or WALGA. If it happens that a notice will affect land in the scheme of only one LG, the Minister could comply with the notification obligation in clause 78I(4) by giving the notice to WALGA instead of the affected LG. There must be a real question as to whether it is reasonable that a notice affecting a particular LG might be given only to WALGA. It can hardly be a difficult thing to identify the administrative office, or the administrative officers of a particular LG, and to deliver the notice accordingly.

Clause 78J - Application of exemptions under a cl. 78H(1) notice

Under clause 78J(1), a clause 78H(1) notice must state the date and time at which it is signed. Clause 78J(2) additionally requires a notice to state if the exemption (from a planning requirement) is to expire:

1. when the state of emergency declaration ceases to be in force; or
1. at a date and time stated in the notice, which must not be later than the end of the period of 5 years beginning on

the day on which the notice is signed

Under clause 78J(3), a clause 78H(1) notice takes effect when it is signed. Under clause 78J(4), an exemption from planning requirements remains in effect (subject to any amendment or revocation) until the time of expiry for that exemption.

The significant time for expiry that may be set for a notice under clause 78J(2) should be noted. Under clause 78J(2), the time for expiry as stated in the notice will be either the date when the SOED ceases to be in force or a date and time stated in the notice, which must not be later than the end of the period of 5 years beginning on the day on which the notice is signed. An extension of an exemption from planning requirements beyond the duration of the SOED could have a significant impact on local government planning control functions. The impact could be beneficial if the extended operation of a notice is applied genuinely to enable LGs to use their planning control powers to assist recovery from the effects of the emergency. An extension of the operation of the notice beyond that purpose would be inappropriate, and contrary to the intent of deemed clause 78J(4).

Under clause 78J(5), when an exemption under a notice is amended or ceases to be in effect, the provisions of the scheme in relation to non-conforming uses of land do not apply in relation to any use or development of land that was permitted only because of the effect of the exemption under the notice prior to its amendment or cessation. LGs are likely to be interested to know whether the Minister in issuing a clause 78H(1) notice may limit the operation of the exemption in a way similar to that which applies to non-conforming uses, i.e. a Ministerial notice may exempt compliance with certain standards and requirements, and a question may arise as to whether a development carried out under that exemption would continue to be lawful after the SOED ceases to be in force.

Relevant provisions of the *Emergency Management Act 2005*

To make sense of what is provided in the new deemed clauses, and the significance and effect of an exemption notice, it is useful to consider the provisions of sections 56-58 of the EM Act.

Part 5 of the EM Act provides for the making by the Minister for Emergency Services of a state of emergency declaration (**SOED**). Under section 56(1) of the EM Act, the Minister may, in writing, declare that a state of emergency exists in the whole or in any part of WA. Subsection (2) sets out the circumstances in which the Minister may make a SOED. Subsection (3) requires an SOED to state the time when, and the date on which the declaration is made, and the area of the State to which it applies.

Section 57 of the EM Act provides that an SOED has effect on and from the time it is made, or such later time as is specified in the declaration; and if it is not extended by the Minister under section 58, or sooner revoked under section 59, **remains in force for three days after the time it first has effect**.

However, under section 58(1), the Minister is given power to extend by declaration the duration of an SOED. The limits on the power of extension are given in section 58(4) which provides the period by which the duration of an SOED is extended **must not exceed 14 days**, unless the special circumstances in sections 69 or 72 apply. Section 69 (hazard management officer to control or use property) and section 72 (exchange of information) will seldom be applicable to the planning requirements which may be subject to an exemption (deemed clause 78H(3)).

Accordingly, under section 57 of the EM Act, an SOED may be made having effect from the time an SOED is made, or such later time as is specified in the SOED, to three days after the time the SOED first had effect. However, under section 58 of the EM Act, the SOED may be extended for an additional period not exceeding 14 days and there may be successive 14 day extensions of the SOED.

In contrast, under deemed clause 78J(2), a notice issued by the Minister for Planning for exemption from planning requirements will expire either when the SOED ceases to be in force (i.e. at the expiration of the last extension under section 58(1)) or at the expiration of the extended time period provided for in clause 78J(2)(b).

COVID-19 SOEDs that have been made to date

For the purpose of deemed clause 78H(1), an SOED is presently in force in relation to the COVID-19 pandemic. An SOED in relation to the COVID-19 pandemic was made initially on 15 March 2020, to operate for a period of three days.

On 18 March 2020, a declaration was made extending the period of the SOED from 19 March 2020 for a further 14 days. On 31 March 2020, a declaration was made extending the SOED for a further period of 14 days from 2 April 2020 to 16 April 2020 or until revoked. The 31 March 2020 SOED has effect from 12.00am on 2 April 2020 until 12.00am on 16 April 2020, or until revoked.

No notice under clause 78H(1) has been issued by the Minister for Planning at the time of preparation of this Update.

Potential refunding of planning fees

LGs and their planners are likely to be apprehensive as to how the Ministerial notice will deal with applications for planning approval presently under consideration by an LG. Amongst other things, if an application has been received, fees paid, and the application has been fully or partially processed, if the notice delays the granting, or removes the necessity for the granting of a planning approval, there will be concern as to whether fees paid will need to be refunded. It is to be hoped that a sensitive approach will be adopted, allowing LGs to make a decision on the issue of fees sensitive to the circumstances of the emergency, and any planning application affected. If the effect of the notice will be for instance to approve an application under consideration, there may be no justification for refunding of any part of the fees paid, if the application had been fully processed by the time the notice takes effect.

Planners are likely also to be concerned about the revenue received by the LG for the processing of planning applications. If the notice was to take the extraordinary step of removing the requirement for planning approvals generally, that could impose a heavy burden on LG planning sections through the removal of a budgeted revenue source. It is to be hoped that the Minister's notice will not adopt such a radical approach as to apply a blanket exemption from the obtaining of planning approvals under local planning schemes during and perhaps in the recovery phase after, the emergency. Such an approach would be likely to have a range of unintended consequences.

Significance of amendment for compliance and enforcement

A notice issued by the Minister may have significant ramifications for local government compliance and enforcement, particularly if a notice exempts a person from the need to obtain development approval or the need to comply with

conditions of development approval.

A notice may exempt specific developments from the requirement for development approval or provide that development approval is not required for development occurring on specified classes of land. A notice may also exempt persons from having to comply with existing conditions of development approval or conditions imposed for new development.

In view of the above, local governments will need to ensure they are fully aware of the terms of any notice and how the notice applies to new and existing development.

As stated above, no notice has yet been issued by the Minister under deemed clause 78H(1). We will be able to provide more specific advice in relation to how any notice issued by the Minister will affect local government compliance and enforcement once a notice is issued.

LG planners and compliance officers will also be anxious to ensure that the good work they have done in the past in ensuring compliance with development and land use controls, and conditions imposed on planning approvals, will not be undone by a Ministerial notice. To prevent LGs from exercising their normal planning compliance functions could have a heavy impact on the community, the effects of which could extend for many years after the passing of the emergency.

Conclusion

The amendments to the Deemed Provisions introduced by the Amendment Regulations will have significant implications for LGs and the administration of planning requirements in the current environment. The nature and extent of this impact will depend on the manner in which the power under clause 78H is exercised by the Minister in practice.

On the one hand, the amendments will enable the Minister by notice under clause 78H(1) to free up restrictions on LG powers during the COVID-19 emergency, to facilitate the special pressures facing business operators, developers, and land users in these difficult times. On the other hand the ability to issue a notice under clause 78H(1) exempting planning requirements for a period that may significantly exceed the duration of a SOED is of concern, as it provides a mechanism for the Minister to suspend LG development and land use control functions for an unnecessarily long period, or in a way which simply sidelines LGs in their planning functions.

Provided the SOED powers of the Minister responsible for emergency services are exercised in good faith for their intended purpose, and provided the powers of the Minister for Planning under the newly introduced LPS deemed provisions are exercised in good faith and for the purpose expressed in deemed clause 78H(2) and (4), there should be no cause for concern by LGs, their planners and compliance officers.

Advance information from the Department suggests that whilst notices may be issued under clause 78J(2) for a period of time in excess of the current SOED, the scope of the exemptions granted are likely to be relatively limited in scope and principally directed towards protecting businesses that have been required to undertake changes of use etc due to the current environment, which normally would require planning approval.

The information contained in this article should not be relied upon without obtaining further detailed legal advice in the circumstances of each case. Enquiries regarding any matter touched on in this Update may be made to Denis McLeod (0408



929 009) or to the following:

- On planning issues - Denis McLeod or Craig Slarke (0400 240 593), Andrew Roberts (0422 713 405), Peter Wittkuhn (0400 123 501) or David Nicholson (0410 619 971);
- Compliance or enforcement - Peter Gillett (0403 302 974) or Tim Beckett (0466 656 074).

Liability limited by a scheme approved under Professional Standards Legislation.