

## Development controls

*Controls that apply to development proposals are important in addressing a range of issues – including assessing possible environmental impacts.*

*This Factsheet examines the Planning and Development Act 2005 (WA), the legal controls applying to developments in Western Australia, and how they can be used to promote better environmental outcomes. See also **Factsheet 3: Planning laws**, **Factsheet 5: Environmental impact assessment in Western Australia** and **Factsheet 21: Rivers and watercourses**.*

### What is a development?

Under the Planning and Development Act 2005, 'development' is defined to include erection, demolition or alterations to any building or other structure as well as excavation or other works affecting the land itself<sup>1</sup>. Works which are undertaken in the context of subdivision are considered in **Factsheet 3: Planning laws**.

### Control of developments

Developments are regulated under a number of different statutes and planning instruments. The main controls are provided by local planning schemes administered by local government. A local planning scheme is a planning instrument that sets out the types of development and land uses which can be undertaken in particular zones or reserves which make up the scheme area controlled by the particular local planning scheme. Local planning schemes also set out what types of developments require approval, the standards and requirements applying to particular forms of development and the matters a local government must take into account when considering an application. Other types of planning instruments which may also control development in certain areas include region planning schemes and interim development orders. For more information on different types of planning instruments, and how to have input into the development of planning laws, see **Factsheet 3: Planning laws**.

In addition to planning instruments, certain developments are subject to a range of other controls, including vegetation and heritage protection, energy conservation and pollution controls.

### Development approval from local government

#### Approval to commence a development

Most local planning schemes use zoning to classify different types of land. The zoning table (found in each local planning scheme) lists the zones and specifies what land uses can be carried out in those zones. The following designations are an example of the kind of controls that might apply:

- Permitted use (P) – use permitted if it complies with the relevant development standards of the scheme
- Discretionary use (D) – use requires planning approval from the local government
- Discretionary use subject to public consultation (A) – use requires planning approval from the local government and the proposal must be advertised for public comment, or
- Prohibited use (X) – not permitted by the scheme.

As an example of how zoning operates, the Shire of Irwin's Local Planning Scheme 5 (WA) (LPS 5)<sup>2</sup>, Paragraph 4.2.7, establishes a rural residential zone. The purpose of this zone is to provide land for residential purposes in a rural setting for an alternative residential lifestyle and to preserve the amenity of such areas as well as control land use impacts. The zoning table in LPS 5 provides that a fast food outlet is a prohibited land use within the rural residential zone, whilst a veterinary clinic or hospital may be permitted in the zone with the approval of local government after a public consultation process.

Check with your local government to determine what controls apply to developments in your area. For information on how local planning schemes are created and amended, refer to **Factsheet 3: Planning laws**.

#### Reserved land

Local planning schemes may also set aside land as reserves for public purposes<sup>3</sup>. A person must not carry out or commence any development on reserved land without first having obtained planning approval under the scheme<sup>4</sup>.

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This Factsheet is for general information purposes. Important legal details have been omitted to provide a brief overview of this area of law. If you require legal advice relating to your specific circumstances you should contact the EDO or your solicitor. The EDO takes no responsibility for any loss or damage resulting from any errors in this Factsheet.

## Exempt Development

Local planning schemes usually exempt certain forms of development from the need for approval. These exemptions are not uniform across all local planning schemes. Consequently, it is necessary to look at each scheme to identify what constitutes exempt development. It is common for the following types of developments not to require development approval under a local planning scheme:

- Using the land for a non-conforming use (a use that was lawful prior to the land being rezoned)
- Erection of dividing fences
- Replacement, maintenance or repair by a government entity of equipment used to provide public services
- Maintenance or repair of any building where there are no structural works or changes to physical appearance
- Mining activities (see **Factsheet 36: Mining law**) and
- Works associated with a subdivision approval (see **Factsheet 3: Planning laws**).

## Process for obtaining development approval

A person wishing to undertake a development will need to lodge the appropriate application forms and plans with the relevant local government. Check with the relevant council to see what is required.

## Advertising development applications

The local planning scheme will describe the circumstances (if any) in which a development proposal needs to be advertised. This will usually be for developments that are likely to have a significant impact on the amenity of the area.

Councils include details of most development applications in their meeting agendas. This provides a limited notice of development proposals being considered by the local government<sup>5</sup>. Members of the public are entitled to attend local government council meetings and ask questions about development applications<sup>6</sup>.

## Assessment of development applications

### Making the assessment

Development applications are usually assessed in detail by planning officers employed by the local government and may be considered by a special planning committee of the relevant council. However, unless the planning committee or the relevant officer has delegated authority to make a decision about the proposed development, that decision can only be made at a full council meeting.

### Matters that must be taken into account

A local planning scheme will typically set out the matters that a council needs to take into account before

determining a development application. Examples of the matters that a council may be required to consider include:

- Preservation of the amenity of the locality;
- The comments or submissions of any authority consulted on the proposal;
- Any policy developed by the local government to guide planning decisions; and
- The conservation of any place that has been entered on the Register of the *Heritage Act of Western Australia 1990*.

Failure to take into account a relevant consideration, or taking into account an irrelevant consideration, may lead to the local government decision being challenged in court.

## Environmental impact assessment

If a development proposal is lodged with a local government, and it appears that the proposal is likely to have a significant effect on the environment, the local government must refer the proposal to the Environmental Protection Authority (the EPA) for an environmental impact assessment<sup>7</sup>. The proponent, or a member of the public can also refer a proposal<sup>8</sup>. If the EPA decides to assess the proposal, the relevant local government is prevented from making a decision on the development application until the EPA assessment process has concluded<sup>9</sup>. For more details see **Factsheet 5:**

### **Environmental Impact Assessment in Western Australia.**

Where a local government's local planning scheme has been formally assessed by the EPA, development proposals arising under such a scheme do not have to be referred to the EPA unless the environmental issues raised by the proposal were not assessed during the assessment of the scheme, or the proposal does not comply with the scheme or the conditions to which the scheme is subject<sup>10</sup>.

## Conditions placed on a development approval

A local government has broad discretion to place conditions on a development approval. This includes provisions to protect the environment, in appropriate cases.

### **Right of appeal against a local government decision**

A proponent may appeal to the State Administrative Tribunal against a local government decision to refuse a development approval or against the conditions imposed on an approval<sup>11</sup>. There is generally no right of appeal against a local government planning decision by third parties (ie, a neighbour or conservation group) unless the right of appeal is provided in a local planning scheme. For more detail see **Factsheet 3: Planning Laws**.

### **Penalty for not obtaining approval or breaching a condition**

If a development has been undertaken in contravention of a local planning scheme, the local government may direct the owner to remove, pull down, take up or alter

the development and restore the land as nearly as practicable to its condition immediately before the development started<sup>12</sup>.

Failure to comply with a direction from the local government is an offence, punishable by a maximum fine for individuals of \$50,000 with an additional maximum daily penalty of \$5,000<sup>13</sup>. Where an offender is a company, more substantial penalties may be imposed. If the person responsible for the development does not restore the land, the local government may undertake the works and recover the cost from that person<sup>14</sup>.

## Public works and development approval

Government departments and local governments undertaking public works are generally not required to obtain approval for that work under a local planning scheme<sup>15</sup>. In the Perth Metropolitan Region, this exemption applies under the *Metropolitan Region Scheme* (WA) (the MRS)<sup>16</sup> to certain developments which are undertaken by public authorities on reserved land which is owned by or vested in them.

## Special controls in certain areas

### Perth metropolitan region

Developments in the Perth metropolitan region are subject to additional controls under the MRS. Whilst most development approvals under the MRS have been delegated to local government, some have not. These developments therefore require the approval of the Western Australian Planning Commission (the WAPC). The following types of developments require approval from the WAPC<sup>17</sup>:

- Development of land reserved under the MRS
- Developments partly within or abutting to any part of a Swan development control area<sup>18</sup> or
- Developments in a planning control area and other developments that are not delegated to local government.

### Peel region

The Peel region is the second region in Western Australia to have a region scheme put in place. Under the Peel Region Scheme, developments affecting reserved land must be approved by the WAPC. Additionally, developments impacting on water catchments must be referred to the Department of Water.

### Swan River management area

Developments entirely within a development control area require approval by the Minister, or the Swan River Trust<sup>19</sup>.

### Redevelopment and specific planning areas

Areas being redeveloped by the State Government may be subject to specific legislation. Examples include areas within Subiaco, East Perth, Midland, Armadale and Hope Valley. This legislation generally places the

area to be redeveloped under the control of a redevelopment authority, and requires that all development proposals within the area are subject to the approval of the redevelopment authority. It is usual also for the legislation to state that local planning schemes and the MRS do not apply<sup>20</sup> within the redevelopment area.

## Other relevant laws

### Heritage protection

Developments affecting places that possess cultural heritage significance may require special approvals under local, State and Commonwealth law. See **Factsheet 13: Heritage protection**.

### Pollution licences and works approval

Certain types of developments require a works approval and pollution licence from the Department of Environment and Conservation. Examples include certain types of brickworks, rendering operations and aquaculture projects in natural waterways. For more information, see **Factsheet 27: Pollution and environmental harm**.

### Offensive trades

Approval of the local government is required to establish an offensive trade<sup>21</sup>. Examples of an offensive trade includes abattoirs, piggeries and tanneries<sup>22</sup>. A person carrying out an offensive trade must register for a license with the local government each year<sup>23</sup>.

### Extractive industries

Proposals to establish a quarry may (in addition to planning approval) require a licence from the local government where local laws require approval. For more information, see **Factsheet 37: Gravel pits and quarries**.

### Native vegetation protection

Approval to clear native vegetation is required from the Department of Environment and Conservation<sup>24</sup>. For more information see **Factsheet 7: Clearing native vegetation**.

### Subdivision approval

Approval of subdivision proposals is vested in the WAPC. The process for obtaining subdivision approval is considered in **Factsheet 3: Planning law**.

### Restrictive covenants

Some land may have a restrictive covenant registered on its certificate of title that may limit how that land is to be used. Examples include conservation covenants that operate to protect native vegetation or covenants that require a certain type of building material to be used to maintain the image of a particular suburb or development. For information on conservation covenants, see **Factsheet 14: Voluntary conservation**



## How can you become involved?

There are a number of things you can do to have input into the process for approving developments:

1. Monitor local government agendas for development proposals and have input into the approval process through relevant council and committee meetings
2. Refer potentially illegal developments or land uses to the relevant local government for investigation
3. Monitor landholders' compliance with any conditions that are placed on a development approval, and report any non-compliance to the local government
4. Refer development proposals likely to have a significant impact on the environment to the EPA for an environmental impact assessment (see **Factsheet 5: Environmental impact assessment in WA**)
5. Monitor local government agendas and local newspapers for details about new local planning scheme proposals and make submissions on those proposals (see **Factsheet 3: Planning laws**) and
6. Report potentially illegal land clearing to the Department of Environment and Conservation (see **Factsheet 7: Clearing native vegetation**).

## Contacts and further information

### **Western Australian Planning Commission**

[www.wapc.wa.gov.au](http://www.wapc.wa.gov.au) – Ph (08) 9264 7777

### **Department of Planning**

[www.planning.wa.gov.au/](http://www.planning.wa.gov.au/) Tel: (08) 9216 8000

### **Department of Environment & Conservation**

[www.dec.wa.gov.au](http://www.dec.wa.gov.au) – Ph (08) 6467 5000

### **Environmental Protection Authority**

[www.epa.wa.gov.au](http://www.epa.wa.gov.au) – Ph (08) 6467 5000

### **Department of Water** Ph (08) 6364 7600

### **Swan River Trust** Ph (08) 9278 0900

## **For copies of legislation considered in this Factsheet:**

### **State Law Publisher** (WA legislation)

[www.slp.wa.gov.au](http://www.slp.wa.gov.au)

## **References**

1. Section 4 of the *Planning and Development Act 2005* (P&D Act)
2. Paragraph 4.2.7 of the Shire of Irwin's Local Planning Scheme 5 (LPS 5)
3. Paragraph 1.5 of the above
4. Paragraph 3.4.1 of the above
5. Regulation 12 of the *Local Government (Administration) Regulations 1996* (WA)
6. Sections 5.23 and 5.24 of the *Local Government Act 1995* (WA)
7. Section 38(5) of the *Environmental Protection Act 1986* (EP Act)
8. Section 38(1) of the above
9. Section 41 of the above
10. Section 48I(3) of the above
11. Sections 252 and 254 of the P&D Act
12. Section 214(3) of the above
13. Section 223 of the above
14. Section 215 of the above
15. Section 6 of the above
16. Division 2, Clause 16(3) of the *Metropolitan Region Scheme* (WA) (the MRS)
17. Clause 29 of the above
18. Section 3 of the *Swan and Canning Rivers Management Act 2006* (WA)
19. Section 70 of the above
20. See, for example, Section 45 of the *Midland Redevelopment Act 1999* (WA)
21. Section 187 of the *Health Act 1911* (WA)
22. Schedule 2 of the above
23. Section 191 of the above
24. Section 51E of the EP Act

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