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## **LEGAL BRIEFING – PLANNING ASSISTANCE FOR BUSINESSES ADAPTING TO COVID-19**

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## Summary

- Although not its intended field of operation, the provisions excluding temporary uses from the need for development approval can be co-opted to assist businesses that are adapting to measures being taken to combat COVID-19, by providing the flexibility to allow for changes of uses – even uses that would otherwise be beyond the scope of planning laws. Just as importantly, these provisions also allow for those businesses to return to previous operations when circumstances return to normal.
- The necessary powers can be delegated by Councils to planning officers or emergency planning committees, to assist in urgent determinations, and can be exercised in a variety of ways to accommodate different circumstances.
- This Legal Briefing concludes with an outline of steps to be taken to most effectively implement this assistance.

## The problem

- 1 There are many scenarios of businesses adapting their operations in response to the measures being taken to combat COVID-19. One of the most obvious is restaurants that are now operating solely for takeaway or the home-delivery of orders. Others include businesses that may be able to offer facilities or premises to assist in combatting COVID-19. The difficulty that arises is that some of these adaptations involve changes of use that require development approval. Even greater difficulty arises if the change of use is prohibited by the local planning scheme – which will often be the case in the restaurant example.
- 2 One option for planning authorities is to simply "ignore" these changes. Another may be to rely on the broad role given to Local Governments under the *Emergency Management Act 2005* and the State's *State Emergency Management Plan, State Hazard Plan- Human Biosecurity and Pandemic Plan WA*. However, the latter is uncertain in its specific application to planning, and the former is unsatisfactory on a number of levels. It is far preferable if the existing planning regime can be made to accommodate, support and even encourage changes that assist in the continued operation of local businesses. The question is, how can this be achieved within a framework that is not exactly known for its flexibility?
- 3 For changes of use that are permissible under the planning framework, an application for approval can of course be made – and can be determined on an urgent basis. But the difficulty is that, as an approved change of use, it then becomes necessary to apply again to change the use back when circumstances return to normal – and it clearly cannot assist in situations where the proposed adaptation is not permitted.

## The solution – Temporary uses and works

- 4 Clause 60 of the Second Schedule to the *Planning and Development (Local Planning Schemes) Regulations 2015 (Deemed Provisions)* provides that a person must not commence or carry out works on land, or use land, without having obtained development approval – unless the development is of a type referred to in clause 61.
- 5 Clause 61(2)(d) of the Deemed Provisions provides that development approval is not required for "a temporary use which is in existence for less than 48 hours, or a longer period agreed by the local government, in any 12 month period".
- 6 There is no separate definition of "temporary use". In effect, any use is a temporary use (and therefore does not require development approval) if it operates for no more than 48 hours in any 12 month period, or such longer period as is agreed by the Local Government.
- 7 It is this reference to "a longer period agreed by the local government", although never intended to operate in circumstances such as the present, that provides the basis for a solution.

- 8 First, there is no absolute majority requirement for the exercise of the power to agree a longer period for a temporary use, is to be exercised. As such, it is a power that can be delegated by the Council under clause 82 of the Deemed Provisions to either a committee or to the Chief Executive Officer, and can then be on-delegated by the Chief Executive Officer to any other employee under clause 83 of the Deemed Provisions.
- 9 Second, the power to agree a longer period for a temporary use can be exercised subject to reasonable conditions (by virtue of section 50(2)(b) of the *Interpretation Act 1984 (WA)*). For example, this allows the longer period to be limited to certain types of temporary use, rather than applying to all uses.
- 10 Third, the power to agree a longer period for a temporary use can also either be exercised generally, by reference to a class or type of use, or on a case-by-case basis by reference to criteria.
- 11 Returning to the restaurant example, it would be open to agree that, during the 12-month period commencing on 19 March 2020 (the date when Western Australia declared its State of Emergency), all premises with development approval as a restaurant use can operate as a temporary fast food outlet use for a period of XXX months, or for period ending on (or within a specified period of time after) the cessation of State of Emergency. Any approved restaurant would then be able to lawfully operate as a temporary fast food outlet for that agreed "longer period", without any need for development approval or even an application process – even if the fast food outlet use would otherwise be prohibited under the applicable planning framework.
- 12 For other types of temporary uses, such the utilisation of premises or facilities for manufacturing supplies to combat COVID-19, it may be appropriate to consider these on an individual or case-by-case basis, subject to the decision-maker (whether it the Council, a committee or a planning officer exercising delegated power) being satisfied that a particular proposed temporary use is by way of response to measures to combat COVID-19. It is important to bear in mind that what is being approved in each case is not the temporary use itself, but the longer period of time (longer than 48 hours) for which the temporary use can be carried out without the need for development approval – but the outcome is the same.
- 13 The Queensland *Planning Act 2016* contains provisions dealing with applications for "temporary use licences" which provide a useful framework for such a process.
- 14 We suggest that Local Governments seek specific advice on the formulation of criteria by which to assess and determine whether to agree to longer periods for the carrying out of temporary uses as adaptations in response to COVID-19 measures, but at its simplest it may involve no more than the decision-maker being satisfied that there are reasonable grounds for the temporary use in question being allowed for the longer period.
- 15 Finally, clause 61(1)(f) of the Deemed Provisions deals with temporary works in the same way as clause 61(2)(d) in relation to temporary uses. Although a temporary change of use is likely to be a far more common adaptation in response to the COVID-19 measures than the carrying out of temporary works, the same process set out above can also be applied in relation to works.

## **Amendments to existing development approvals**

- 16 In some cases, rather than a change of use, all that may be required for a business to adapt to the COVID-19 measures is an amendment to an existing approved use, or an amendment to the conditions of an existing development approval.
- 17 These amendments can generally be accommodated under clause 77 of the Deemed Provisions (or under essentially identical provisions relating to approvals issued by Development Assessment Panels).
- 18 Appropriate delegations by a Local Government can ensure that applications for these types of amendments are determined as a matter of priority.

- 19 Also, clause 72 of the Deemed Provisions allows for the approval of such amendments to operate for a temporary or limited period, and to provide that, at the end of that period, the approval reverts to its original form.

## What to do?

- 20 Because of the limited use of clauses 61(1)(f) and 61(2)(d) of the Deemed Provisions, it is unlikely that Local Governments already have a delegation in place under these provisions. If you do, it may still be necessary to review the scope of the delegation.
- 21 Bearing in mind the potential delay in being able to hold an ordinary meeting of Council by way of videoconference or eMeeting<sup>1</sup>, Local Governments wishing to implement these provisions should **convene a special meeting of Council, using the new eMeeting provisions, to exercise its power under clause 82(1) of the Deemed Provisions to delegate to the Chief Executive Officer (or planning committee) the power under clause 61(1)(f) and clause 61(2)(d) of the Deemed Provisions to agree a longer period of time during which either temporary works or temporary uses can be in existence without the need for development approval.**
- 22 This delegation must be by **absolute majority** (clause 82(2) of the Deemed Provisions).
- 23 The delegation to the CEO or committee can be subject to conditions or criteria, but to streamline the process, and avoid the need to come back to Council to refine any conditions, **we recommend that the delegation be general or unrestricted, and that the CEO then impose any conditions or criteria for the exercise of the power as part of his or her on-delegation to planning officers under clause 83 of the Deemed Provisions, or those conditions and criteria be determined by the planning committee.**
- 24 As a particular measure, and in addition to the delegation of the power, the Council may wish to itself resolve to agree the longer period of time for the operation of approved restaurants or cafes as fast food outlets.

Please contact either Julius Skinner, Ian Rogers, Brendan Foley or Moshe Phillips of the Planning, Environment and Local Government team at Thomson Geer Lawyers if you have any queries or require any assistance. While we are all working from home, our direct lines below are diverted to our mobile phones, and we are all contactable by email.

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<sup>1</sup> Refer to our Legal Briefing issued on Friday, 27 March 2020 and follow-up advice on the same date. At the time of preparing this Legal Briefing, the notice provisions for eMeetings in the amendments to the *Local Government (Administration) Regulations* gazetted on 26 March 2020 have not been amended.



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