

SECTION 76 of the *PLANNING and DEVELOPMENT ACT 2005*

This fact sheet provides information on the purpose and operation of an order made by the Minister for Planning (the Minister) under section 76 of the *Planning and Development Act 2005*.

What is a section 76 order?

Section 76 of the *Planning and Development Act 2005* (the Act) states:

76. Minister may order local government to prepare or adopt local planning scheme or amendment

- (1) If the Minister is satisfied on any representation that a local government —
 - (a) has failed to take the requisite steps for having a satisfactory local planning scheme or an amendment to a local planning scheme prepared and approved in a case where a local planning scheme or an amendment to a local planning scheme ought to be made; or
 - (b) has failed to adopt a local planning scheme or an amendment to a local planning scheme proposed by owners of any land, in a case where a local planning scheme or an amendment to a local planning scheme ought to be adopted; or

- (c) has refused to consent to any modifications or conditions imposed by the Minister, the Minister may order the local government, within such time as is specified in the order, to prepare and submit for the approval of the Minister a local planning scheme or an amendment to a local planning scheme, or to adopt a local planning scheme or an amendment to a local planning scheme, or to consent to the modifications or conditions imposed.

- (2) If the representation under subsection (1) is that a local government has failed to adopt a local planning scheme or an amendment to a local planning scheme, the Minister, in lieu of making an order to adopt the local planning scheme or an amendment to the local planning scheme, may approve of the proposed scheme or amendment subject to such modifications and conditions, if any, as the Minister thinks fit.
- (3) A local planning scheme or an amendment approved under subsection (2) has effect as if it had been adopted by the local government and approved by the Minister under this Part.
- (4) The Minister must ensure that written reasons for making an order under subsection (1) are provided with the order.

- (5) The Minister must, as soon as is practicable after an order is given to the local government under subsection (1), cause to be laid before each house of Parliament or dealt with under section 268A –

- (a) a copy of the order; and
- (b) a copy of the reasons for making the order.

Planning context

Control of many planning matters sit with local government through the establishment of local planning schemes. However, the State has always had a role in the consideration of local planning schemes and amendments, and the authority to take action, to a varying extent, where such action is deemed necessary. Similar provision existed prior to Section 76, which now covers both local planning schemes and amendments to local planning schemes.

Section 76 allows the Minister to order local governments to prepare and submit a new local planning scheme or scheme amendment, or to adopt a new local planning scheme or scheme amendment.

What is the legal effect of a section 76 order signed by the Minister?

When a local government receives a signed order under section 76, it is required to:

- prepare and submit a local planning scheme or an amendment to a local planning scheme for approval of the Minister
- adopt a local planning scheme or an amendment to a local planning scheme and
- consent to the modifications or conditions imposed, within such time as is specified in the order.

A section 76 order requires a relevant local government to complete all the requisite steps set out in Part 5 of the Act and Part 4 or 5 of the Planning and Development (Local Planning Schemes) Regulations 2015 (LPS Regulations), and submit a prepared or adopted scheme or amendment for the Minister's final consideration under section 87 of the Act.

What must the Minister consider when reviewing a section 76 representation?

Section 76 generally imposes two mandatory questions for the Minister to consider:

- (1) Has the relevant local government failed to:
 - (a) take requisite steps for having a satisfactory local planning scheme or amendment prepared and approved or
 - (a) adopt a local planning scheme or amendment proposed by owners?

- (1) If there is a failure on the part of local government, is this a case where, on planning grounds, the Minister ought to intervene, by issuing an order under section 76, that a proposed scheme or amendment be made or adopted?

These two issues must be assessed primarily on the interconnected principles of proper and orderly planning, the triple-bottom line (social, economic and environmental considerations), efficient and effective land use, and the promotion of sustainable use and development of land in the State. Also, without intending to limit any other factor, any relevant Local Planning Strategy or other strategic framework will be of considerable importance in making this decision.

When may the Minister issue a section 76 order?

Section 76 orders are not issued on every representation by any applicant, but only in justified circumstances. The onus will rest with an applicant to demonstrate how they believe a local government has failed to prepare or adopt a local planning scheme or amendment, and why that failure is of such a scale on planning grounds that the Minister ought to intervene with an order.

There are three primary situations where a section 76 order may be issued, noting the Minister's discretion to decide each matter on a case-by-case basis:

1. A local government has resolved to initiate a scheme or amendment but fails to reasonably complete the requisite procedural steps.

The original rationale behind section 76 was to allow the Minister to intervene where a local government has never initiated a scheme, or has resolved to initiate a scheme, but has halted or unacceptably delayed carrying out the requisite steps to complete that process under Part 5 of the Act. Examples might include where a local government has resolved to initiate a scheme or amendment, but following a Council election or other change of policy direction, either actively refuses to, or unreasonably delays or omits to:

- forthwith refer the scheme to the Environmental Protection Authority for assessment under sections 81 and 82
- carry out necessary consultation under section 83
- advertise the scheme under section 84
- complete any of the other prescribed requisite steps set out in Part 5 of the Act or
- complete any of the requisite steps outlined in Part 4 or 5 of the LPS Regulations.

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- 2. An applicant has submitted a proposed scheme or amendment, where the local government has resolved not to initiate the scheme or amendment, and where there are proper planning grounds that the proposed scheme or amendment ought to be made or adopted.**

A section 76 order may be issued where an applicant can demonstrate that:

- the applicant has submitted a proposed scheme or amendment to local government for due consideration
- the relevant local government has formally considered the applicant's proposal but resolved not to initiate the scheme or amendment and
- there are proper planning grounds that the Minister ought to intervene so that the proposed scheme or amendment is made or adopted.

- 3. An applicant has submitted a proposed scheme or amendment, where the local government has unreasonably failed to consider the proposal, and where there are proper planning grounds that the proposed scheme or amendment ought to be made or adopted.**

A section 76 order may also be issued where an applicant can demonstrate:

- the applicant has submitted a proposed scheme or amendment to local government for due consideration
- the relevant local government has unreasonably failed to consider the applicant's proposal (that is, the local government has been given sufficient time but has failed to make a formal decision – this can occur either at the officer level or Council level) and
- where there are proper planning grounds that the Minister ought to intervene so that the proposed scheme or amendment is made or adopted.

Situations where a section 76 order is unlikely to be issued:

A section 76 order is unlikely to be issued in the following types of circumstances, noting the Minister's discretion to decide each matter on a case-by-case basis:

(a) An applicant fails to provide proper facts and reasons, on planning grounds

A section 76 order is unlikely to be issued where an applicant fails to provide proper facts and reasons, on planning grounds, why the relevant local government has failed and why the Minister ought to direct a local government to prepare or adopt a scheme or amendment. Without accurate information, it is not possible for the Minister to make an informed and reasoned decision, taking into account all relevant considerations; any application containing insufficient information is unlikely to be supported.

(b) An applicant has not yet submitted a proposed scheme or amendment to local government for due consideration

A section 76 order is unlikely to be granted where an applicant has not yet submitted a proposed scheme or amendment to local government for due consideration. Section 76 requires an applicant to make a representation demonstrating how a local government has failed to take requisite steps for having a satisfactory local planning scheme or amendment, or has failed to

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adopt a local planning scheme. So where an applicant has not yet submitted a proposed scheme or amendment to local government for due consideration, it is not possible to demonstrate how local government has 'failed'. In these circumstances, any section 76 application is considered premature and not a case where the Minister ought to intervene.

(c) An applicant has proposed a scheme or amendment to local government, but where local government has not yet had a reasonable opportunity to consider the proposal and make a resolution whether to initiate that scheme or amendment

Similarly, a section 76 order is unlikely to be issued where an applicant has submitted a proposed scheme or amendment to local government, but where local government has not yet had sufficient time to consider that proposal and make a resolution whether to initiate that scheme or amendment.

Where an applicant contends that a local government has been given a reasonable opportunity to make a resolution whether to initiate a proposed scheme or amendment, and that local government has refused or omitted to pass a formal resolution, such matters must be considered on the evidence. In most cases,

where an applicant cannot demonstrate multiple communications to have the matter formally considered by the local government, the application is unlikely to be supported.

What relevant criteria will the Minister consider when reviewing a section 76 representation?

When considering a section 76 representation, the Minister will take special note of, but is not limited to, the following relevant criteria:

- 1 The applicant's representations, and in particular, whether these are supported by documentary evidence or other material.**
- 2. Any response or explanation by local government as to why a proposed scheme or amendment was not prepared, considered or adopted.**
- 3. Relevant statutory instruments, including but not limited to any relevant:**
 - a. Regulations (such as the LPS Regulations)
 - b. Region Planning Scheme
 - c. Local Planning Scheme

4. Relevant policies, including but not limited to any relevant:

- a. State Planning Policy
- b. Regional and Sub Region Strategic Plans or Strategies
- c. Local Planning Strategy
- d. Position Statements
- e. Other operational policy endorsed by the Western Australian Planning Commission or State Government

5. Any relevant instruments and plans including but not limited to any regional or local structure plan and/or local development plan.

6. Any further considerations including:

- a. Any other submissions made by any relevant person
- b. The credibility of the applicant's claim, particularly any evidence or documentation to support such claims
- c. The level of consultation the applicant has carried out with local government and the extent to which:
 - i. the representation attempts to abrogate the local government's role as the primary and preliminary decision-maker

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- ii. whether the applicant has or has not submitted a proposed scheme or amendment to local government for due consideration
- iii. whether the local government has considered the applicant's proposal, resolved not initiate the proposal, or after reasonable opportunity, refused to consider the proposal by passing a formal resolution whether to initiate the proposed scheme or amendment
- d. The extent to which the representation is an attempt to bypass prescribed statutory processes set out in Part 5 of the Act and Part 4 or 5 of the LPS Regulations, including but not limited to any likely impact on:
 - i. communication or developmental requirements with related government agencies, especially environmental referral and review
 - ii. procedural fairness or natural justice rights of residents and others likely to be affected by the applicant's proposal, and in particular, community consultation
- e. The extent to which the representation would be contrary to the principles of comprehensive and coordinated planning, and whether:
 - i. the applicant effectively seeks an amendment to spot rezone his or her land
 - ii. the result of issuing a section 76 order would increase fragmented development
- f. Whether it contradicts any comments by the Western Australian Planning Commission
- g. Whether it contradicts any previous and similar decisions, with a focus on precedence, the precautionary principle and consistent decision-making
- h. The local planning scheme is arguably not 'satisfactory', and that the planning issues raised appears are of significant concern
- i. There are good grounds for deferring initiation of the proposed scheme amendment at this time, notably where:
 - i. the relevant local planning scheme is currently being amended or is proposed to be amended soon
 - ii. a relevant planning instrument or policy is currently a 'seriously entertained' draft proposal, and once finalised, is likely to have a substantial impact on the contents and subject matter of the applicant's proposed scheme or amendment (for example, where local government was preparing a draft Activity Centre Plan in relation to the same area)
- j. other principles of proper and orderly planning.

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How is a section 76 representation progressed when a landowner/proponent has requested a scheme amendment?

The process for representation under section 76, together with preparing an order, is as follows:

Process for representation under Section 76

Stage 1

An applicant requests their local government to amend their scheme and the local government has refused to initiate or failed to progress the amendment.

Stage 2

An applicant submits a representation under section 76 to the Minister for Planning's office.

Stage 3

A procedural assessment whether the application technically amounts to a legal 'representation' for the purposes of section 76 is undertaken.

Stage 4

A preliminary assessment of the application is made and a report is forwarded to the Minister.

Stage 5

The Minister determines if there is sufficient merit to the application.

Yes, there is merit to the application.

Direction is given to prepare a draft 76 order.

Stage 6

The necessary consultation with local government is undertaken and a draft section 76 order is prepared.

Stage 7

The draft section 76 order is forwarded to the Minister for consideration and final decision as to whether or not to issue the order, and if so, on what terms.
When an order is made, the Minister must table a copy before both Houses of Parliament.

No, there is considered to be insufficient merit to the application.

The applicant advised in writing of this determination by the Minister.

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While refusal or failure by a local government to progress an amendment is a common reason for a representation under section 76, it is not the only scenario which the Minister's powers may be used under section 76. For example, the local government may have resolved to initiate their own amendment to their local planning scheme, then failed to progress that amendment in accordance with requirements of the Planning and Development (Local Planning Schemes) Regulations 2015 (LPS Regulations). A representation by a third party that such an event has occurred, and the amendment ought to be progressed in accordance with the LPS Regulations is likely to fall within the scope of section 76.

Additionally, if a landowner/proponent's proposed scheme or amendment effectively amounts to a spot rezoning, a section 76 order would generally not be supported or issued, as it sets an undesirable precedent for fragmented development of an area. Spot rezoning is an application to rezone land in the absence of a comprehensive and coordinated strategic plan for the area.

Is there a right of appeal?

No, there is no right of appeal, for either the applicant or the relevant local government, against the Minister's decision to issue a section 76 order or not.

Once a section 76 order is issued, what must the local government do next?

A Ministerial order under section 76 does not exempt local government from having to perform the other procedural requirements set out in Part 5 of the Act and Part 4 or 5 of the LPS Regulations, except as set out in sections 76(2) and (3).

Section 76(2) and (3) allows the Minister to adopt a scheme or amendment where the requisite procedural steps (i.e. EPA referral, advertisement and consultation) have already been substantially completed.

Does a scheme or amendment pursuant to a signed section 76 order, require final Ministerial determination?

Yes, except where provided under sections 76(2) and (3) of the Act, a scheme or amendment prepared and submitted by local government pursuant to a signed section 76 order still requires final Ministerial approval under section 87 (the Minister may approve, require modifications or refuse the scheme or amendment).

What can the Minister do if a local government fails to comply with a signed section 76 order?

The Minister can undertake further enforcement action against non-compliance of a section 76 order, under section 212 of the Act.

Section 212 enables the Minister to serve written notice on the local government requiring it to comply within a specified period. If the local government does not comply, then the Minister, in place of the local

government, can take whatever action is necessary for compliance with the requirement. Any costs to do this are recoverable from the local government.

In some cases, there may be valid reasons why a local government has not complied with the section 76 order within the specified time. In particular, there may be unavoidable delays associated with completing the remaining procedural steps set out in Part 5 of the Act and Part 4 or 5 of the LPS Regulations. So the Minister needs to be confident there are no legitimate reasons for non-compliance, before taking action under section 212.

Once the preparation of a local planning scheme or amendment has been started by a local government, it cannot be stopped by that local government unless it is a complex amendment which is the only instance in which a local government has the ability to not proceed to advertising (under regulation 37(1)(c) of the LPS Regulations). Once the scheme or amendment is advertised, a local government can only pass a resolution under regulation 25(3)(c), 41(3)(c) and 50(3)(c) of the LPS Regulations (whichever is relevant) that it does not support the scheme or amendment. However, from that point on, the decision ultimately rests with the Minister (with the WAPC to provide a recommendation) whether to refuse, approve or approve with modifications the scheme or amendment.

Is there a form for applicants to use when making a section 76 representation?

Yes. The [form](#) can be downloaded from the Department of Planning, Lands and Heritage website.