



Department of **Planning,
Lands and Heritage**



Lease, Licence, Agreement and Option Guidelines

December 2020

The Department of Planning, Lands and Heritage acknowledges the traditional owners and custodians of this land. We pay our respect to Elders past and present, their descendants who are with us today, and those who will follow in their footsteps.

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BACKGROUND NOTES

These guidelines set out the general principles that will be used by the Western Australian Planning Commission (WAPC) in determining applications for the leasing, licensing, selling or agreeing to sell and options to purchase made under Part 10, Division 2 of the *Planning and Development Act 2005* (the Act).

1 INTRODUCTION

- 1.1 The Act and the *Planning and Development Regulations 2009* (the Regulations) set out the legislative requirements for the leasing, licensing, selling or agreeing to sell and options to purchase land within Western Australia to manage arrangements that could essentially result in subdivision. This includes:
- Section 136 – lease, licence, sale and agreements to sell land and options to purchase applications (referred to as section 136 applications) over a portion of a lot or lots for a term exceeding 20 years (including any option to renew or extend the term)
 - Section 139 – a class of lease or licence (referred to as section 139 applications) for any duration over a portion of a lot or lots, with the ability to sub-lease or sub-licence.
- 1.2 These guidelines apply to:
- all leases, licences and classes of lease or licence and
 - the sale or agreement to sell land, or option to purchase land
- to which section 136 and 139 of the Act applies.
- 1.3 These guidelines do not apply to leases, licences, classes of lease or licence, sale or agreements to sell land provided for under other legislation, such as the *Strata Titles Act 1985*.

The following do not require approval under the Act:

- Leasing or granting of a licence, sale or agreements to sell or options to purchase over the whole of a lot or lots.
- Sub-leases or sub-licences under a section 139 application, which are consistent with an approved section 139 application (refer to clause 3.1 of these guidelines).
- Options or agreements to lease or licence.
- Transactions for sale subject to a condition the land will be subdivided in the future.
- Leasing or granting of a licence for the whole or portion of a building that was constructed in accordance with a relevant building licence, building permit, occupancy permit or building approval certificate for the building. This includes any land necessary for the convenient occupation of that whole or portion of a building, for example, car parking, loading bays and advertising as provided for in clause 136(4) of the Act.

- 1.4 Entering into a transaction listed in clause 1.2 of these guidelines without obtaining (or subject to) WAPC approval is an offence under the Act.



2 GUIDELINE OBJECTIVES

These guidelines:

- outline and provide clarification on the provisions of section 136 and 139 of the Act and the process for assessment and determination of applications under these sections
- ensure approvals are broadly consistent with subdivision standards, to the extent provided for within these guidelines
- ensure that the term of transaction are temporary and support future planning as provided for under the State and local planning framework and
- support the principles of orderly and properly planning.

3 GUIDELINE MEASURES

3.1 WHETHER AN APPLICATION IS REQUIRED

- 3.1.1 Occasionally the WAPC receives requests to approve sub-leases or sub-licences, such as shopping centres, lifestyle villages and rail infrastructure. The Act provides that where there is an approved section 139 application in place (head lease or licence), there is no requirement to apply for approval from the WAPC for any sub-lease or sub-licence, and it is the position of the WAPC to not accept applications of this sort.
- 3.1.2 The terms of the sub-lease or sub-licence must be consistent with the terms of the approved section 139 application including, but not limited to:
 - the same use or occupancy
 - the area of the sub-lease or sub-licence being within the area approved for the section 139 application.

3.2 DURATION OF TERM

- 3.2.1 The Act provides for the WAPC to:
 - determine section 136 applications where the term exceeds 20 years; this means terms of precisely 20 years do not require approval of the WAPC
 - determine section 139 applications for any duration and the WAPC may grant approval subject to such conditions,

which may include the duration of term, having regard to the planning framework.

- 3.2.2 In comparison to freehold tenure, the leasing or granting of a licence is a temporary form of land tenure. To ensure leases or licences are not held in perpetuity, the WAPC will generally support leasing or granting of a licence for terms of up to:
 - 60 years for residential purposes
 - 99 years for commercial purposes.

Different terms may be applied on the applicant's request where it is consistent with the objectives of these guidelines and the State planning framework.

- 3.2.3 The WAPC will generally require section 136 and 139 applications, with the exception of sale or option to purchase applications, to specify a commencement date within three (3) years from the date of WAPC approval, to ensure that proposals are consistent with the contemporary planning framework when implemented and that approvals are not held in perpetuity.

- 3.2.4 Lease or licence applications under sections 136 or 139, may include options to renew or extend the term of the lease or licence duration with the WAPC determining the overall term. Examples of this include a lease term for a period of 21 years, with the option to extend the term for a further 21 years, with the total term being 42 years.



3.3 HOLDING OVER CLAUSES

Lease or licence applications under sections 136 or 139 are approved by the WAPC for a specific term, which will be stated in the approval letter. Continued use of the land by the lessee or licensee beyond the approved term of the lease or licence, such as through a holding over clause, constitutes an offence under the Act.

3.4 CONSISTENCY WITH ESTABLISHED PLANNING FRAMEWORK

3.4.1 Section 136 and 139 applications should be consistent with the State and local planning framework. In determining an application, the WAPC will:

- have due regard to the provisions of any local planning scheme that applies to the land
- not approve an application that conflicts with the local planning scheme, unless set out in section 138(3) of the Act
- ensure that section 136 approval complies with a local planning scheme to the extent necessary for compliance with an environmental condition, agreed under section 48 of the *Environmental Protection Act 1986*, relevant to the land or where section 137 of the Act applies to heritage land.

3.4.2 If the section 136 or 139 application involves development, a development approval is not required to be submitted with the application, however, the WAPC

may request a copy of the development approval if one has not been provided, to assist in the assessment of the application. If relevant it should be noted in the cover letter that development approval will be obtained in the future.

3.4.3 Approval under section 136 and 139 of the Act does not constitute development approval and does not infer that development approval will be forthcoming.

3.5 CONDITIONS AND TIME LIMITATIONS ON APPROVALS

The Act permits the WAPC to apply conditions to approvals for section 136 and 139 applications as necessary.

3.5.1 The WAPC will not generally apply conditions (other than commencement under 3.5.2) as the transaction should ensure that the State and local planning framework are complied with.

Any conditions that are imposed are to be carried out prior to the approval coming into effect or through the life of the approval as specified within the condition (Appendix 1).

3.5.2 Where the lease or licence is yet to be entered (unsigned) or for other transactions, the WAPC will impose a condition requiring the lease or licence or transaction to

commence within three (3) years from the date of WAPC approval, after which time the approval will no longer be valid.

3.5.3 While an approval under section 139 may be for any duration, the WAPC may limit the duration under a condition of approval. Any conditions imposed on a section 139 application will be the same for each sub-lease or sub-licence which the applicant enters into using the approved section 139 application.

3.6 ACCESS AND CARPARKING

3.6.1 Critical to the use of land occupying a portion of a lot, is that the user has access to a legally constructed public road network. As a result, the WAPC will:

- require section 136 and 139 applications to demonstrate a permanent and ongoing right of access directly from a legally-constructed public road to the lease, licence or purchase area or
- in the absence of access to a legally-constructed public road, consider the use of easements or other agreements that ensure a permanent and ongoing right of access to the lease or licence area; for leasing and granting licence applications, access may be demonstrated through lease or licence provisions and



- if access cannot be obtained directly from a legally-constructed public road to a section 136 or 139 application area, the WAPC may impose conditions to ensure ongoing access is maintained for the duration of the approval.

3.6.2 The WAPC will not approve a section 136 or 139 application where an approval would give rise to any deficiency in car parking for an occupier or tenancy under a development approval or on the advice of the local government.

3.7 SERVICING

3.7.1 Section 136 and 139 application areas must be provided with an acceptable level of utility services appropriate for its intended use, provided by either a public, or a licensed private, service provider. The WAPC may require a section 136 and 139 application to demonstrate the provision and access to services (power, water and sewer) where land is already connected to services, or demonstrate the proposed servicing arrangements where land is not already connected. Servicing arrangements may be demonstrated on a plan and/or through clauses in the transaction.

3.8 SUBDIVISION APPROVAL

3.8.1 WAPC approval of a section 136 or 139 application does not constitute subdivision approval and does not infer future subdivision approval will be forthcoming.

3.9 AMENDED APPLICATIONS

Where an applicant seeks to amend an application made under section 136 or 139, the applicant will be required to lodge a Form 2B.

4 IMPLEMENTATION

4.1 REFERRALS

4.1.1 The WAPC may refer section 136 and 139 applications to local governments, public authorities, utility providers and any other entity, to provide comment, for a period of 42 days or within such a period as the WAPC considers relevant.

4. ENDORSEMENT OF DOCUMENTS

- 4.2.1 Transaction documents that are executed by the parties which require a section 136 or 139 application, do not breach the Act if:
- the agreement is entered subject to the approval of the WAPC being obtained and
 - an application for the approval of the WAPC is made within a period of three (3) months after the date of executed agreement.
- 4.2.2 If a transaction is entered into, it has no effect until the WAPC gives its approval. If an application is lodged, the WAPC can grant approval, within a period of six (6) months from the date of executed agreement, or in such further period agreed.



- 4.2.3 The WAPC is not a party to a section 136 or 139 application, nor can it be burdened by any requirements of a transaction, unless the WAPC is the landowner, lessee or licensee.

4.3 ADVICE TO LOCAL GOVERNMENT

Under the Regulations, where approval is granted pursuant to section 136 or 139, the WAPC is required to provide a copy of the approval and the sketch of land concerned to the local government of the district where the land is situated.

4.4 RIGHT OF REVIEW

Applicants seeking a review of a WAPC decision may lodge an application with the State Administrative Tribunal under section 251 of the Act.

5 DEFINITIONS

Class of lease or licence means approval of a template lease or licence (head lease or licence), which permits the lessor or licensor the right to sub-lease or sub-licence land which is consistent with the overarching lease or licence.

Class of lease or licence applications are typically used for shopping centres, lifestyle villages and for railway servicing and maintenance.

Commercial lease or licence means a lease or licence for a commercialised activity and include, but are not limited to, wind farms, solar farms and railways.

Holding over clause means a clause contained within a fixed term agreement which specifies that when the agreement is terminated, the lessee or licensee can continue to occupy and use the premises for the prescribed purpose and for a specified time, if the lessor or licensor agree.

Lease means a legal agreement by which money is paid in order to use or occupy land for an agreed period of time, usually with exclusive possession rights to the land. This arrangement may include leases for renewable energy facilities.

Licence means a legal agreement by which money is paid in order to use or occupy land, usually without exclusive possession rights to the land. This arrangement may include access rights for construction, maintenance and/or access to telecommunication facilities, signage and railway servicing and maintenance.

Option to lease or licence, or agreement to lease or licence means an agreement to grant a lease or licence in the future without granting a right of possession to the land.

Option to purchase agreement means agreeing, through written agreement, for the option to purchase land in the future without granting a right of possession to the land. An example of this is a purchaser agreeing to purchase a portion of land from a landowner at a future date, but not purchasing and transferring ownership of the land at this time.

Residential lease or licence means a lease or licence for the purpose of residential development or for residential use and may include, but are not limited to, retirement villages and residential dwellings.

Sale or agreement to sell means a person or entity having land in return for money or accepting, through written agreement, that a person or entity will have land in return for money.

Transaction means a document by which the land is leased, licenced, sold, agreed to be sold, or the option to purchase is granted.



6 FURTHER INFORMATION

Enquiries concerning these guidelines can be directed by email to wapcleases@dplh.wa.gov.au or by post to:

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Information relevant to these guidelines is published at:
www.dplh.wa.gov.au



APPENDIX 1 – MODEL CONDITIONS

	CONDITION	SITUATION	APPLICABLE SUBDIVISION / POLICY LINK
L1	This decision is valid for three years from the date of this approval	Where the transaction is unsigned (typically signing page is at the front or back of the transaction)	State planning framework
L2	Legal access from a gazetted constructed road to the lease / licence [DELETE AS APPLICABLE] area is to be maintained for the term of the lease / licence	Where a lease / licence area does not have direct legal access to a gazetted constructed road and the lease does not provide for legal access (e.g. agreement or easement)	<i>OP 1.1 Subdivision of Land General Principles</i>
	ADVICE	SITUATION	
La1	In regard to condition L1, if the transaction is not entered into within this period, a new application is required	To be used where L1 is applied	
La2	This approval does not constitute subdivision approval and does not infer future subdivision approval will be forthcoming	To be used for all applications	
La3	The proposed lease / licence [DELETE AS APPLICABLE] area potentially contains [INSERT VALUE], a Threatened Ecological Community (TEC). Any proposal which impacts a TEC may be subject to requirements under the <i>Commonwealth Environmental Protection and Biodiversity Conservation Act 1999</i> . This approval does not permit the removal or disturbance of native vegetation within the lease / licence [DELETE AS APPLICABLE] area.	Where a lease / licence area contains a TEC which may be impacted by the proposal	<i>SPP 2 Environmental and Natural Resources</i>