

Explanatory Notes for Planners - Clause 78H

EXPLANATORY NOTES ONLY – THIS DOCUMENT IS NOT THE NOTICE AND HAS NO LEGAL STATUS

REQUIREMENTS (Notice of Exemption dated 4 March 2022)	CONDITIONS (Notice of Exemption dated 4 March 2022)	EXPLANATION TO ASSIST PLANNERS	CHANGES FROM THE PREVIOUS NOTICE OF EXEMPTION (Dated 30 April 2020)
Schedule 1 – Exemption from requirement to obtain approval			
1.1 Proponents are exempted from the requirement to obtain development approval for the use of, or undertaking of works on, land, where such use or works relate to medical or health related activities associated with a response to the COVID-19 Pandemic.	<ol style="list-style-type: none"> 1. Provided that a Public Authority or local government advises or identifies the medical or health related activities as necessary in response to the COVID-19 Pandemic. 2. An exemption under this clause will expire 90 days after the date upon which the State of Emergency Declaration ceases to have effect, or is revoked. 	<p>Approval is not required for any works or development necessary for medical or health related purposes associated with a response to the COVID-19 Pandemic that is identified by a Public Health Authority.</p> <p>Discretion applies to proponents as to whether this exemption it utilised.</p>	No change.
1.2 Proponents are exempted from the requirement to obtain development approval to the use of, or undertaking of works on, land, where such use or works concern temporary workers' accommodation.	<ol style="list-style-type: none"> 1. Provided that the temporary workers' accommodation applies to a workforce necessary for the installation of, or construction of, and maintenance of, essential services such as (but not limited to) power stations, water, desalination plants or sewer treatment facilities. 2. Provided that the proponent notifies the local government within 7 days of commencing the use, that the use is being undertaken. 3. An exemption under this clause will expire 90 days after the date upon which the State of Emergency Declaration ceases to have effect, or is revoked. 4. Despite any other condition, this exemption does not apply to workers' accommodation connected with agriculture, which is dealt with in 1.3. 	<p>On-going supply of essential services during the COVID-19 Pandemic may require workers to be temporarily accommodated near those services.</p> <p>The main issue relates to regional areas where there is no region scheme and the local scheme may not allow any form of residential use.</p> <p>Discretion applies to proponents as to whether this exemption it utilised.</p>	<p>Note, this was clause 1.6 in the previous Notice.</p> <p>No changes.</p>

REQUIREMENTS (Notice of Exemption dated 4 March 2022)	CONDITIONS (Notice of Exemption dated 4 March 2022)	EXPLANATION TO ASSIST PLANNERS	CHANGES FROM THE PREVIOUS NOTICE OF EXEMPTION (Dated 30 April 2020)
1.3 Proponents are exempted from the requirement to obtain development approval to the use of, or undertaking of works on, land, where such use or works concern agricultural workers' accommodation.	<ol style="list-style-type: none"> 1. Provided that the temporary workers' accommodation applies to a workforce necessary for ongoing operation of agricultural activities. 2. Provided that: <ol style="list-style-type: none"> a) the land to be used is located in the Rural zone; b) the use is capable of being approved under the scheme; c) if the land can be connected to all reticulated utility services, is so connected; and d) no new permanent buildings or structures are required. 3. Provided that the proponent notifies the local government within 7 days of commencing the use, that the use is being undertaken. 4. An exemption under this clause will expire 90 days after the date upon which the State of Emergency Declaration ceases to have effect, or is revoked. 5. Despite any other condition, this exemption does not apply to temporary workers' accommodation connected with the essential services dealt with in 1.2. 	<p>See above. This exemption responds to the differing land use categories in some local planning schemes, and clarifies the exemption can apply to 'agricultural workers' accommodation'.</p> <p>Discretion applies to proponents as to whether this exemption it utilised.</p>	<p>Note, this was clause 1.7 in the previous Notice.</p> <p>The exclusion now applies to Rural zone land in all local planning scheme areas.</p>
1.4 Proponents are exempted from the requirement to obtain development approval for the following uses, and temporary works associated with these: <ol style="list-style-type: none"> I. commercial vehicle parking. 	<ol style="list-style-type: none"> 1. Provided that the proponent notifies the local government within 7 days of commencing the use, that the use is being undertaken. 2. An exemption under this clause will expire 90 days after the date upon which the State of Emergency Declaration ceases to have effect, or is revoked. 	<p>Provides for delivery drivers and similar services who may be required to temporarily park their vehicle at home in response to the COVID-19 requirements.</p> <p>Discretion applies to proponents as to whether this exemption it utilised.</p>	<p>Note, this was clause 1.5 in the previous Notice.</p> <p>No changes.</p>

REQUIREMENTS (Notice of Exemption dated 4 March 2022)	CONDITIONS (Notice of Exemption dated 4 March 2022)	EXPLANATION TO ASSIST PLANNERS	CHANGES FROM THE PREVIOUS NOTICE OF EXEMPTION (Dated 30 April 2020)
---	---	---------------------------------------	---

Schedule 2 – Exemptions relating to non-confirming uses

<p>2.1 Any approval for a non-conforming use, is exempt from a provision that annuls the approval because of a discontinuance of that non-conforming use.</p>	<ol style="list-style-type: none"> The period during which the State of Emergency is declared shall be excluded from any calculation of the period for which a non-conforming use ceases to exist. An exemption under this clause will expire on the day after that upon which the State of Emergency Declaration ceases to have effect or is revoked. 	<p>Acts as a “stop the clock” for the duration of the State of Emergency which will preserve non-conforming use rights in the event that the use is unable to operate as a result of the COVID-19 Pandemic. The duration of the State of Emergency is excluded from the period calculated for discontinuance of the use.</p> <p>Discretion applies to proponents as to whether this exemption it utilised.</p>	<p>Note, this was clause 3.1 in the previous Notice.</p> <p>Condition 2 has been added, explaining exemptions under this clause will expire on the day after the State of Emergency Declaration ceases to have effect or is revoked.</p>
---	--	--	--

Schedule 3 – Exemptions from requirements regarding time limits / conditions of approval

<p>3.1 In relation to an approved development application, proponents are exempted from the requirement to substantially commence development.</p>	<ol style="list-style-type: none"> Provided that: <ol style="list-style-type: none"> the development application was not approved by a Development Assessment Panel, as defined by the <i>Planning and Development (Development Assessment Panels) Regulations 2011</i>; the original deadline for substantial commencement is exempted; and a new deadline for substantial commencement is substituted, being the day which is 2 years after the day on which, but for this exemption, the development approval would have ceased to be valid. The exemption under this clause will only be available for development applications decided on, or before, the date upon which the State of Emergency Declaration ceases to have effect, or is revoked. 	<p>Extends the approval timeframes for all current approvals by adding a further 2 years to the timeframe remaining as at the date of the Notice.</p> <p>This is intended to reduce the likely requests to local government/DAP for extensions to the term of existing approvals due to the COVID-19 Pandemic.</p> <p>Discretion applies to proponents as to whether this exemption it utilised.</p>	<p>Note, this was clause 4.2 in the previous Notice.</p> <p>Development Assessment Panel (DAP) approvals have been removed given the <i>Planning and Development (Development Assessment Panel) Regulations 2011</i> now provide for a 4 year term as of right (rather than the previous 2 years as for other approvals), noting that the decision-maker can apply a term longer than this if appropriate. See FAQs for further clarification.</p>
--	---	--	--

REQUIREMENTS (Notice of Exemption dated 4 March 2022)	CONDITIONS (Notice of Exemption dated 4 March 2022)	EXPLANATION TO ASSIST PLANNERS	CHANGES FROM THE PREVIOUS NOTICE OF EXEMPTION (Dated 30 April 2020)
3.2 Proponents are exempted from any restriction upon loading or unloading times, related to the delivery of goods and/or petroleum products.	<ol style="list-style-type: none"> 1. Confined to premises with an existing approval, or the benefit of an exemption under this Notice, to sell goods and/or petroleum products. 2. Provided that the proponent notifies the local government within 7 days of commencing use of this exemption. 3. An exemption under this clause will expire 90 days after the date upon which the State of Emergency Declaration ceases to have effect or is revoked. 	<p>Assists in maintaining the continued supply of goods and fuel by temporarily removing the need to comply with any planning restrictions relating to loading/unloading and hours of delivery.</p> <p>This does not exempt the proponent from complying with provisions under other legislation (eg health, road traffic etc).</p> <p>Discretion applies to proponents as to whether this exemption it utilised.</p>	<p>Note, this was clause 1.6 in the previous Notice.</p> <p>No changes.</p>

Schedule 4 – Exemption of a type that may fall within multiple categories

4.1 Exemption from any requirement under a scheme that would ordinarily apply to development required to implement a direction or authorisation issued under the <i>Emergency Management Act 2005</i> or the <i>Public Health Act 2016</i> .	<ol style="list-style-type: none"> 1. An exemption under this clause will expire 90 days after the date upon which the State of Emergency Declaration ceases to have effect or is revoked. 	<p>A general provision to clarify that planning approval is not required to comply with a direction issued under the nominated legislation.</p> <p>Discretion applies to proponents as to whether this exemption it utilised.</p>	<p>Note, this was clause 6.3 in the previous Notice.</p> <p>No changes.</p>
--	---	---	---

REQUIREMENTS (Notice of Exemption dated 4 March 2022)	CONDITIONS (Notice of Exemption dated 4 March 2022)	EXPLANATION TO ASSIST PLANNERS	CHANGES FROM THE PREVIOUS NOTICE OF EXEMPTION (Dated 30 April 2020)
---	---	---------------------------------------	---

Schedule 5 – Exemptions that are only applicable during a Lockdown

<p>5.1 Proponents are exempted from the requirement to obtain development approval for a home business use, and temporary works associated with this use.</p>	<p>1. Provided that the land to be used is located in:</p> <ul style="list-style-type: none"> a) a residential zone; or b) where a dwelling, grouped dwelling or multiple dwelling is a permitted use. 	<p>Provides for people either working from home or temporarily relocating their small business to their home. The exemption only applies during a Lockdown, and only applies to the land/area subject to that lockdown.</p> <p>Discretion applies to proponents as to whether this exemption it utilised.</p>	<p>Note, this was clause 1.4 in the previous Notice.</p> <p>'Home Occupation' has been removed (now only applies to 'Home Business'). This is due to the exemption now being covered by clause 61 of the deemed provisions of the <i>Planning and Development (Local Planning Schemes) Regulations 2015</i>, which exempts the need to obtain approval.</p>
<p>5.2 Where premises are approved for use as an hotel, tavern, restaurant/café or other similar venue, proponents are exempted from:</p> <ul style="list-style-type: none"> i. any condition of approval, or designation in the approved use, requiring the food prepared at the premises to be consumed on the premises; ii. any requirement to obtain approval for food to be prepared for consumption off premises; and iii. any requirement to obtain approval to minor, temporary, works that are necessary to adapt existing premises to use the exemption contemplated under (i) or (ii) above. 	<p>1. Provided that no new permanent buildings or structures are required (with the exception that car parking bays are permitted).</p> <p>2. Despite any other condition, this exemption does not apply to a Heritage-Protected Place where works are required.</p>	<p>This enables food and beverage businesses to continue to operate by providing take away and/or home delivery as they are unable to comply with the requirement to primarily prepare and serve food on their premises due to the COVID-19 Pandemic. Signage is not considered due to the amendments to the <i>Planning and Development (Development Assessment Panels) Regulations 2011</i> that became operational in 2021, which now exempt the need to obtain approval for signs of a certain size or that are consistent with a local planning policy, thus removing the need for this exemption.</p> <p>The exemption only applies during a Lockdown, and only applies to the land/area subject to that lockdown.</p> <p>Discretion applies to proponents as to whether this exemption it utilised.</p>	<p>Note, this was clause 6.1 in the previous Notice.</p> <p>The considerations in relation to signage have been removed. This is due to the exemptions covered by clause 61 of the deemed provisions of the <i>Planning and Development (Local Planning Schemes) Regulations 2015</i>, which exempts the need to obtain approval for signs of a certain size or that are consistent with a local planning policy, thus removing the need for this exemption.</p>

REQUIREMENTS (Notice of Exemption dated 4 March 2022)	CONDITIONS (Notice of Exemption dated 4 March 2022)	EXPLANATION TO ASSIST PLANNERS	CHANGES FROM THE PREVIOUS NOTICE OF EXEMPTION (Dated 30 April 2020)
---	---	---------------------------------------	---

Schedule 6 – Exemptions that expire 90 days after the signing of this Notice

<p>6.1 Proponents are exempted from the requirement to obtain development approval for the following uses, and temporary works associated with these:</p> <ul style="list-style-type: none"> i. shop; ii. restaurant/café; iii. convenience store (excluding those selling petroleum products); iv. consulting rooms; v. office. 	<ol style="list-style-type: none"> 1. Provided that: <ul style="list-style-type: none"> a) the land to be used is located in a commercial, centre and/or mixed use zone; b) the use is not prohibited by the scheme; c) no new permanent structures are required (with the exception that car parking bays are permitted); d) for shop uses, once the proposed use is in place, the net lettable area for the land use does not exceed 400m²; and e) the land is connected to all reticulated utility services, and does not depend on any onsite effluent disposal. 2. Provided that the proponent notifies the local government within 7 days of commencing the use, that the use is being undertaken. 3. Despite any other condition, this exemption does not apply to a Heritage-Protected Place. 4. An exemption under this clause will expire 90 days after the date upon which this Notice is signed. 	<p>This exemption has been removed as it has been replaced by exemptions in the <i>Planning and Development (Local Planning Schemes) Regulations, 2015</i>.</p> <p>It is noted that the exemption related to land uses with a floor area of 400m² (in lieu of 300m²) included in the Regulations. However, it is considered that given the relaxation of restrictions, the remaining part of the exemption is no longer necessary or required.</p> <p>Notwithstanding, a condition is to be added to the exemption to state that it will be revoked 90 days after the signing of the Notice. This will provide sufficient time for landowners that utilised the exemption to seek development approval.</p>	<p>This was clause 1.2 in the previous Notice.</p> <p>Condition 4 has been added, so it is revoked after 90 days after the signing of the Notice.</p>
<p>6.2 Proponents are exempted from the requirement to obtain development approval for the following uses, and temporary works associated with these:</p> <ul style="list-style-type: none"> i. industry; ii. industry-light; iii. trade supplies; iv. warehouse/storage; v. transport depot. 	<ol style="list-style-type: none"> 1. Provided that: <ul style="list-style-type: none"> a) the land to be used is located in an industrial zone; b) the use is not prohibited by the scheme; c) the land is connected to all reticulated utility services, and does not depend on any onsite effluent disposal; and d) either: <ul style="list-style-type: none"> i. no new permanent structures are required; or ii. any structures required to facilitate the use are deemed temporarily approved for a period of no more than 2 years, from the date the use commences, after which the structures must be removed. 2. Provided that the proponent notifies the local government within 7 days of commencing the use, that the use is being undertaken. 3. Despite any other condition, this exemption does not apply to a Heritage-Protected Place. 4. An exemption under this clause will expire 90 days after the date upon which this Notice is signed. 	<p>In consulting with key stakeholders it has become apparent that the temporary exemption has not been well utilised due to a range of factors, particularly that existing facilities have capacity to deal with lockdown constraints and most proponents want to seek permanent development approval rather than relying on a temporary exemption. This exemption is therefore no longer required.</p> <p>Notwithstanding, a condition is to be added to the exemption to state that it will be revoked 90 days after the signing of the Notice. This will provide sufficient time for landowners that did utilise the exemption to seek development approval.</p> <p>Discretion applies to proponents as to whether this exemption it utilised.</p>	<p>This was clause 1.3 in the previous Notice.</p> <p>Condition 4 has been added, so it is revoked after 90 days after the signing of the Notice.</p>

Interpretation and Guidance notes

1. In this Notice a generous, broad interpretation is to be given to terms.
2. “Deemed Provisions” means Schedule 2 of the *Planning and Development (Local Planning Schemes) Regulations 2015*.
3. The term “all local planning schemes” relates to those schemes to which the Deemed Provisions apply.
4. The term “proponent” should be interpreted broadly and includes any owner or occupier of land, and also includes any applicant or agent acting on their behalf. A proponent may also include any local government, if acting as an owner or occupier of land.
5. Unless otherwise stated, a reference to a clause in this Notice is to a clause in the Deemed Provisions.
6. Heritage Protected Place has the same definition as contained within the *Planning and Development (Local Planning Schemes) Regulations 2015*.
7. “State of Emergency Declaration” means the State of Emergency declared by the Minister for Emergency Services, as effective from 12am, 16 March 2020. This was made under s56 of the *Emergency Management Act 2005*.
 - a) When the State of Emergency Declaration is no longer required, the declaration will expire on either:
 - i. a date specified in a notice issued under s58 of the *Emergency Management Act 2005*, by the Minister for Emergency Services: or
 - ii. a date specified in a revocation notice issued by the said Minister.
 - b) Information relating to this will be available on websites such as:
<https://www.wa.gov.au/government/document-collections/covid-19-coronavirus-state-of-emergency-declarations>
8. “Public Authority” has the same definition as “public authority” in section 4, *Planning and Development Act 2005*.
9. For the purpose of this Notice, a “Lockdown”
 - a) occurs when the Police Commissioner issues directions under section 72A (or other relevant section) of the *Emergency Management Act 2005*, which has the either one, or more, of the following effects:
 - i. to mandate the closure to the public of one or all of the following premises:
 1. restaurants or cafe;
 2. businesses characterised as a pub, bar or club that supplies alcohol under a licence granted under the *Liquor Control Act 1988* (WA);
 3. gyms.
 - or**
 - ii. to restrict 2 or more persons from gathering in an indoor space, where there is not at least 4 square metres of space for each person at the gathering.
 - b) Is in place from the time stipulated in the direction and ends upon the revocation of such restrictions by the Police Commissioner.
10. For the avoidance of doubt, while the definition of a Lockdown provided under explanatory condition 9 refers to closure of certain premises, this does not negate the service of takeaway food enabled under temporary exemption 5.2.
11. For the avoidance of doubt, this Notice provides **temporary** exemptions from planning requirements. Consistent with clause 78J (2) of the Deemed Provisions, this Notice cannot provide a permanent exemption from a planning requirement under a scheme.
 - a) For example, in clauses 1.2 to 1.3 of this Notice the exemption is generally limited to “temporary works” and “no permanent buildings or structures”. That is, at the expiration of the exemption period set out under this Notice, if new development approval is not otherwise obtained, a proponent must remove, pull down, take up, or otherwise alter any development and cease any unauthorised use, and return the land as nearly as practicable to its condition immediately before any development activity relied upon under this Notice started. Failure to do so may result in enforcement action by the responsible authority, including prosecution or a separate take-down notice under section 214 of the *Planning and Development Act 2005*.
 - b) For example, in clause 1.3 references to “the use is capable of being approved under the scheme” generally includes, but is not limited to, uses that are not a “X” use, or equivalent concept, as set out in zoning table. Moreover, to avoid doubt and reflective of clause 78J(S), if an exemption is relied upon because at the time of such reliance a use was capable of being approved, but is no longer capable at the time of a future development application due to a change in the scheme, no non-conforming use rights apply. That is, the proponent in such a situation, not being able to obtain development approval, must remove, pull down, take up, or other alter any development and cease any unauthorised use, and return the land as nearly as practicable to its condition immediately before any development activity relied upon under this Notice started.
12. An exemption provided for under this Notice only relates to planning requirements applicable pursuant to a local planning scheme (including under the Deemed Provisions), and does not exempt any other requirement that might apply under any other law. For example, a proponent seeking to rely upon an exemption set out in this Notice may still require approvals under health, building, environment, liquor licencing and other statutory requirements.
13. In interpreting both this Notice and different local planning schemes to which this Notice applies, including but not limited to land use terms and zoning classification descriptions, words can express the same idea in a different form of words and ideas are not to be taken as different just because different forms of words were used. For example, a reference to a “residential” zone and uses includes all such zones and uses substantively of this type or genus, whatever nomenclature is used by a local government in their particular local planning scheme.
14. The ‘Rural’ zone as referred to in the direct conditions of clause 1.3 regarding agricultural workers accommodation, refers to rural zones and other zones substantively of this type or genus, such as general farming or general agriculture zones, but not special rural or rural residential zones where agricultural workers accommodation is generally not required or appropriate.
15. To avoid any doubt, the exemption in clause 2.1 operates to “stop the clock” on the period of discontinuance for a non-conforming use, which is usually 6 months or other longer period approved by the local government, and will be paused for such time as the State of Emergency Declaration is in force.

16. An exemption relied upon by a local government or proponent under this Notice does not preclude a local government or proponent from relying upon any other exemption, if applicable, including but not limited to cl.61 of the Deemed Provisions.
17. An exemption under this Notice is a discretionary right afforded to the person designated in the Notice – it is not an obligation imposed on that person.
 - a) A local government afforded an exemption under this Notice may exercise their discretion not to rely upon that exemption. A proponent afforded an exemption under this Notice may likewise exercise their discretion not to rely upon that exemption.
 - b) To avoid doubt, a local government cannot prevent or prohibit the free exercise of an exemption afforded to a proponent in accordance with the conditions of the exemption. Likewise, proponents and other members of the community cannot prevent or prohibit the free exercise of an exemption afforded to a local government in accordance with the conditions of the exemption.
18. In clause 1.1, the exemption does admittedly permit the construction of permanent works and permanent buildings or structures, and not merely temporary development. The clause also is not bound by the limitations of exclusions relating to any Heritage-Protected Place. This is due to the extraordinary need for any use or works in connection with medical or health related activities necessary to respond to the COVID-19 Pandemic. In many circumstances, any works involved with such a need will in any event be a public work, already exempted from development approval. Nonetheless, to the extent any development is not a public work and clause 1.1 is relied upon by a proponent, the clause remains only temporary.
19. The exemptions contained within Schedule 6 cease to have effect 90 days after the signing of this Notice. The exemptions identified have either been superseded by the amended Regulations or are now unnecessary based on the relaxation of restrictions. A period of 90 days has been provided to enable landowners who previously relied on these exemptions to obtain development approval should they wish to continue operating the land use.