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Department of **Planning,
Lands and Heritage**



Position Statement:

Exemptions under local planning schemes and approvals under the Metropolitan Region Scheme

August 2023

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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1. Policy Intent

The intent of this position statement is to provide greater clarity concerning the issue of exemptions under local planning schemes and approvals under the Metropolitan Region Scheme (MRS).

2. Planning scheme exemptions in Western Australia

The Western Australian Planning Commission (WAPC) is aware of a potential anomaly which involves some minor developments that are exempt from the requirement for development approval under a local planning scheme but require development approval under the MRS. This derives from the MRS text being a document first published in 1963 with no significant wholesale updates or amendments to the provisions around development approval since it came into operation. While a development approval granted under a local planning scheme is deemed to be an approval under the MRS, an exemption from the requirement for development approval is not.

The nuance as to the role of a region scheme versus a local planning scheme, having regard to the provisions of the *Planning and Development Act 2005 (Act)*, and longstanding principles of planning law, need to be considered when addressing the question as to whether development approval is required under the MRS when a proposal is exempt under the provisions of a local planning scheme.

Local planning schemes and region planning schemes have a different role and any assessment under each will be different. Region planning schemes, such as the MRS, are broad-brush in nature.

They provide a general blueprint, and pursuant to section 34(1) of the Act, are intended to address matters of State or regional importance.

It has long been recognised that not every activity with respect to land will necessarily constitute 'development' for the purposes of the Act. A degree of commonsense is required. For example, a lawnmower, a quad bike and other equipment may be visible on land that is zoned Rural or Special Rural, but that does not necessarily mean that the items are being 'stored' for planning purposes. Such activities are minor in nature and not intended to be captured by formal regulatory controls.

In the context of the regional functions of the MRS, the *de minimis* principle should be considered when considering if a proposal meets the threshold of 'development' requiring approval. This principle comes from the legal maxim *de minimis non curat lex*, which means 'the law does not concern itself with trifles'.

Notwithstanding that both the region scheme and the local scheme use the same definition of development from the Act, it may be that some matters that are exempt under a local planning scheme would in fact be *de minimis* from a regional perspective and would not require approval under the region scheme.

The WAPC applies the *de minimis* principle when determining if development approval is required for proposals on reserves or public works under the MRS.

3. Application of the position statement

This position statement will be used by the WAPC when it is the decision maker, and should be used by other decision makers who have delegated authority from the WAPC and are therefore the 'responsible authority' to determine development applications on zoned land under the MRS.

This position statement does not apply where the MRS does not apply, including to:

- Peel Region Scheme;
- Greater Bunbury Region Scheme;
- Swan Valley Planning Scheme;
- Improvement schemes;
- Metropolitan redevelopment schemes;
- Local planning schemes where there is no region scheme.

Where the MRS does apply, this position statement also does not apply to any development application under clause 29:

- within a MRS reserve;
- within or abutting the Swan development control area;
- called-in to the WAPC under clause 32.

This position statement will not be applicable in circumstances where development approval is required or granted under a local planning scheme because such approval is deemed to be an approval under clause 26(1) of the MRS.

4. Policy Objectives

- To provide the WAPC position on exemptions under local planning schemes and approvals under the MRS.
- To provide guidance for decision makers around matters to consider when determining if development approval is required under the MRS for a proposal that does not require development approval under a local planning scheme.

5. Policy Measures

5.1 Development of, or ancillary to or incidental to, a single house

There is existing clarity that the development of a single dwelling house is exempt under clause 24(2)(b) of the MRS.

Many exempt developments under local planning schemes, including patios, pergolas, cubbyhouses, swimming pools and home renovations will be a part of, or incidental or ancillary to, a single dwelling house and therefore will not require approval under the MRS.

5.2 Updating the Metropolitan Region Scheme

The WAPC, in cooperation with the Parliamentary Counsel's Office, has commenced drafting a revised MRS text. This new text will address this matter by taking a similar approach to that used in the Peel and Greater Bunbury Region Schemes – development approval will not be required under the MRS unless the WAPC has made a specific resolution that it is required.

In drafting the revised MRS text, consideration will be given to whether any transitional provision is necessary to deal with existing use rights for minor developments that are exempt from the need for approval under local planning

schemes but were not at the time of their commencement necessarily exempt from MRS approval requirements.

5.3 Interim position until the Metropolitan Region Scheme is updated

Given the process to undertake a review of the MRS text, which includes consideration by Parliament and Governor approval, the new MRS text will not be able to address this issue in the immediate term.

The question of whether a proposal, that is exempt under a local planning scheme will or will not require development approval under the MRS, will ultimately be a question of fact and degree, depending on the circumstances of each proposal.

Until such time as the MRS is amended, the key issue for decision makers to consider when determining if development approval is required under the MRS is:

- Does the proposal, which is exempt under the local planning scheme, require region scheme development control, having regard to the scope and policy of the MRS and the Act?

In considering this question, the responsible authority needs to keep the role and purpose of the region scheme in mind and apply the *de minimis* principle to the proposal to determine if the proposal meets the threshold for development control under the MRS.

Such considerations are not dissimilar to those local government make on a daily basis to determine whether something meets the threshold of development.

The WAPC is of the view that much of the development exempt under local planning schemes is unlikely to meet the threshold for development under a region scheme. While much exempt development will not meet the threshold, it is recognised that some will, and it is recommended that local government consider these carefully.

5.4 Role of the responsible authority in MRS development applications

The definition in section 4 of the Act of a responsible authority for a region scheme is (emphasis added):

responsible authority, *except as provided in regulations made under section 171A(2)(a), means:*

- (a) *in relation to a local planning scheme or local interim development order, the local government responsible for the enforcement of the observance of the scheme or order, or the execution of any works which under the scheme or order, or this Act, are to be executed by a local government; and*
- (b) *in relation to a region planning scheme, regional interim development order or planning control area, the Commission or a local government exercising the powers of the Commission; and*

(c) *in relation to an improvement scheme or the Swan Valley Planning Scheme, the Commission.*

As the initial recipient for all development applications (including applications under the MRS) and possessing delegated authority, local governments are the responsible authority for administering development approvals under the MRS in the first instance.

Development proponents are likely to seek advice and assistance in relation to the question of development applications from local government for this reason.

It is recommended that a responsible authority should only provide a view on the question of whether approval is required when sufficient details of the development application are provided to them, with all requisite information attached to determine if the proposal meets the threshold for development approval under the MRS. This may not have to be a formal application.

In circumstances where MRS development approval is required, it is noted that the assessment process will usually not involve a detailed assessment, such as would occur if a local planning scheme approval were required. This is because the primary focus of the MRS is on regional issues, rather than local aspects of planning.

For new development activities, proponents are advised to contact their relevant local government if they have any ongoing questions or concerns considering the nature of these matters. It is recognised that it is the principal role of local governments – not the WAPC – to determine whether a proposal is likely to reach the threshold for development under the MRS. The WAPC will support local governments in this assessment.

The WAPC will continue to work with all stakeholders to address this issue in a practical manner, until the amended MRS text is in place and the issue is put beyond doubt. If a local government has queries around the content or how to apply this position statement, please contact the Department of Planning, Lands and Heritage.

Disclaimer

Please note this is not formal legal advice and of a general nature only. Readers are encouraged to seek their own professional advice and assistance.