

1. Introduction

As part of the Government's commitment to streamlining and improving the planning approvals process in Western Australia, the WA Parliament passed *Approvals and Related Reforms (No. 4) (Planning) Act 2010* (the '2010 Amendment Act'). The 2010 Amendment Act contained a number of amendments to the *Planning and Development Act 2005* (the 'PD Act') that are designed to improve the planning system.

The previous provisions under section 76 allowed the Minister to direct a local government to prepare or adopt a local planning scheme. The 2010 Amendment Act clarifies that the Minister can also direct a local government to prepare or adopt an *amendment* to a local planning scheme.

The amendments under section 76 substantially commenced on 22 November 2010¹.

2. Purpose

The purpose of this planning bulletin is to provide a general background as to the purpose and operation of an order made by the Minister for Planning (the 'Minister') under section 76 of the PD Act.

3. What is a section 76 order?

The new section 76 provision, as amended by the 2010 Amendment Act, states as follows:

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, as soon as is practicable after an order is given to the local government under subsection (1), cause a copy of the order to be laid before each House of Parliament or dealt with under section 268A. (**emphasis added**)

4. Background and history

It has been the State's longstanding intention to delegate many planning matters to the control of local government through the establishment of local planning schemes. However, the State has always retained the prerogative to intervene in a local planning matter, to a varying extent, where such intervention is deemed necessary. Section 76, together with its equivalent under previous statutes, has been in operation for some time and reflects this longstanding position.

Section 76, as introduced in the 2005 PD Act, allowed the Minister to order local governments to prepare and submit a new local planning scheme, or to adopt a new local planning scheme. However, the PD Act was silent on the issue of scheme amendments. The 2010 Amendment Act remedies this situation, by clarifying that the Minister is able to give an order to local government to prepare or adopt an *amendment* to a local planning scheme.

5. 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 will be required to take steps to:

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

The usual practicable effect of a section 76 order is that it requires a relevant local government to complete all the requisite steps set out in Part 5 of the PD Act, and submit a prepared or adopted scheme or amendment for the Minister's final consideration under section 87 of the PD Act.

¹The commencement of s.76(4) will occur upon a minor amendment being effected to correct a clerical error. If the Minister issues an order prior to s.76(4) coming into effect, the Government intends to table any such order and the reasons for the order.

6. What mandatory questions 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
 - b. adopt a local planning scheme or amendment proposed by owners?
2. 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 in the State. Furthermore, 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.

7. In what situations may the Minister issue a section 76 order?

Section 76 orders will not be issued on every representation by any applicant, but only in justified circumstances.

The onus will rest with an applicant to demonstrate how local government has supposedly '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 now intervene with an order.

7.1 Situations where a section 76 order may be issued

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

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

In many ways, 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 for whatever reason, that local government has halted or unacceptably delayed performing the requisite steps to complete that process under Part 5 of the PD 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; or
- complete any of the other prescribed requisite steps set out in Part 5 of the PD Act.

- b. 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* 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 formally considered the applicant's proposal but resolved not to initiate the scheme or amendment; and
- where there are proper planning grounds that the Minister 'ought' to intervene so that the proposed scheme or amendment is made or adopted.

- c. 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 (i.e. local government has been given sufficient time but 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.

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

It is envisioned that 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 proper particulars, it is not possible for the Minister to make an informed and reasoned decision, taking into account all relevant considerations; therefore, 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:

Furthermore, 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 make a representation demonstrating how local government has purportedly 'failed' to take requisite steps for having a satisfactory local planning scheme or amendment, or has failed to adopt a local planning scheme.

As such, where an applicant has not yet submitted a proposed scheme or amendment to local government for due consideration, arguably it is not possible to demonstrate how local government has 'failed'. In these circumstances, any section 76 application is likely to be rejected as 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 a reasonable opportunity 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 Council, the application is unlikely to be supported.

- d. An applicant's proposed scheme or amendment effectively amounts to an attempt at ad hoc spot re-zoning:

Finally, a section 76 order is not likely to be issued where it effectively amounts to an *ad hoc* attempt at spot re-zoning. Spot re-zoning is generally not supported, given it sets an undesirable precedent for fragmented development of an area otherwise requiring comprehensive and coordinated planning.

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

When considering a section 76 representation, the Minister is likely to take special note, 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 deemed provisions under the *Planning and Development (General Provisions for Local Planning Schemes) Regulations 2010* and *Planning and Development (Local Planning Schemes) Regulations 2010*, or the historic *Model Scheme Text* where applicable);
 - b. Region Planning Scheme; and
 - c. Local Planning Scheme.
4. Relevant policies, including but not limited to any relevant:
 - a. State Planning Policy;
 - b. Region Strategy;
 - c. Local Planning Strategy;
 - d. Development Control Policy;
 - e. Planning Bulletin; and
 - f. other 'operational policy' endorsed by the WAPC or Government.
5. Any relevant instruments and plans, including but not limited to any:
 - a. regional or local structure plan; and
 - b. detailed area plan.
6. Any further considerations, including:
 - a. Any other *submissions* made by any relevant person;
 - b. the *credibility* of the applicant's claim, and in particular whether there is 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*;
 - ii. whether the applicant has or has not yet submitted a proposed scheme or amendment to local government for due consideration; and
 - iii. whether the local government has:
 - o *considered* the applicant's proposal;
 - o *resolved* not to initiate the proposed scheme or amendment; or
 - o after a *reasonable opportunity*, refused or omitted 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 in effect an attempt to bypass *prescribed statutory processes* set out in Part 5 of the PD Act, including but not limited to any likely impact on:
 - i. communication or developmental requirements with related government agencies, and in particular, environmental referral and review; and
 - 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 in particular whether:
 - i. the applicant effectively seeks an *ad hoc* amendment to *spot re-zone* his or her land; and
 - ii. the result of issuing a section 76 order would in effect be to tend towards *fragmented development*.
- f. any comments of the *Western Australian Planning Commission*;
- g. any *previous and similar decisions*, keeping in mind the issues of precedent, the precautionary principle and consistent decision-making;
- h. to the extent that a local government has 'failed' by having a local planning scheme that is arguably not 'satisfactory', whether the planning issues raised appears are of *significant concern*;
- i. the extent to which, even if the applicant's representation has some merit, whether there are good grounds for *deferring* the initiation of the proposed scheme or amendment at this time, notably where:
 - i. the relevant local planning scheme is currently being amended or is proposed to be amended soon in any event (where there is often a moratorium on further amendments being considered during this time); or
 - 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 a scheme or amendment (for example, where local government was preparing a draft

Activity Centre Structure Plan in relation to the same area), and

- j. other principles of *proper and orderly planning*.

Other relevant criteria include but are not limited to the following:

1. Any *draft* State Planning Policy; and
2. Any other *draft* policy document.

9. How will a representation under section 76 be received and assessed?

The process for receiving and assessing a representation, together with preparing an order under section 76, is summarised as follows:

- **Stage 1**, an applicant consults with local government;
- **Stage 2**, an applicant submits a representation under section 76 to the Minister;
- **Stage 3**, the department receives the application and makes a **procedural assessment** whether it technically amounts to a legal 'representation' for the purposes of section 76, to take account of any vexatious applications;
- **Stage 4**, the department makes a **preliminary assessment** as to the merits of the application and forwards a report to the Minister;
- **Stage 5**, the Minister decides whether to give preliminary approval for the preparation of a draft section 76 order;
- **Stage 6**, the department carries out necessary consultation with local government and prepares a **draft section 76 order**; and
- **Stage 7**, the draft section 76 order is **settled** and the Minister makes a final decision whether or not to issue the order, and if so, on what terms. Where an order is made, the Minister must **table** a copy before both Houses of Parliament.

10. Is there a right of appeal against the Minister's decision?

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

11. If the Minister signs a section 76 order, does local government still have to complete the remaining procedural steps prescribed under Part 5 of the PD Act?

Yes, except as set out in sections 76(2) and (3), 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 PD Act. It appears that the primary purpose of section 76(2) and (3) is to allow 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.

12. Does a scheme or amendment prepared and submitted to the Minister pursuant to a signed section 76 order still require final Ministerial approval under section 87 of the PD Act?

Yes, except where provided under sections 76(2) and (3) of the PD Act, a scheme or amendment prepared and submitted by local government pursuant to a signed section 76 order still requires final Ministerial approval. The Minister still has an obligation to turn his or her mind to the question of whether to grant final approval to a submitted scheme or amendment pursuant to section 87 of the PD Act.

13. If a local government fails to comply with a signed section 76 order, can the Minister undertake further enforcement action?

Yes, where a local government fails to comply with a signed section 76, the Minister can undertake further enforcement action. Action against non-compliance with a section 76 order is likely to be carried out under section 212.

Section 212 of the PD Act enables the Minister, if satisfied that a local government has failed to comply with such an order or provision, 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 the place of the local government, can take whatever action is necessary for compliance with the requirement. The Minister's costs in doing so are recoverable from the local government.

14. Does the Minister have a discretion whether to commence enforcement action under section 212 for non-compliance with a section 76 order?

Yes, the Minister contains a discretion whether to issue a section 212 notice. In some cases, there may be valid reasons why a local government has not complied with the section 76 order within the time specified in the order. In particular, there may be unavoidable delays associated with completing the remaining procedural steps set out in Part 5 of the PD Act. Therefore, before proceeding directly to taking action under section 212, discussions should be held with the local government to establish whether there are any particular reasons for non-compliance.

Finally, in relation to this issue, it is relevant to note that the preparation of a local planning scheme or amendment which, once begun by a local government, cannot be stopped by that local government. Once the scheme or amendment is advertised a local government can only pass a resolution under regulation 17(2)(b) TPR that it does not wish to proceed with the scheme. However, from that point on, the decision ultimately rests with the WAPC and the Minister whether to refuse or approve the scheme or amendment.

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

Yes – see Appendix A attached.

16. Further information

For further information, please contact the Department for Planning at:

Albert Facey House
469 Wellington Street
Perth 6000
Western Australia

Tel: (08) 9264 7777
Fax: (08) 9264 7566
TTY: (08) 9264 7535

As part of its continuing improvements to its service to clients and the public, the Western Australian Planning Commission has an internet site at the following address:

www.planning.wa.gov.au

The site contains a range of information concerning the WAPC, including planning bulletins.

17. Glossary

In this planning bulletin:

applicant means any person making a representation under section 76 of the PD Act.

DoP or the department means the Department of Planning.

initiate a scheme or amendment means a local government resolution to:

- prepare a scheme (under regulation 4 of TPR);
- proceed with a scheme (under regulation 13 of the TPR);
- prepare a scheme amendment (under regulations 13 and 25 of the TPR); or
- otherwise prepare, adopt or proceed with a scheme or amendment, in accordance with any equivalent statutory procedure that might be amended in any regulations from time-to-time.

Minister means the Minister for Planning.

PD Act means the *Planning and Development Act 2005*.

section 76 order means an order of the Minister made under the newly amended section 76 of the PD Act, requiring a local government to, 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.

section 76 request, section 76 application or section 76 representation means a representation to the Minister from an applicant, made under section 76 of the PD Act.

TPR means the *Town Planning Regulations (1967)*, including the *Model Scheme Text*, and its equivalent as amended from time-to-time.

Appendix A

- Section 76 request form (for applicants)

Applicants should note that this form may change from time-to-time. Please refer to the Department of Planning's website at www.planning.wa.gov.au for the latest version.

Example of the form is attached.

Disclaimer

This planning bulletin is intended as a guide only. It is not intended to be comprehensive or to cover particular circumstances.

Readers are advised to refer to the legislation, which is available from the State Law Publisher, and to seek professional legal advice should they have specific legal questions in relation to their particular circumstances.

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website: www.planning.wa.gov.au
email: corporate@planning.wa.gov.au

tel: 08 9264 7777
fax: 08 9264 7566
TTY: 08 9264 7535
info: 1800 626 477

This document is available in alternative formats on application to WAPC Communication Services.



Section 76 request form (for applicants)

Section 1 - Applicant's details

Name:

Address:

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Phone: Email:.....

Section 2 - Local government to which this relates

Name of relevant local government:

Name of relevant local planning scheme:

Section 3 – Summary of representation

Please provide a brief summary, in 250 words or less, why you say the relevant 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:

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Section 4 – Summary of consultation with local government

Please provide a brief summary, in 250 words or less, of what consultation you carried out with local government in relation to this matter. Please note that the Minister cannot and will not consider this application if no consultation with local government has occurred, as an applicant must demonstrate as a matter of precedent fact how the local government has purported ‘failed’ with regard to the stated local planning scheme:

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Section 5 – Documentary evidence and other material

Please list what document evidence or other material you are submitting in support of this application. Please ensure all listed material is attached to this form. Please note that the Minister cannot and will not consider this application where no evidence or other material is provided as to how the local government has purportedly ‘failed’ with regard to the stated local planning scheme.

In most situations, an applicant will need to provide the following information in order to make a section 76 application that is capable of being seriously considered by the Minister:

- Copies of all relevant written correspondence to and from the applicant and the relevant local government;
- A copy of the proposed new scheme or amendment, if prepared by a landowner;
- A copy of any relevant local government resolution (e.g. a resolution refusing to prepare or adopt a new scheme or amendment) if applicable;
- A brief outline of all attempts at consultation with the relevant local government (e.g. a synopsis of any telephone and personal meetings); and
- A summary of the main points of justification on planning grounds, including all relevant facts and reasons, why local government ‘failed’, and why a new scheme or amendment ‘ought’ to be made or adopted in this instance. This should include, but is not limited to, all research, consultant reports, submissions or other professional material where relevant.

Without the above information, it may impossible for the Minister to assess all the relevant considerations, or other planning merits, of an application. Please note further and additional information can also be submitted, even if it was not previously submitted to the relevant local government:

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Section 6 – Ministerial action sought

Please provide a brief summary, in 250 words or less, what action you now seek the Minister to carry out. In particular, where you request the Minister issue an order under section 76 of the *Planning and Development Act 2005*, please provide a brief description of what terms you consider appropriate and necessary:

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Section 7 – Other information attached

Please attach all other information, including more detailed written submissions, reasons and documentary evidence.

Where to send this form once completed?

Please send this form, once completed and containing all relevant attachments, to the following address:

Minister for Planning
13th Floor, Dumas House, 2 Havelock Street,
WEST PERTH WA 6005
Fax: (08) 9213 6601
Ref: Section 76 Application