

Urgent legislative WA Government planning and development response to COVID-19

27 May 2020

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Worthwhile read for: Developers, Town Planners

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The *Planning and Development Amendment Bill 2020* (WA) (**PDA Bill**) is currently being considered in the Western Australian Parliament. The PDA Bill amends the *Planning and Development Act 2005* (WA) (**PDA Act**), and other related Acts, in order to introduce historic planning reforms in an attempt to assist in the rescue of the Western Australian economy post-COVID-19.

Planning reforms

The two most significant planning reforms introduced by the PDA Bill are:

- the introduction of a new approvals pathway for significant developments; and
- the creation of special matters Development and Assessment Panels (**DAPs**).

New approvals pathway for significant developments

The new approvals pathway for significant developments proposes that significant development applications are dealt with directly by the Western Australian Planning Commission (**WAPC**), as the sole decision-maker.

A significant development is defined in the PDA Bill to include proposals of \$30 million or more, involving residential development of 100 or more dwellings, or commercial development with the total net lettable area of 20,000m² or more (warehouses excluded). In addition to this, a significant development may include a regional or tourism project that, although it does not meet the above criteria, is considered to assist in COVID-19 recovery.

In assessing applications, the WAPC is given broad discretion and flexibility in decision making and is not bound by any law, rule or other requirement. Despite this, the WAPC is obligated to give due consideration to relevant matters such as the purpose of any applicable planning schemes, the principles of orderly and proper planning and any applicable policies.

It is interesting to note that the WAPC is not given a time limit on consideration of applications. This may be problematic, as an application could languish without recourse to the applicant until a decision is made – a decision ‘as soon as reasonably practicable’ provides inadequate confidence to the market and seems counter-intuitive to this amendment’s intended purpose of driving economic recovery.

Division 3 Part 2 of the PDA Bill attempts to avoid conflicts between approvals granted by the WAPC and the requirement to gain other approvals. However, when a conflict arises, the decision-maker must notify the Minister of its intention to perform a function, which will conflict with the approval, or alternatively perform the function in compliance with a direction by the Minister. A direction may go so far as to lead to a decision-maker complying where that involves doing or omitting to do something it could not do or omit to do, in other circumstances. In a nutshell, the Minister can rescue a WAPC approved development from being stymied by refusal of other required approvals.

To encourage proponents to submit development applications for significant projects a sunset clause

of 18 months will apply from the date of gazettal of the amendment. To encourage proponents who obtain approval by this expedited pathway to commence development as soon as possible, the approval of the WAPC will lapse if the development has not substantially commenced:

- within the period specified in the approval; or
- if no period is specified in the approval – within the period of 48 months beginning on the day on which the approval is granted.

‘Substantially commenced’ means that some substantial part of the work has been performed.

If the new approvals pathway for significant developments is effective, then why should it not continue post the COVID-19 recovery period? There is no persuasive reason why DAPs should not be given the same broad discretion and flexibility, as given to the WAPC, in deciding significant development applications post the COVID-19 recovery period. If a development is a significant development, a developer should not lose an opportunity to reap the benefits of this expedited pathway by virtue of not being able to apply in time. Further, significant developments will always have a stimulating effect on the State’s economy, so why not make the application and approvals process more efficient, enabling these large job-creating projects to commence sooner?

Special matters Development Assessment Panels

The PDA Bill also proposes to alter the scope of the Minister’s power to enable the establishment of a new class of DAP, that being, special matters DAPs. Special matters DAPs will be specialised panels with the expertise to competently deal with complex proposals such as those located in areas with significant tourism or unique aesthetic qualities.

Once the PDA Bill is passed, amendments will be made to the *Planning and Development (Development Assessment Panel) Regulations 2011* (WA) in order to establish this new class of DAP. These amendments are expected to:

- specify the composition and membership of special matters DAPs;
- outline the matters to be determined by special matters DAPs; and
- outline their process for assessment.

Further planning reforms to be expected

The PDA Bill is the first of two bills that propose to reform the State’s planning legislation, regulations and policies. Notwithstanding the expedited application process for significant developments and the creation of a new class of DAP, the PDA Bill provides only a glimpse of what is to come.

Significant reforms that are expected to be introduced in the second Bill, as well as through amendments to the *Planning and Development (Local Planning Schemes) Regulations 2015* (WA) include, among other things:

- exemptions from planning approval for a range of small residential projects, such as minor extensions, patios, carports, shade sails and pergolas;
- a streamlined approvals pathway for simple development applications; and
- the elimination of change of use applications for a number of different uses to support small businesses wishing to establish or change their operations.

We will continue to follow the progress of the PDA Bill, the second bill and other relevant regulatory amendments and provide updates when available.

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