

**CITY OF SUBIACO**  
**LOCAL PLANNING POLICY 3.3**

**EXERCISING DISCRETION UNDER CLAUSE 12 OF THE DEEMED PROVISIONS**

**ADMINISTRATIVE**

<b>Version</b>	<b>Date</b>	<b>Comment</b>
0.1	18 February 2020	Draft for public advertising
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1.1	23 February 2021	Renumbered

**AUTHORITY**

- Planning and Development (Local Planning Schemes) Regulations 2015 (**LPS Regulations**)
- City of Subiaco Local Planning Scheme No. 5 (**Scheme**)

**STATUTORY BACKGROUND**

This local planning policy (**the Policy**) is made pursuant to Schedule 2, Part 2, Division 2 of the *Planning and Development (Local Planning Schemes) Regulations 2015* relating to local planning policies.

The policy applies where the subject site of a development application:

- a. is entered in the State Register of Places under the *Heritage Act 2018* or listed in the Heritage List; and/or
- b. is located in a Heritage Area.

This policy relates to the following clauses of the Deemed Provisions of the LPS Regulations:

1. Clause 12 – the provision for the local government to vary a site or development control to facilitate a positive heritage outcome:

*12 Variations to local planning scheme provisions for heritage purposes*

- (1) *The local government may vary any site or development requirement specified in this Scheme to —*
  - (a) *facilitate the built heritage conservation of a place entered in the Register of Places under the Heritage of Western Australia Act 1990 or listed in the heritage list; or*
  - (b) *enhance or preserve heritage values in a heritage area.*
- (2) *A variation under subclause (1) may be unconditional or subject to any conditions the local government considers appropriate.*
- (3) *If the local government is of the opinion that the variation of site or development requirements is likely to affect any owners*

*or occupiers in the general locality of the place or the heritage area the local government must —*

- (a) consult the affected parties by following one or more of the provisions for advertising uses under clause 64; and*
- (b) have regard to any views expressed prior to making its determination to vary the site or development requirements under this clause.*

2. Clause 63(1)(d) – accompanying material submitted with applications for development approval.

#### *63 Accompanying material*

*(1) An application for development approval must be accompanied by —*

- (d) Any other plan or information that the local government reasonably requires.*

## **DEFINITIONS**

1. The following terms are defined for the purpose of this policy:

***Deemed Provisions*** means the provisions contained in Schedule 2 of the *Planning and Development (Local Planning Schemes) Regulations 2015*.

***Heritage Area*** means a Heritage Area designated under clause 9 of the Deemed Provisions.

***Heritage List*** means the Heritage List created under clause 8 of the Deemed Provisions.

***Heritage Place*** means a place entered on the State Register of Heritage Places or listed in the Heritage List.

***Scheme*** means *City of Subiaco Local Planning Scheme No. 5*.

2. All other terms, words and expression used in this policy have the same meaning as they have in the Scheme.

## **PURPOSE**

The purpose of this policy is to provide guidance on the submission, assessment and determination of applications for development approval where the local government may exercise its discretion under clause 12 of the Deemed Provisions.

This may be necessary on occasions where site and development requirements conflict with achieving positive heritage outcomes

Applicable site and development requirements may include, but are not limited to, building height, setbacks, plot ratio, vehicle access and car parking. The relevant development controls vary depending upon the site and the development proposed.

## **OBJECTIVES**

1. To ensure site and development requirements contribute to positive heritage outcomes during the development of Heritage Places and properties within Heritage Areas.
2. To ensure the exercise of discretion to provide for positive heritage outcomes also provides for development which is consistent with the strategic direction, and zoning/reservation of that land, and which does not have any undue impacts on neighbouring properties or the locality.
3. To facilitate built heritage conservation of heritage listed places and enhance or preserve heritage values in a Heritage Area.
4. To ensure the discretion to vary site or development requirements is exercised appropriately.

## **APPLICATION**

Where a development application for a Heritage Place or within a Heritage Area requests the exercise of discretion pursuant to clause 12 of the Deemed Provisions, the local government should:

1. Consider whether a development that is compliant with the applicable development controls in the planning framework will be detrimental to the conservation of the Heritage Place, or the heritage values of the Heritage Area.
2. Consider whether variations to the site and development requirements applicable in the Local Planning Scheme, may enable a proposal to avoid the impacts referred to in point 1 above and facilitate the built heritage conservation of the heritage place, or enhance or preserve the heritage values in the Heritage Area.
3. Only favourably exercise discretion in cases where a development which complies with the site and development standards of the Scheme will not adequately achieve the Objectives of this policy.

## **POLICY**

### **1. Information to be submitted with a development application**

- 1.1. Where a development application requests the local government to exercise its discretion under clause 12 of the Deemed Provisions, the application must be accompanied by information that clearly demonstrates that the exercise of discretion is necessary to:
  - a. Facilitate the built heritage conservation of a Heritage Place; and/or
  - b. Enhance or preserve the heritage values in a Heritage Area.

- 1.2. The information referred to in point 1.1 above must be provided in the form of a written Statement of Justification. The Statement must provide a clear rationale to support the elements of the development that rely on the local government to vary the site and development requirements of the scheme, and explain how the discretion will achieve one or more of the outcomes referred to in point 1.1 above.
- 1.3. The Statement of Justification must address the following:
  - a. The physical relationship (nature and extent) between the elements of the proposed development which require a variation and one or more of the heritage outcomes referred to in point 1.1 above;
  - b. How the heritage outcomes sought as a result of the variation/s will make a positive contribution to the public realm (for example, the streetscape);
  - c. How the extent of the variation (for example, additional building height or reduced setback) is reduced to the minimum necessary to achieve one or more of the outcomes referred to in point 1.1 above;
  - d. The proportionality between the extent of the variation/s sought and the manner in which the variation/(s):
    - i. facilitates built heritage conservation and/or;
    - ii. enhances or preserves the heritage values of a Heritage Area;
  - e. The spatial relationship (including degree of proximity) between the Heritage Place or Heritage Area and the elements of the development where a variation is sought;
  - f. How the variation does not cause an undue adverse impact on adjoining properties or the locality.
  - g. Any other relevant justification; and
  - h. Any other matter considered appropriate by the local government.

The Statement of Justification may include drawings, photographs, community feedback or other relevant information in support of the written statement.

## **2. Requirement for consultation**

- 2.1. Where consultation is required under clause 12(3) of the Deemed Provisions, it will be carried out with consideration of clause 64 'Advertising applications' of the Deemed Provisions and the relevant City of Subiaco Local Planning Policy that considers public consultation for planning proposals.

## **3. Assessment**

- 3.1. A variation sought under clause 12 of the Deemed Provisions must be for the statutory purpose of facilitating built heritage conservation, or enhancing or preserving the heritage value of a place. For that reason:
  - a. A variation should not be sought to obtain a financial benefit beyond that which is reasonably necessary to achieve the statutory purpose; and

- b. The variation sought should not exceed the extent to which the development potential of the place is limited by the need to conserve the Heritage Place.
- 3.2. The matters set out in point 1.3 of this policy above will be considered by the local government to assess whether the discretion sought either:
  - a. Facilitates the built heritage conservation of a Heritage Place (see example in Appendix 1); and/or
  - b. Enhances or preserves the heritage values of a Heritage Area (see example in Appendix 2).
- 3.3. In exercising discretion under clause 12 of the Deemed Provisions, the local government will give due regard to any comments of the Heritage Council of Western Australia and the City's Design Review Panel relating to the development proposal.
- 3.4. In exercising discretion under clause 12 of the Deemed Provisions, the local government will give due regard to any submissions received during public advertising to determine that the variation will not cause an undue adverse impact on the amenity of adjoining properties or the locality.

#### **4. Determination**

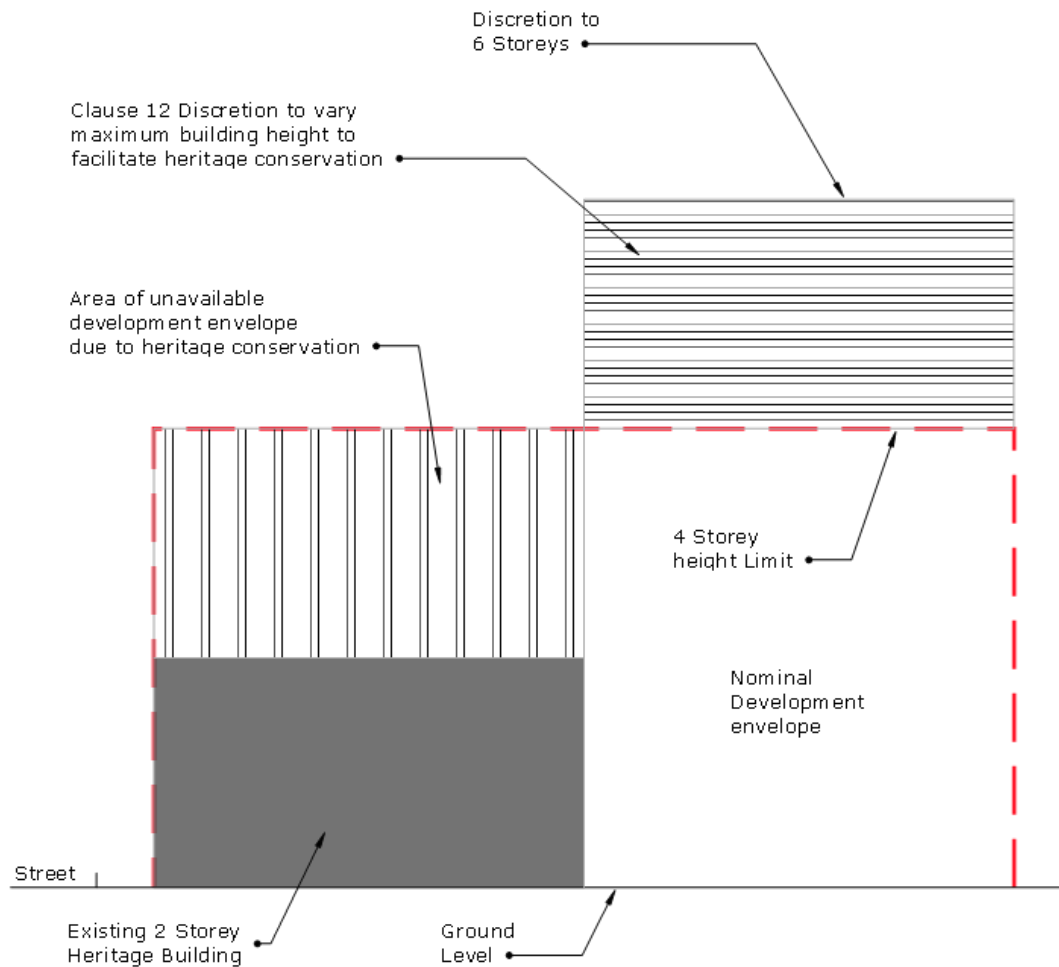
- 4.1. When determining a development application under clause 12(2) of the Deemed Provisions, the local government may impose conditions on the approval to ensure that positive heritage outcomes are achieved.

Conditions of approval may include, but are not limited to, a requirement for a legal agreement between the local government and the owner of the land to which the approval relates, to ensure that positive heritage outcomes associated with the approved development are achieved when the development is undertaken and thereafter maintained.

- 4.2. The requirements of any condition will depend upon the nature of the development that is the subject of the approval granted, and its relationship with the heritage outcome associated with the development.

## 5. Appendices

### Appendix 1 – Example of appropriate use of discretion in pursuance of clause 12(1)(a)



Note: The extent of discretion in relation to a site and development requirement in the scheme shall not exceed the extent that the development potential is limited by conservation of a heritage place.

## Appendix 2 – Example of appropriate use of discretion in pursuance of clause 12(1)(b)

