



ACT
Government
Treasury

MINUTE

SUBJECT: Extension of Time fees: Interim holding letters

To: Treasurer

Critical Date for consideration: nil

Purpose: To seek your agreement to sending out interim letters for those seeking access to the Extension of Time waiver.

Key Points:

- Treasury has received seven applications seeking access to a waiver of the Extension of Time fees.
- Work is currently underway in conjunction with the Environment and Sustainable Development Directorate to give effect to this policy in the future, and to develop criteria to deal with breaches in this part. A brief seeking your agreement to the policy and legislative amendments will be provided shortly.
- In the meantime, interim holding letters (Attachment A) have been prepared to applicants until the final policy is agreed to and a formal position is determined on each case.

Recommendations:

- It is recommended you sign the interim letters at Attachment A.

Khalid Ahmed
Executive Director
Policy Coordination and Development

July 2012

Noted / Approved / Not approved / Please discuss

Andrew Barr MLA 80 / 7 / 2012



SUBJECT: Extension of Time Fees for Commencement and Completion

To: Treasurer

Critical Date for consideration: Urgent

Purpose: To provide advice on the implementation of announcement regarding waivers for Extension of Time fees in the Territory, and the proposed approach to address consequential budgetary and planning issues.

Background

- You announced on 21 June 2012 that “the Government will waive commence and completion fees for commercial, mixed-use and multi-unit residential developments. Commence and complete provisions will now only apply to the construction of single dwellings on standard residential blocks.”
- It is understood that your intent is to revert to the nominal fees that were applicable before the current fees were introduced.
- This brief provides advice on:
 - the implementation of the announcement and the necessary actions to revert to nominal fees for applications made after the announcement;
 - treatment of applications made prior to the announcement (transition issues);
 - financial and budgetary impacts arising from the change;
 - considerations for lease administration; and
 - the proposed process for implementation.

The Current Legislative and Administrative Framework

- Sections 298A-298C of the *Planning and Development Act 2007* provide for commence and complete fees to be applied. In summary:
 - where a lease includes timing provisions, the lessee can apply for an extension. Where an extension is granted, a fee is to be paid in accordance with a formula set in Section 298C of the Act;
 - the fee rate (which is a multiple of General Rates for the property) is set under the *Planning and Development Regulation 2008*. Division 5.7.2 of the Regulation also contains provisions and rates applicable to address hardship circumstances;
 - The legislation and the regulation setting the rates do not distinguish between zoning or the nature of development.
- It is useful to note that the liability on part of the lessee arises upon the extension of time to commence or complete being granted following an application by the lessee. Alternatively, fees are determined when the lease is transferred or subject to an

approval process. Any fees attaching to a block will then be payable before a dealing in the land can be completed. It is possible, and not uncommon, that lease conditions regarding commence or complete continue to be breached until an approval process is initiated.

Implementation of the Announced Policy

- For the purpose of implementation, breaches (of commencement or completion requirements in leases) could be categorised into prospective breaches and retrospective breaches.
 - subject to the timing of the policy being settled, any breaches beyond that date could be treated under a new system of fees. The legislative mechanisms and the system of fees are discussed further below; and
 - the past breaches could be considered on case by case basis. The rationale for a case by case approach and possible criteria are also discussed below.

Treatment of Future Breaches

- Commence and complete provisions are used quite extensively in leases to ensure orderly and timely developments. Individual waivers under the *Financial Management Act 1996* will require considerable administrative effort, and also introduce uncertainty regarding Government’s policy position.
- Amendments and inclusions to clauses under Division 5.7.2 in the *Planning and Development Regulation 2008* would appear to be the most effective approach. The scope of those amendments would be to:
 - provide distinction between single residential and other leases;
 - revert to a fee rate which was applicable before 2008 (escalated appropriately to 2012); and
 - an alternative to this option would be to determine the optimal default fee to the Territory to fully cover the administration and regulatory cost with in ESDD and ensure they are able to monitor any breach of the lease conditions.
- It would be reasonable for the regulation to be applicable from the date of the policy announcement, i.e., 21 June 2012. Alternatively, the change could be commenced as of the commencement of the new financial year.

Treatment of Breaches Prior to 21 June 2012

- For breaches that occurred prior to the announcement date, a case by case treatment is suggested with a waiver (or deferral) provided under the *Financial Management Act 1996*.
- It is likely that the industry has interpreted your policy announcement to be applicable to past breaches. A number of applications for waiver have been received by Treasury, which would suggest such an interpretation by developers.

- o In principle, it is possible to provide exemptions or change the fee rates through regulation. However, such an approach would raise equity, competitive neutrality and moral hazard concerns.
 - Developers who elected to pay the fee and/or complied with the provisions of their leases would view it as inequitable.
 - The approach would appear to reward breaches and punish compliance.
- o As at 6 August 2012, 9 applications for a waiver of EOT fees have been received totalling around \$1.2 million. This breakup is shown below.

Exempt s43

- o The current Treasury criteria is likely to preclude all the applications for waiver, as the assessed fees are in accordance with the relevant legislation in place at the time, and consistent with the intent of the legislation. For these cases, the criteria will need to be expanded to include consideration of other mitigating circumstances or planning considerations.
 - For example, it would be reasonable to waive fees where the delay has occurred due to objections or court cases.
 - Subject to your agreement to the proposed approach, the additional criteria will be developed with input from ESDD.

Financial impacts and Budgetary Considerations

- o The Extension of Time fees are included in the departmental revenue for ESDD, and as such, deemed to be appropriated for recurrent expenditure. The revenue included in the budget and forward estimates is as follows:

2012-13 \$'000	2013-14 \$'000	2014-15 \$'000	2015-16 \$'000

Exempt s36

- o A breakup of these forecasts by development type is not available. Advice from ESDD indicates that around 80 per cent of the annual revenue typically relates to commercial, multiunit residential and mixed use developments.

- The budgetary impact of any changes in the fee structure will need to be recognised. Policy decisions will also be required to address the shortfall in revenue.
- You should note that abolishing or waiving EOT fees will not reduce the workload for ESDD. There will be no savings, as staff will still be required to monitor compliance and ensure planned activity in accordance with the lease conditions continues in the Territory.

Policy Considerations

- As mentioned above, the fees are one of the means to ensure compliance with the timing provisions in the leases. The Minister for Planning has raised concerns regarding ESDD's ability to enforce compliance through means other than lease cancellation and court process.
- Such concerns have also been echoed at the officer level. Advice from ESDD indicates that the nominal fees (at previous levels) are unlikely to provide sufficient incentives for timely developments, based on the experience before the current fees were put in place. At this stage, no alternative mechanisms have been identified to address those concerns and further work will be required jointly by ESDD and Treasury in this regard.
- The retention of current fees for single residential dwellings will appear to be inequitable, with relatively heavier penalties imposed on households compared to commercial developers. Consideration could be given to extending the nominal fee structure to single residential dwellings.

Next Steps and Process

- Subject to agreement to the preferred approach, amendments to the *Planning and Development Regulation 2008* could be drafted and enacted prior to the caretaker period. It would be beneficial to commence drafting as soon as possible. You may wish to seek agreement from the Minister for Planning and the Chief Minister.
- Given the nature of the issues involved including changes to regulation, and financial and budgetary impacts, in general a Cabinet process and agreement would be appropriate.
- In view of the pressures on Cabinet agenda and the short timeframe, agreement may be sought outside that process. You may wish to discuss this approach with the Minister for Planning, and following his support, with the Chief Minister.
- Treasury will continue to work with ESDD to deal with the outstanding issues raised in the letter from the Minister for Planning.

Recommendations:

- It is recommended that you:
 - provide an indication of your preferred approach for implementing the policy announcement through:

- : amendments to *Planning and Development Regulation 2008* for breaches occurring after 21 June 2012; and
- : consideration on a case by case basis for breaches and applications currently in the system;

Noted / Approved / Not approved / Please discuss

- agree for the drafting of the necessary legislative changes required;

Noted / Approved / Not approved / Please discuss

- agree to single residential dwellings being treated on the same basis as commercial developments for the purposes of the revised fee determination;

Noted / Approved / Not approved / Please discuss

- agree for Treasury to prepare a submission for Cabinet's consideration prior to implementation of the Regulations;

Noted / Approved / Not approved / Please discuss

- agree to the consideration of the foregone revenue and impact on ESDD's budget through the 2013-14 Budget process; and

Noted / Approved / Not approved / Please discuss

- note that Treasury and ESDD will continue to liaise over an alternative mechanism for achieving the objective of timely land development in accordance with lease provisions.

Noted / Approved / Not approved / Please discuss

BA

Khalid Ahmed
 Executive Director
 Policy Coordination and Development
 13 August 2012

Andrew Barr

Noted / Approved / Not approved / Please discuss
 Andrew Barr MLA 16 / 8 / 2012

Legislative Provisions

Planning and Development Act 2007

298A Application for extension of time to commence or complete works

- (1) This section applies if a lease includes a building and development provision requiring the commencement or completion of works to take place within a stated time.

Note The planning and land authority may make a controlled activity order under div 11.3.2 (Controlled activity orders on authority's initiative) or terminate a lease under s 382 (Termination of leases) if a lessee fails to comply with a building and development provision.

- (2) The lessee may, at any time before or after the stated time has ended, apply to the planning and land authority to extend the stated time under section 298B.

Note If a form is approved under s 425 for this provision, the form must be used.

- (3) The application must be accompanied by the most recent assessment notice for rates for the land.

298B Extension of time to commence or complete works

- (1) This section applies to an application for extension of a stated time under section 298A.

- (2) The planning and land authority must—

- (a) approve the extension; or
(b) refuse to approve the extension.

- (3) The planning and land authority must approve the extension if satisfied on reasonable grounds that the extension for the period sought would not cause an unacceptable delay to another development or land release.

- (4) An approval may be given for a shorter extension than that sought by the application.

298C Extension of time to commence or complete works—required fee

- (1) If the planning and land authority approves an extension of a stated time under section 298B, the approval is subject to the condition that the applicant pays the planning and land authority the amount, or the total of the amounts, (the *required fee*) for each year, or part year, of the period of extension of time approved, worked out as follows:

$$A \times \frac{D}{365} \times B$$

Example

Frank applies for an extension of time for 1 October 2009 to 31 December 2011 (2 years and 92 days). In Frank's case, the *Planning and Development Regulation 2008* prescribes *A* in the above formula to be 1 for the 1st year, 2 for the 2nd year and 3 for the 3rd year of the period of extension. The fee is worked out using the following formula: $[1 \times 365/365 \times B] + [2 \times 365/365 \times B] + [3 \times 92/365 \times B]$.

Note 1 The required fee may be waived under the *Financial Management Act 1996*, s 131.

Note 2 An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see *Legislation Act*, s 126 and s 132).

- (2) However, if an extension (the *earlier extension*) of time has been approved, in working out the required fee for a further extension—
- (a) the formula for working out the required fee applies as if the period of extension included each earlier extension, other than—
- (i) an earlier extension for which the required fee was waived under the *Financial Management Act 1996*, section 131; or
 - (ii) an earlier extension prescribed by regulation; and
- (b) the required fee is reduced by—
- (i) the amount of the required fee paid for each earlier extension; and
 - (ii) if part of the required fee was waived under the *Financial Management Act 1996*, section 131 for an earlier extension—the amount waived.

- (3) In this section:

A is the figure, not more than 5, prescribed by regulation for the relevant year of the period of extension.

Note Power to make a statutory instrument (including a regulation) includes power to make different provision for different categories (see *Legislation Act*, s 48).

B is the amount of rates imposed under the *Rates Act 2004*, section 14 in relation to the land for the financial year in which the application is made.

D is the lesser of—

- (a) 365; and
- (b) the number of days for which the extension is sought in the relevant year.

period of extension means—

- (a) the period of extension applied for under subsection (2); or
- (b) if an application seeks extensions for 2 or more building and development provisions in a lease—the longest of the extensions sought.

Planning and Development Regulation 2008

Division 5.7.2 Applications for extension of time to commence or complete required works

202 Application for extension of time—earlier extension—Act, s 298C (2) (a) (ii)

An earlier extension to which section 205, section 206 or section 207 applies is prescribed.

203 Application for extension of time—general rule—Act, s 298C (3), def A

- (1) This section applies to an application for an extension of time in relation to a lease (other than an application to which section 204, section 205, section 206 or section 207 applies).
- (2) The prescribed figure for *A* is the figure mentioned in table 203, column 3 in relation to the year of the period of extension mentioned in column 2.

Table 203 General rule

column 1 item	column 2 year	column 3 figure
1	1st year	1
2	2nd year	2
3	3rd year	3
4	4th year	4
5	5th or later year	5

- (3) In this section:

period of extension—see the Act, section 298C (3).

Note The Act, s 298C (3) defines *A* to be 5 if a lower figure is not prescribed.

204 Application for extension of time—hardship reason—Act, s 298C (3), def A

- (1) This section applies to an application for an extension of time in relation to a single dwelling house lease or a lease granted to a community organisation (other than an application to which section 205 or section 206 applies) if the planning and land authority is satisfied that—
 - (a) a hardship reason applies in relation to the lessee; and
 - (b) the extension sought is necessary because of the hardship reason.

Note *Single dwelling house lease* means a lease granted under the Act, s 240 (1) (e) (see Act, s 234).

- (2) The prescribed figure for *A* is the figure mentioned in table 204, column 3 in relation to the year of the period of extension mentioned in column 2.

column 1 item	column 2 year	column 3 figure
1	1st and 2nd year	0
2	3rd year	2
3	4th year	3
4	5th or later year	4

- (3) However, this section does not apply to an application for an extension of time in relation to a single dwelling house lease if the lessee—
- is the lessee of another lease; and
 - has applied for, or been granted, an extension of time to commence or complete development in relation to that lease.
- (4) In this section:

hardship reason, in relation to a lessee, means—

- if the lessee is an individual—a reason mentioned in the Act, section 298 (2) (b) (i), (ii) or (iii); and
- in any other case—a reason mentioned in the Act, section 298 (2) (b) (ii) or (iii).

period of extension—see the Act, section 298C (3).

205 Application for extension of time—external reason—Act, s 298C (3), def A

- (1) This section applies to an application for an extension of time in relation to a lease if the planning and land authority is satisfied that—
- an external reason applies in relation to the lessee; and
 - the extension sought is necessary because of the external reason.
- (2) The prescribed figure for *A* is 0.
- (3) In this section:

external reason—each of the following is an *external reason* in relation to a lessee:

- the lessee is unable to commence or complete the works required under the building and development provision for the lease because—
 - road or traffic infrastructure to be provided by the Territory is not complete; or

- (ii) a sewerage, electricity, water or gas service to be provided by the Territory is not installed or connected;
- (b) the lessee is unable to commence or complete the works required under the building and development provision for the lease because of a delay in obtaining a statutory approval required for the works, other than a delay caused in whole or part by—
 - (i) the lessee; or
 - (ii) a decision to refuse, or impose a condition on, a statutory approval required for the works.

206 Application for extension of time—lease transferred or assigned in special circumstances—Act, s 298C (3), def A

- (1) This section applies to an application for an extension of time in relation to a lease if—
 - (a) the lease was transferred or assigned in circumstances mentioned in subsection (3); and
 - (b) the extension sought is for a period that—
 - (i) starts on or after the day of the transfer or assignment; and
 - (ii) is not longer than the period allowed under the building and development provision when the lease was granted.
- (2) The prescribed figure for *A* is 0.
- (3) For subsection (1) (a), the circumstances are that—
 - (a) the lessee has died; or
 - (b) the transfer or assignment is made under any of the following orders:
 - (i) an order of the Family Court;
 - (ii) an order of another court having jurisdiction under the *Family Law Act 1975* (Cwlth);
 - (iii) an order under the *Domestic Relationships Act 1994*, division 3.2 adjusting the property interests of the parties in a domestic relationship; or
 - (c) the transfer or assignment happened by operation of, or under, bankruptcy or insolvency; or
 - (d) the transfer or assignment happened in the exercise by an authorised deposit taking institution or finance company of a power of sale under the *Land Titles Act 1925*, section 94 that arose from a default in payment by the lessee.

207 Application for extension of time—certain leases granted before 31 March 2008—Act, s 298C (3), def A

- (1) This section applies to an application for an extension of time in relation to a lease (other than a single dwelling lease or a lease granted to a community organisation for community use) if—
 - (a) the lease was granted before 31 March 2008; and
 - (b) the planning and land authority is satisfied that the time for commencing or completing the works required under the building and development provision was not sufficient when the lease was granted; and
 - (c) the period of extension sought is—
 - (i) for an application to commence the required works—not more than 1 year after the end of the period allowed under the building and development provision when the lease was granted; or
 - (ii) for an application to complete the required works—not more than 2 years after the end of the period allowed under the building and development provision when the lease was granted.
- (2) The prescribed figure for A is 0.



SUBJECT: Extension of Time Policy – implementation and key dates required for implementation prior to Caretaker.

To: Treasurer

Critical Date for consideration: Urgent

Purpose: To provide further information on the timelines required to implement changes to the Extension of Time policy prior to Caretaker.

Key Points:

- You have announced your intent to make changes to the Extension of Time policy in the Territory. You have previously agreed for Parliamentary Council’s Office (PCO) to commence drafting of the legislative changes required and for Cabinet to consider these changes prior to their implementation.
- This brief sets out the timeframes required to have these changes in place prior to the start of the Caretaker period.
- The Environment and Sustainable Development Directorate (ESDD) has commenced discussions with the Parliamentary Council’s Office (PCO) to commence drafting of the legislative changes required to the *Planning and Development Regulation 2008*.
 - You should note that Cabinet agreement is not required for drafting changes to the Regulations.
- The last possible date for Cabinet consideration of this issue prior to Caretaker is 11 September 2012. Meeting this timeframe will be tight, however, achievable subject to the Chief Minister’s agreement to shortened timeframes for this submission.
- The letter at Attachment A seeks the Chief Minister’s agreement to bypass Exposure Draft stage and undertake shortened circulation during the First Lodged stage of the process.
- It is proposed that the submission be lodged with the Cabinet Office on 6 September 2012 for Cabinet consideration on 11 September 2012. The Regulations will come into effect the day after their notification on the ACT Legislation Register.
- For your information and reference, a proposed timeframe for this process has been prepared at Attachment B.

Recommendations:

- It is recommended that you:
 - sign the attached letter to the Chief Minister at Attachment A; and
 - note the proposed timeframe for this process at Attachment B.



Khalid Ahmed
Executive Director
Policy Coordination and Development

27 August 2012



Noted / Approved / Not approved / Please discuss

Andrew Barr MLA 29/8 /2012



Andrew Barr MLA

DEPUTY CHIEF MINISTER

TREASURER

MINISTER FOR ECONOMIC DEVELOPMENT
MINISTER FOR TOURISM, SPORT AND RECREATION

MEMBER FOR MOLONGLO

COPY

Ms Katy Gallagher MLA
Chief Minister
ACT Legislative Assembly
GPO Box 1020
CANBERRA ACT 2601

Dear Chief Minister ^{Katy}

I am writing in relation to the proposed legislative changes to the *Planning and Development Regulation 2008* (the Regulation).


These changes are required to give effect to the commitment to waive commence and completion fees for commercial, mixed-use and multi-unit residential developments.

I am seeking your agreement for Cabinet to consider these changes prior to their implementation. Subject to your agreement, I propose to bring forward a submission on Monday 11 September 2012.

Due to the short time frame before the commencement of the Caretaker period, I am seeking your agreement to bypass the Exposure Draft stage of the process and for limited circulation under the First Lodged stage. This arrangement would provide sufficient time for PCO to finalise drafting of the amendments and for Cabinet to consider the amendments prior to their implementation.

The development of a Submission and drafting of amendments will be coordinated between Treasury Directorate and the Environment and Sustainable Development Directorate.

Yours sincerely


Andrew Barr MLA
Treasurer

29 AUG 2012

ACT LEGISLATIVE ASSEMBLY

Attachment B: Timetable

Monday 27 August 2012	Treasure sign brief seeking the Chief Minister's agreement to bypass Exposure Draft stage and limited circulation for First Lodged stage.
Monday 3 September 2012	<ul style="list-style-type: none">• Legislative amendments and explanatory statement to be finalised.• Cabinet Submission to be provided to the Treasurer for signature.
Tuesday 4 September 2012	Agency circulation
Wednesday 5 September 2012	Comments due from agencies
Thursday 6 September 2012	Final lodgement with Cabinet Office
Tuesday 11 September 2012	Cabinet consideration