

2008

**LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

**Planning and Development Amendment Regulation 2008 (No 4)
SL2008-41**

EXPLANATORY STATEMENT

Circulated by authority of the
Minister for Planning
Mr Andrew Barr MLA

Planning and Development Amendment Regulation 2008 (No 4)

Overview

Application for an extension of time to commence and complete (refer to clauses 5, 16 and 17) - for extensions to commence and complete development provisions in a lease. The Act is modified and the regulation amended to provide for a reduced fee regime; removal of a maximum extension period; makes provision for hardship; and allows for delays in obtaining statutory approvals to be taken into account.

Designated Land (refer to clauses 14 and 15) - the interrelationship of territory land and designation under Commonwealth law is a complex matter. The Territory has exempted effectively all development in a designated area from requiring any territory approvals, requiring only lease variations to be subject to approval processes.

The regulation modifies the Act to apply merit track provisions to the processing of an application of a development proposal for a lease variation in a designated area. The regulation also excludes any reference to the territory plan in determining such applications, as Commonwealth law provides that the territory plan does not apply to designated areas.

Fences (refer to clauses 10, 11 and 12) - the regulation provides an exemption from requiring a development application approval for fences up to 2.3 metres in height. Building Act provisions and the *Common Boundaries Act 1981* provisions still apply. The 2.3 metres is intended to allow fences with standard length panels or palings of 2.1 metres to be constructed while allowing 200mm variance to accommodate for any fall in the land. There is also a 200mm allowance for capping (knobs etc) to fence posts.

Further Rural Leases (refer to clause 15) - the regulation modifies the Act to allow a further grant of a rural lease to be made where an undertaking to pay rent and/or payment instalments is made. This restores practice prior to the commencement of the new Act.

Concessional Leases (refer to clauses 8 and 9) - the regulation removes any doubt that leases granted under the *City Area Leases Act 1936* (CALA) are not concessional leases as defined in the Act. However, such leases that were subject to either a dealing restriction under the terms of lease or by the operation of CALA, are not covered by this provision, and therefore their concessional lease status will have to be determined in accordance with the Act.

Transitional arrangements for leases applied for before 31 March 2008 (refer to clause 18) - the regulation simplifies the transitional arrangements by modifying the Act. The regulation does this by modifying the Act so that the repealed Act applies to any application for a lease made before 31 March 2008 irrespective of when the decision on the application is made. This is the default arrangement, however the applicant can elect to have the new Act apply to the application. This arrangement applies for the life of the modification (31 March 2010). The former six month cut off period for transitional arrangements is also removed.

Minor technical corrections (refer to clauses 14, 15, 16, 17, 18) - the regulation also introduces a number of minor technical changes to clarify certain provisions or ensure

consistency. For example, the modification of s114 of the Act to ensure consistency in the use of development tables and the application of s123 of the Act on impact matters.

Act modifications - made under section 429 expire on 31 March 2010 as a result of the operation of section 431 of the Act.

Clause Notes

Clauses 1 – Name of Regulation –states the name of the regulation, which is the *Planning and Development Regulation 2008 (No 4)*.

Clause 2 – Commencement –states that the regulation commences the day after its notification.

Clause 3 – Legislation amended – states that the regulation amends the *Planning and Development Regulation 2008*.

Clause 4 – New division 5.7.1 heading – creates a new division under *Part 5.7 Transfer or assignment of leases subject to building and development provision*. The new division provides for the transfer or assignment of a lease subject to building and development provisions. The provisions within the new division are unchanged.

Previously provisions now in new division 5.7.1, that is section 200 & 201, were located within Part 5.7. Other provisions that were in Part 5.7 are now located within new division 5.7.2 *Applications for extension of time commence and complete required works*. Clause 5 relates to this.

Clause 5 – Sections 202 and 203 – inserts a new division 5.7.2 *Applications for extension of time to commence or complete required works*, and amends existing section 202 and 203 and inserts new sections 204 - 207.

New division 5.7.2 – creates a division that deals specifically with applications for an extension of time to commence and complete required works.

New section 202 – defines for the division *period of extension* as either the period sought in the application for extension, or if there has been 1 or more extensions of time sought (other than an extension of time under section 205, 206 or 207), the combined total of all extensions of time approved.

The provision also provides that an application for an extension of time that seeks an extension for 2 or more building and development provisions in a lease, that the period of extension, for the application, is the longest of the periods sought. For instance a typical single residential house lease has 2 building and development provisions, 1 for commencement and 1 for completion. Therefore an applicant (the lessee) may apply for an extension of time to commence the required works, say for 12 months, and also an extension of time to complete the required works, say 24 months. The provision provides that the longest period, that is 24 months, would be used in determining the period of extension sought.

The period of extension is applied when working out, under section 298A of the Act and new sections 203 and 204 of the regulation, the required fee for an application for an extension of time to commence or complete building and development.

New section 203 – specifies the general rules for an application for an extension of time under s298A (5), def A, par (b) of the *Planning and Development Act 2007*. Section 298A provides the method for working out the fee for an application for an extension of time to commence or complete building and development provisions. Section 298A (5) def A, par (b) provides that a lower figure (for use in working out the amount of the required fee) may be prescribed by regulation for A, otherwise the figure for A is 5 (s298A (5) def A, pa (a)).

The provision applies to all lease types other than those leases to which section 204, section 205, section 206 or section 207 would apply.

New section 204 – provides for an application for an extension of time in relation to a single dwelling house lease or a lease granted to a community organisation for community use where the planning and land authority is satisfied that hardship reasons apply and that the extension is necessary because of the hardship reason. The provision does not apply if section 205 or 206 applies.

New section 204 (4) defines *hardship* by reference to sections 298 (2) (b) (i), (ii) or (iii) of the Act. In summary hardship reasons, for an individual include personal reasons, financial reasons or an unforeseen major event outside of the lessee's control. In any other case (e.g. corporation or association) hardship reasons include financial reasons or an unforeseen major event outside of the lessee's control.

However, this section does not apply to an application in relation to a single dwelling house if the lessee is the lessee of another lease and has applied for or been granted an extension of time to commence or complete required works for that lease.

Section 298A of the Act provides the method for working out the fee for an application for an extension of time to commence or complete building and development provisions. Section 298A (5) def A, par (b) provides that a lower figure (for use in working out the amount of the required fee) may be prescribed by regulation for A, otherwise the figure for A is 5 (s298A (5) def A, pa (a)). The provision prescribes figures for A where the planning and land authority is satisfied that hardship reasons apply and that the extension is necessary because of the hardship reason. The maximum figure for A, under new section 204, is 4 (refer to Table 203 column 1 item 4 - column 3 figure 4).

New section 205 – provides for an application for an extension of time in relation to a lease where the planning and land authority is satisfied that an external reason applies and that the extension is necessary because of the external reason.

The provision defines *external reason* as when a lessee is unable to commence or complete required works because road or traffic infrastructure, is not complete; or because sewerage, electricity, water or gas service, to be provided by the Territory, is not installed or connected; or because there is a delay in obtaining statutory approvals, other than that wholly or partly caused by the lessee or a decision to refuse, or impose a condition on a required statutory approval.

Section 298A of the Act provides the method for working out the fee for an application for an extension of time to commence or complete building and development provisions. Section 298A (5) def A, par (b) provides that a lower figure (for use in working out the amount of the required fee) may be prescribed by regulation for A, otherwise the figure for A is 5 (s298A (5) def A, pa (a)). New section 205 prescribes figures for A where the planning and land authority is satisfied those external reasons apply and that the extension is necessary because of the external reason. For these applications the figure for A is always zero (refer subsection 205 (2)).

New section 206 – provides for an application for an extension of time where the lease has been transferred or assigned in special circumstances and before the end of the period allowed under the building and development provisions. The extension, if granted, is considered to have commenced on the day or after the day of the transfer or assignment. The extension cannot be for a period longer than that allowed under the original lease.

Special circumstances, specified in subsection 206 (3) include:

- where the lessee has died; or
- the transfer or assignment is made under a Family Court Order; or
- an order of another court having jurisdiction under the *Family Law Act 1975 (Cwlth)*, an order under the *Domestic Relationships Act 1994*, div 3.2; or
- as a result of bankruptcy or insolvency, or where an authorised deposit taking institution or a finance company has exercised a power under the *Land Titles Act 1925*, section 94 as a result of default in payment of the mortgage. Section 94 provides that a mortgagee or encumbrancee may sell all the interest of the mortgagor or encumbrancer if required payments are in default for a period specified in the notice. Breach of mortgage covenants other than default in payment do not constitute a special circumstance.

Section 298A of the Act provides the method for working out the fee for an application for an extension of time to commence or complete building and development provisions. Section 298A (5) def A, par (b) provides that a lower figure (for use in working out the amount of the required fee) may be prescribed by regulation for A, otherwise the figure for A is 5 (s298A (5) def A, pa (a)). For applications under new section 206 the figure for A is always zero (refer subsection 206 (2)).

New section 207 – applies to an application for an extension of time in relation to a lease granted before 31 March 2008 is the planning and land authority is satisfied that the time provided to commence or complete required works was not sufficient at the time of grant.

The provision specifies that the application for an extension of time to commence must not be for more than 1 year after the end of the period allowed under the original lease. This means, for example, that if the period allowed to commence expired on 2 April 2008 that the extension of time to commence can only be for a period up until 2 April 2009.

An application for an extension of time to complete must not be for more than 2 years after the end of the period allowed for in the original lease. This means, for example, that if the period allowed to complete expires on 2 April 2009 that the extension of time to complete can only be for a period up until 2 April 2011.

Note that under section 456A of the Act, applications for an extension of time covering periods prior to commencement of the Act on 31 March 2008 must be dealt with under the provisions of the repealed Act.

Clause 6 – New section 210 (1) (c) – inserts a new subsection to include an additional lease type for the section. The additional lease type is a lease terminated for a breach of a building and development provision. New section 210 (1) (c) together with new section 211 (1) (c), inserted by clause 7, permit compensation to be paid for termination of leases of this type and other leases already identified. The amount of compensation is specified in existing subsection 210 (2) and 210 (3).

Clause 7 – New section 211 (1) (c) - inserts a new subsection to include an additional lease type for the section. The additional lease type is a lease that has been terminated, for a breach of a building and development provision. Otherwise the provision is unchanged. New section 211 (1) (c) permits the planning and land authority to pay compensation (of an amount set out in existing subsections 210 (2) and 210 (3)).

Clause 8 – New section 240 (e) – existing section 240 (under section 235 (1) of the Act) lists lease types that are deemed to **not** be *concessional leases* for the purposes of the Act. New section 240 (e) adds to this list. Under section 240 (e) leases granted before 1 January 1971 under the *City Area Leases Act 1936* are deemed to **not** be concessional unless:

- when the lease was granted it was subject to a restriction in dealing under the terms of the lease; or
- operation of *City Area Leases Act 1936*; or immediately prior to the repeal of the *City Area Leases Act 1936*, the lease was subject to a restriction in dealing in the lease.

Clause 9 – Section 240, examples for par (c) – relocates examples currently located under subsection (240 (d) to subsection 240 (c) as the examples are only applicable to that subsection.

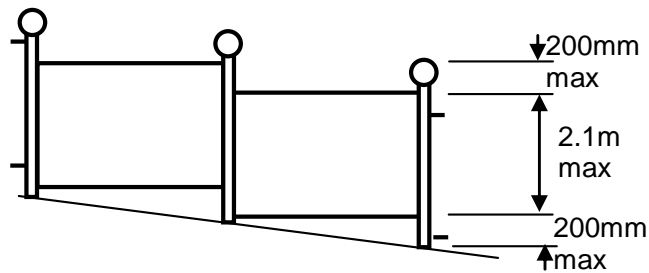
Clause 10 – Schedule 1, section 1.51 (1) – substitutes existing schedule 1, part 1.3, section 1.51 (1). The provision defines *excluded criteria* for the section as those that, if applied, would unintentionally affect the function and application other exemptions (Clause 10 and clause 11 refer to this). For example, section 1.50 (1) (a) (ii) provides that a structure, to which the section applies, must not be higher than 1.85m above natural ground level. Therefore, if s1.50 was applied an exemption provided for under new section 1.52 (2) (a) (ii), for instance, would be of no effect as it provides for a height of 2.3m. The provision rectifies this anomaly by excluding application of s1.50 to s1.51.

The provision defines a *fence* and a *wall* for the section. Previously the provision only provided a definition of a fence however proceeding subsections use the term wall.

Clause 11 – Schedule 1, section 1.51 (2) (a) (ii) – substitutes existing schedule 1, section 1.51 (2) (a) (ii) with a new section to specify that the height of a fence or wall must be no higher than 2.3m above natural ground level, and that the support structure of the fence or wall be no higher than 2.5m above natural ground level. Natural ground level is defined, in the volume 2 of the territory plan, as the ground level at the date of the grant of the lease of the block.

The increase in height, from 1.85m to 2.3m, is to cater for standard modular fence sizes up to 2.1m nominal height, including the following for example: Metal fence panels generally range in size up to 2.1m high, as 2.1m is a standard length of many building products including corrugated metal sheeting for fencing. However, to protect the sharp edges of metal sheeting used as fencing, a top and bottom capping strip is usually installed over the top end of the sheet and under the bottom end of the sheet.

To avoid compromising metal fencing product warranties, some products must be kept out of contact with the ground. The 2.3m increased fence height therefore allows for a 2.1m high panel, plus an extra 200mm for the thickness of the top and bottom capping strips, and a gap between the ground and the bottom of the panel. The 200mm extra will also allow for panels to be installed horizontally over sloping ground, such as where one of the panel is close to the ground but as the ground slopes away beneath parts the panel, those parts become higher above the ground. The 200mm extra will similarly cater for undulating or rough ground. The following diagram is an example of this:



The provision also allows the support structure for relevant fences or walls to no higher than 2.5m above natural ground level. That is intended to allow posts or columns to project above wall or fence panels for decorative effect. It will also allow column or post caps, including decorative spherical knob-type column or post caps to project above the fence or wall panels.

The amendment will also cater for a popular standard decorative fencing product that provides for a 1.8m high solid metal fence sheet with an integral 300mm high open lattice panel above the sheet, including capping strips etc. The following diagram is an example of the product mentioned:



Clause 12 – Schedule 1, section 1.51 (2) (d), except the notes - specifies that an exemption, provided for by the section, must comply with general exemption criteria,

specified in part 1.2, and only s1.41 in part 1.3.2. This is because all other exemptions, other than s1.41, in part 1.3.2 are not applicable to the exemption provided for at s1.51. For example, section 1.50 (1) (a) (ii) provides that a structure, to which the section applies, must not be higher than 1.85m above natural ground level. Therefore, if s1.50 was applied an exemption provided for under new section 1.52 (2) (a) (ii), for instance, would be of no effect as it provides for a height of 2.3m. The provision rectifies this anomaly by excluding application of s1.50 to s1.51.

Clause 13 – Schedule 20, new modification 20.1 heading – substitutes a new heading to include new section 429G.

Clause 14 - New sections 429AA and 429G – inserts before s429A a new section 429AA and new section 429AB.

New section 429AA – Modification-s 114 (Application of assessment tracks to development proposals) - provides that subsection 114 (2) of the Act should be read as if it was omitted and substituted with a new subsection 114 (2). New subsection 114 (2) provides that a development application for a development proposal must be assessed in the assessment track determined by the Act development table. The provision also inserts a new subsection (3) and states that the section is subject to section 123 of the Act.

This amendment ensures consistency in the Act, through reference to s123. Section 123 requires a development application to be assessed be in the impact track in the specified circumstances. Therefore the development tables are not the sole determinant of the required assessment track. The amendment makes this clear.

New section 429AB – Modification-div 7.2.5 (Development proposals not in development table and not exempted) – provides that div 7.2.5, of the Act, should be read as if new section 131A were inserted. New section 131A determines how a development application for approval of a lease variation in a designated area must be assessed and dealt with under the Act.

New section 131A – Development proposal for lease variation in designated area - states that the section applies if the development application is for a development proposal that is a lease variation for a lease in a designated area.

Designated area is defined in the *Planning and Development Act 2007*, dictionary: the *Australian Capital Territory (Planning and Land Management) Act 1988* (Cwlth). Section 10 of PALM Act provides for the identification of *designated area* in the National Capital Plan. Subsection 10 (1) states that “...the [National Capital} Plan may specify areas of land that have the special characteristics of the National Capital to be designated areas”.

New section 131A provides that section 50 of the Act and the territory plan do not apply to a development application that relates to designated land. This recognises the fact that under the PALM Act the territory plan cannot apply to designated areas (refer to section 25 (1) (b) and section 25 (6) of the PALM Act).

The provision further provides that the development application must be dealt with under provisions of the Act (other than any territory-plan related provisions) that apply to the merit track unless under section 123 (b), (c), (d) or (e) of the Act the impact track applies.

The provision also defines *territory plan-related provision* as a provision as provisions of the Act that applies a relevant development table, code, rules or criteria, objects for a zone, statement of strategic directions, or anything else in the territory plan.

This means, for example that sections 50, 112 (2) (b), 119 (1) (a), 119 (2) (b), 120 (a), 121 (2), 123 (a), 128 (1) (b) (i), 128 (2) (b), 129 (a), 129 (b), 132, 139 (2) (e) and 139 (2) (f) (i) are territory plan-related provisions and as such would not be used in the processing of a development application for a lease variation in a designated area. These examples noted here are not exhaustive.

The clause modifies the Act and inserts a new section 131A through a transitional regulation making power under section 429 of the *Planning and Development Act 2007*. Act modifications under section 429 expire on 31 March 2010 as a result of the operation of section 431 of the Act.

Clause 15 – Schedule 20, modification 20.1, new sections 429EA to 429ED – inserts after existing section 429E new section 429 EA – 429ED.

New section 429EA – modifications-s 246 (Payment for leases) –amends existing section 246 (2) (c) & (d) by omitting those sections and replacing them with a new section 246 (2) (d). This effectively omits reference to “further rural leases” and “rural leases granted on payment of an amount under s280”. These references are redundant because of the operation of s254 and s280.

New section 429EB – Modification-s 254 (Grant of further leases) – amends existing section 254 of the Act to provide for rural leases that are rental leases. New subsection 254 (1) (e) provides that the section applies if the amount determined under section 280 of the Act for a rental rural lease has been paid or for a rural lease, that is not a rental lease, that any amounts, determined under section 280, allowed to be paid by instalments has been paid.

New section 429EC – Modification-s 255 (Grant of further lease includes authorised use) - amends section 255 of the Act to insert new subsection 255 (3A) which provides that a further lease may include provisions that are different to those in the original lease. This is a ‘to remove any doubt’ provision. However, the further lease must retain all existing authorisations of use of the land under the lease as required by section 255 (2).

The provision includes an example that suggests that a restriction on the number of dwellings permitted on the lease may be included in the further lease where no restriction had been in the original lease. The example provided is not exhaustive and may extend, but does not limit the provision.

New section 429ED – Modification-s 280 (Determination of amount payable for further leases-rural land) – amends section 280 of the Act so that the section reflects the amendments made under new section 429EA and 429EB; and provides that the amount payable for a further rural lease may be paid in instalments.

The clause modifies the Act through a transitional regulation making power under section 429 of the *Planning and Development Act 2007*. Act modifications under section 429 expire on 31 March 2010 as a result of the operation of section 431 of the Act.

Clause 16 – Schedule 20, modification 20.1, section 429F – inserts a new section 429F (1) which provides that section 298A (of the *Planning and Development Act 2007*) should be read as if subsection 298A (4) were omitted. Section 298A (4) if not omitted would conflict with the intended operation of new section 203 and new section 204 of the regulation.

The clause modifies, through a transitional regulation making power under section 429 of the *Planning and Development Act 2007*, section 298A of the *Planning and Development Act 2007*. Act modifications under section 429 expire on 31 March 2010 as a result of the operation of section 431 of the Act.

Clause 17 - Schedule 20, modification 20.1, new section 429G – inserts a new subsection 429G which provides that section 298A (of the *Planning and Development Act 2007*) should be read as if subsection 298B (5) and (6) were omitted. This means that there is no upper limit on the number of extensions that can be granted provided the required fee is paid. This change reflects the amendment of the regulation at clause 5. The provision is otherwise unchanged.

The clause modifies, through a transitional regulation making power under section 429 of the *Planning and Development Act 2007*, section 298B of the *Planning and Development Act 2007*. Act modifications under section 429 expire on 31 March 2010 as a result of the operation of section 431 of the Act.

Clause 18 - Schedule 20, new modification 20.6A - substitutes existing section 458 and deletes existing section 459. New section 458 provides for where an applicant (potential lessee) has applied for a grant of a lease under the repealed Act, section 161 (granting of leases), or section 163 (Leases to community organisations) or section 164 (Special leases), and the lease is not granted before commencement day i.e. 31 March 2008. In this case the lease may be granted either under the repealed Act or if agreed to by the applicant, the Act.

Importantly this modification applies irrespective of when the application was ‘decided’. The existing sections 458 and 459 determines the relevant transitional arrangements by reference to the date of the decision on the application. This approach is simplified so the transitional arrangements are determined solely by the date of application.

This means that a lease applied for but not granted before 31 March 2008 may be granted under the *Land (Planning and Environment) Act 1991* (repealed) or the *Planning and Development Act 2007*. The potential lessee (the person) must agree in writing to a lease being granted under this Act if that person applied for the grant before 31 March 2008.

Subsection 458 (3) provides that the lease may be registered under the *Land Titles Act 1925*, as if the repealed Act had not been repealed, and is taken to have been granted under this Act.

New section 458 also removes the requirement for deciding the application, for the grant of the lease, within 6 months of commencement day.

The clause deletes section 459 as the amendments to section 458 no longer makes the distinction of whether or not an application, for the grant of a lease, has been decided within 6 months or not of commencement day. Section 459 had provided for the grant of a lease applied for before commencement day but not decided within 6 months of commencement day.

New section 458 is taken to have commenced on 31 March 2008 and apply until the period provided for by section 431 of the Act i.e. 31 March 2010..

The clause modifies, through a transitional regulation making power under section 429 of the *Planning and Development Act 2007*, section 458 and deletes section 459 of the *Planning and Development Act 2007*. Act modifications under section 429 expire on 31 March 2010 as a result of the operation of section 431 of the Act.

Clause 19 – Dictionary, new definitions – inserts a new definitions for period of extension (refer to clause 5, section 202).