

Australian Capital Territory

Planning and Development (Remission of Lease Variation Charges for Community Purpose – Childcare Services) Determination 2011 (No 1)

Disallowable instrument DI2011-319

made under the

Planning and Development Act 2007, Section 278B (When commissioner must remit lease variation charge – community purpose)

Explanatory Statement

Terms

In this explanatory statement:

“Act” means the *Planning and Development Act 2007*.

“Regulation” means the *Planning and Development Regulation 2008*.

“determination” means the Planning and Development (Remission of Lease Variation Charges for Community Purpose – Childcare Services) Determination 2011 (No 1) (disallowable determination) that is the subject of this explanatory statement.

“LVC” means lease variation charge.

“nominal rent lease” means as defined in the dictionary to the Act. The dictionary defines this lease as “a lease for nominal rent” *i.e.* a lease for which no significant rent is payable (as opposed to a rental lease).

“s276E chargeable variation” is defined in s276A(1) of the Act. Essentially these are lease variations whose LVC is fixed by the LVC Determination (LVC code) made by the Treasurer under s276E of the Act. These lease variations are identified in s276A(1) of the Act and s170A of the Regulation.

“s277 chargeable variation” is defined in s276A(1) of the Act. These are lease variations other than s276E chargeable variations or s276E chargeable variations whose LVC has not been set in the LVC Determination (the LVC code) made under s276E. The LVC for these variations is determined under s277 of the Act.

Background

A Lease Variation Charge (LVC) is charged when the lessee seeks to vary their lease and this is approved.

The Lease Variation Charge provisions were inserted into the Act by the *Planning and Development (Lease Variation Charges) Amendment Act 2011*. A detailed Explanatory Statement on these provisions is available on the ACT Legislation Register at <http://www.legislation.act.gov>.

The variation of a lease is “development” for the purposes of the Planning and Development Act (s7 (1)(f)). Therefore, a lease variation requires a development application (DA) for development approval unless the variation is exempt from requiring development approval under s133 of the Act (and s20 of the Regulation).

There are three main categories of lease variations for the purposes of the LVC. These include variations of:

1. nominal rent leases for which no LVC is payable. Such leases are identified in the s276 definition of “chargeable variation”. For example, variations of two adjoining leases whose only effect is to alter the boundary between them;
2. nominal rent leases where the variation is a s276E chargeable variation; and
3. nominal rent leases where the variation is a s277 chargeable variation.

A variation to a rental lease i.e. leases other than nominal rent lease, does not attract a lease variation charge. Rather an adjustment to rental payments is determined in accordance with Division 9.6.2 of the Act.

Sections 278A to 278F of the Act permit the required LVC to be remitted (reduced) in whole or in part by a disallowable determination. Only the amount remaining after the remission needs to be paid before the lease variation can take effect (s276B (1) of the Act). For example, if the LVC was \$100 and the amount to be remitted was 80% then only \$20 needs to be paid. When the amount is paid the lease variation, approved through the development application process, can be executed and registered on the Register of Land Titles.

Overview

The disallowable determination is made under s278B of the Act. Section 278B provides that a determination can do two things: firstly it can determine a ‘community purpose’ in this instance the community purpose is ‘childcare services’. Secondly, it can determine an amount to be ‘remitted’ for a lease variation charge for the community purpose. The amount can be between zero and 100 percent.

The determination is made by two Ministers: the Minister for Environment and Sustainable Development determines the ‘community purpose’ (s278B (2)) and the Treasurer (s278B (3)) who determines the amount to be remitted.

The overall effect of the determination is to remit (or reduce) the LVC for certain lease variations where the purpose of the variation is for the provision of childcare services. The determination also provides that for other types of chargeable variations for childcare services no remission is given (section 4).

Section 3 applies to chargeable of a nominal rent lease if the only effect of the variation, other than any other approved chargeable variation approved as part of the DA, must be to do one or other of the following:

- authorise the use of the land for a childcare centre; or
- authorise the use of the land for a childcare centre and place a limit on the maximum gross floor area of a childcare centre; or
- increase the maximum gross floor area of a childcare centre.

This means that the DA can only approve one or more of the above. If the DA approves other chargeable variations then no remission is available (even if one of the chargeable variations is one of those mentioned above). In this way the instrument ensures that the purpose of the variation delivers Government policy objectives.

If the lease variation is seeking to do one of these things then the LVC is fully remitted i.e. 100% of the LVC is remitted. This remission implements Government policy set out in the 2011-12 ACT Budget¹.

The Commissioner for Revenue must remit the amount of the LVC that is required to be remitted by this determination (s278B (5)).

Regulatory impact statement

The *Legislation Act 2001* section 36 states:

36. (1) A regulatory impact statement need not be prepared for a proposed subordinate law or disallowable instrument (the proposed law) if the proposed law only provides for, or to the extent it only provides for:

- (b) a matter that does not operate to the disadvantage of anyone (other than the Territory or a territory authority or instrumentality) by—
 - (i) adversely affecting the person's rights; or
 - (ii) imposing liabilities on the person;
- ...
- (k) an amendment of a fee, charge or tax consistent with announced Government policy.

In this case, a regulatory impact statement is not required. This is because the determination does not adversely affect any rights and does not impose liabilities. The instrument instead operates to a lessee's advantage by reducing the LVC in specified circumstances. In addition, the disallowable instrument has the end effect of amending a charge consistent with announced government policy.

¹ Budget Paper 3, Chapter 3 Revenue and Forward Estimates, p47

Sections of the determination in more detail

Section 1 - Name of Instrument

Section 1 names the determination as the *Planning and Development (Remission of Lease Variation Charges for Community Purpose – Childcare Services) Determination 2011 (No 1)*.

The section also makes reference to terms used in the instrument and provides that the terms have the same meaning as they have in the *Planning and Development Act 2007*.

Section 2 - Community purpose – Act, s 278B (2)

Section 2 identifies the provision of childcare services as a “community purpose” for the purposes of the Act.

Section 3 - Remission of lease variation charges – certain childcare services variations – Act, s 278B (3)

Section 3 (1) applies to a chargeable variation of a nominal rent lease if the only effect of the variation, other than any other chargeable variation approved, is to:

- (a) authorise the use of the land under the lease for a childcare centre; or
- (b) authorise the use of the land under the lease for a childcare centre and limit the maximum number of children provided care in a childcare centre permitted under the lease; or
- (c) increase the maximum number of children provided care in a childcare centre permitted under the lease.

Section 3 (2) provides that the Treasurer has determined that the amount to be remitted is 100% of the charge.

This means that if the lease variation is for one or more of the above (and does not include any other type of chargeable variation) than the remission amount is 100%.

Section 3 (3) defines the term “childcare centre”.

Section 4 - Remission of lease variation charges – certain childcare services variations – Act, s 278B (3)

Section 4 (1) provides that the section applies to all other types of lease variations for a childcare service that are not of a type mentioned at section 3.

Section 4 (2) provides that the Treasurer has determined the remission amounts is 0% of the charge. The provision makes it clear that there are no remissions of LVC for childcare services other than that provided by section 3.

Section 5 Expiry

Section 5 provides that the instrument (that is this determination) ends on 30 June 2014.