

LORD HOWE ISLAND BOARD POLICY

TITLE	Suspension of Condition of Residency on Perpetual Leases Policy		
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REVIEW	5 years	FILE REFERENCE	ED17/6499
ASSOCIATED LEGISLATION	<i>Lord Howe Island Act 1953 (NSW)</i> <i>Lord Howe Island Regulation 2004 (NSW)</i>		
ASSOCIATED POLICIES	Transfer of Perpetual Leases Islander Status Review of Board Decisions		

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1 Title and commencement

This policy is titled the *Lord Howe Island Board Suspension of Condition of Residency on Perpetual Leases Policy (the Policy)*. The policy was adopted by the Lord Howe Island Board (**the Board**) in October 2017.

2 Purpose of the policy

The purpose of the Policy is to prescribe the process for making an application to the Board to suspend the condition of residency that attaches to perpetual leases on Lord Howe Island (**the Island**) in accordance with the requirements of the *Lord Howe Island Act 1953 (the Act)*. The policy also establishes a framework to guide the Board's consideration of the requirements in section 21(7) of the Act relating to applications to suspend the condition of residency attaching to a perpetual lease.

3 Objectives and coverage of the policy

The Act provides for the grant of Perpetual leases for residential purposes. Amongst other things the Act as passed in 1953 gave Islanders more secure title over their land to encourage economic development. One of the objectives of the Act was to support a permanent and viable residential community. To achieve this, the Act restricts eligibility to be granted and hold a Perpetual lease, regulates the transfer of leases, and imposes conditions on lease holders such as bona fide residence on their lease.

The objectives of this Policy are to:

- a) Set out processes in relation to application for the suspension of the condition of residency that attaches to all perpetual leases that satisfy the requirements and objectives of the Act and the *Lord Howe Island Regulation 2004 (the Regulation)*.
- b) Establish a framework to guide the Board's consideration of applications for the suspension of the condition of residency that is a condition of perpetual leases.
- c) Guide the conduct of applicants, interested islanders and the Board in relation to applications for the suspension of the condition of residency attaching to perpetual leases.

While the Board must at all times comply with the Act and Regulations, it should not apply the Policy inflexibly. In circumstances where the Board considers it appropriate to depart from the Policy, the Board should document the circumstances and its reasons for the departure.

4 Background to the policy

In accordance with section 16 of the Act, all land on Lord Howe Island is vested in the Crown. Pursuant to section 21 of the Act, the Minister may lease vacant Crown lands (of 2 hectares or less) in perpetuity for the purpose of residence to an Islander (as defined in section 3 of the Act). Section 21(2) of the Act expressly provides that leases may be held by two or more persons as joint tenants or tenants in common.

Section 21(7) of the Act provides that a condition of residence attaches to all perpetual leases that is to be performed by the holder or sublessee of the lease. The residence is to commence within six months after the granting of a lease or such further period as the Minister on the recommendation of the Board may approve.

Section 2 of the Act defines **reside** and **residence** to mean "*a residing by the person referred to in the context continuously and in good faith on the land indicated by the context as his or her usual home, without other habitual residence.*"

Applications for the suspension of the condition of residency that attaches to perpetual leases on Lord Howe Island can be made under section 21 of the Act. Section 21 of the Act enables leaseholders to make applications in two different circumstances as follows:

1. Section 21(7) is applicable to persons who are **holders of a single lease** and provides:
Subject to this subsection and subsections (7A) and (7B), a condition of residence on the lease shall attach thereto in perpetuity, and shall be performed by the holder or sublessee thereof for the time being, and residence shall commence within six months after the granting of the application or such further period as the Minister on the recommendation of the Board may approve. Where the holder or the owner (subject to mortgage) or sublessee of the lease has been or shall be prevented by sickness of himself or herself or family or other adverse circumstance from performing such condition, the Board may, upon application as prescribed, and on sufficient reason being shown, suspend such condition for such period and subject to such conditions as the Board may approve.

For the purposes of this Section, absence from the Island due to “sickness” could include being an inpatient in a hospital for an extended period, treatment or care in a residential facility or extended regular treatment on an out-patient basis where such treatment is not available on the Island. The “sickness” does not need to be that of the leaseholder but would also extend to circumstances where the leaseholder must be absent in order to provide support for a family member who is ill.

“Adverse circumstances” would exist where a leaseholder is suffering serious personal and/or financial difficulties that preclude residence on the Island for an extended period. Again, the “adverse circumstances” may apply to a family member of a leaseholder requiring the leaseholder’s support and absence from the Island.

2. Section 21(7A) is applicable to an Islander who **holds or owns no more than two leases**. It provides:
The Minister may, in special circumstances, for such time and on such terms and conditions as the Minister thinks fit, suspend the condition of residence on a lease held or owned (subject to mortgage) by, or subleased to, an Islander who already (whether jointly or not) holds or owns (subject to mortgage) or subleases not more than one other lease.

For the purposes of this Section, “special circumstances” could include inheritance of a second lease under a will or purchase of a second lease with a view to providing residential opportunities for other family members in future,

Section 21(7B) qualifies both subsection (7) and (7A) to clarify that where a lease is held by two or more persons jointly the provisions of these subsections apply to all of the holders of the lease in the same way as it does to a sole holder.

It provides as follows:

Where a lease is held or owned (subject to mortgage) by, or is subleased to, 2 or more persons jointly, subsections (7) and (7A) extend to authorising suspension of the condition of residence in respect of any of the joint holders, owners or sublessees in the same way as it does in respect of a sole holder, owner or sublessee.

It is important to note that pursuant to section 27 of the Act “Every lease under this Act shall be liable to be forfeited if any rent be not paid as required by this Act or upon breach of any condition annexed to the lease by or under this Act, or if it should appear to the satisfaction of the Minister after report by the Board that the land comprised in the lease is not used and occupied bona fide for the purpose for which the lease was granted, or where in pursuance of any other provision of this Act the lease becomes liable to forfeiture.”

The Act also establishes the functions, duties and responsibilities of the Board. The Board is required to act in accordance with the provisions of the Act and is guided by the Board's charter, see section 5.

5 Application to suspend the condition of residency attaching to a Perpetual Lease

Neither the Act nor the Regulation prescribe the process to be followed by leaseholders when making an application to the Board pursuant to section 21(7). However the Act enables the Board to prescribe the form of the application.

The Act does not prescribe the process to be followed by leaseholders when making an application to the Minister pursuant to section 21(7A) to suspend the condition of residency that attaches to their lease.

The following application process has been developed to assist applicants, and to support consistency and transparency in the process.

Applications to suspend the condition of residency must:

- a) Be in writing;
- b) Be accompanied by any relevant supporting information;
- c) Be determined by the Board meeting out of session or as a whole.

Forms 1 and 2 attached have been developed to assist applicants with the application process. Applicants are required to use the relevant form when seeking approval from the Board or the Minister (as appropriate) to suspend the condition of residency that attaches to their lease.

6 Application to suspend the condition of residency by persons who hold a single lease either solely or jointly

In the case of an application made under section 21(7) to suspend the condition of residency attaching to a perpetual lease by persons who are the holders (either jointly or solely) of only one lease the applicant should:

- a) Complete Form 1
- b) Include supporting information that will demonstrate to the satisfaction of the Board that he/she is prevented from performing the condition of residency by either:
 - i) sickness of him or herself or family; or
 - ii) other adverse circumstances

As a consequence of the provisions of section 21(7B) of the Act where a lease is jointly held by more than one person in any circumstance where any one of the holders of the lease is prevented from performing the condition of residency, that person must apply to the Board for suspension of the condition irrespective of whether any of the other holders of the lease will be continuing to reside on the lease.

Similarly an application for suspension of the condition of residency will only extend to the person making the application. It is necessary for each holder who is prevented from performing the condition of residency to make an application to the Board to have the condition suspended. Note however that

holders may make joint applications.

7 Board decision-making processes in general

The Board will consider the application in accordance with the Act. The Board may approve or refuse consent to the suspension of the condition of residency but can only grant consent to the application if the Board is satisfied that the applicant is prevented from performing the condition of residency by sickness of him or herself or family or other adverse circumstances.

The decision by the Board to approve or refuse an application to suspend the condition of residency should not be made arbitrarily or without sound reason. The Board must always make the decision having regard to the objectives and purposes of the Act, and must act bona fide and comply with administrative law principles.

While the Board must at all times comply with the Act and Regulations, it should not apply the Policy inflexibly. In circumstances where the Board considers it appropriate to depart from the Policy, the Board should document the circumstances and its reasons for the departure.

Given that applications to suspend the condition of residency will usually be based on personal and private information, often including health information of the applicant or the applicant's family, these applications will be considered by the Board in confidence. However the decision of the Board will be publically available.

8 Application to suspend the condition of residency by an Islander who holds two leases either solely or jointly

As a condition of residency attaches to perpetual leases on Lord Howe Island, approval must be obtained to hold a second lease as it is not physically possible to habitually reside on more than one lease as the holder's usual home (see definition of reside – section 3 of the Act).

From time to time circumstances may arise where a person who is an Islander, as defined by section 3 the Act, becomes the holder (either solely or jointly) of two leases. Such circumstances arise most commonly as a result of the Islander inheriting a second lease, although there could be a range of other circumstances where this situation may arise.

Section 21(7B) of the Act provides that in special circumstances, the Minister may, on such terms and conditions as the Minister thinks fit, suspend the condition of residence on a lease owned by an Islander who already hold not more than one other lease.

In the case of an application made under section 21(7A) to suspend the condition of residency attaching to a perpetual lease by an Islander who holds (either jointly or solely) two leases the application should:

- a) Complete Form 2
- b) Include supporting information that will demonstrate to the satisfaction of the Minister that there are special circumstances to support the application to suspend the condition of residency on one of the leases.

The Act does not include a definition of “special circumstances”. Approval of applications made under section 21(7B) suspend the condition of residency on a lease is at the discretion of the Minister and will be considered on a case by case basis.

9 Register of Leases

The Board will keep a register containing particulars of leases under the Act. The register is to be kept available at the Island Office of the Board for inspection by members of the public (on payment of a fee, if any, fixed by the Board under section 15 of the Act: see clause 62 of the Regulation.

10 Right to vary or revoke

The Board reserves the right to vary or revoke this Policy at any time following consultation with relevant interested parties.

11 Sublease of Perpetual Leases and transfer of the requirement to reside on the lease

Where the holder of a lease finds themselves in circumstances where they are unable to reside on their lease as their habitual place of residence and that this is not as a result of sickness of him/herself or his/her family, or other adverse circumstances, then the holder may wish to consider subleasing the property.

Where a person subleases their property the requirement to perform the condition of residency passes to the sublessee.

In circumstances where the person is the joint holder of the lease consideration could be given to subleasing the share in the lease to one or more of the other joint holders.

Consequently, where the leaseholder decides to sublease the property it is not necessary to apply to the Board to suspend the condition of residency that attaches to the lease.

For information on the requirements of subleasing see the Board’s Transfer of Perpetual Lease Policy.

12 Form 1 – Application under section 21(7) of the *Lord Howe Island Act 1953* to the Board to suspend the condition of residency attaching to a Perpetual Lease

Suspension of Condition of Residency on Perpetual Leases Policy

Form 1 – Application to the Board to suspend the condition of residency attaching to a Perpetual Lease

Lord Howe Island Act 1953, section 21(7)

RECEIVED

Date: / /

.....
Administration Officer, Lord Howe Island Board

Pursuant to section 21(7) of the *Lord Howe Island Act 1953*,

I/We, *[full name(s)]*

.....

of *[address]*

the holder/s of

perpetual lease *[lease number]* *[lot or portion number]*

apply to the Lord Howe Island Board for approval to suspend the condition of residency that attaches to the perpetual lease held by me/us

for a period of *[insert length of time]*

This application is being made on the basis that I/we are prevented from performing the condition of residency by:

- sickness to me/ or my family; and/or
- other adverse circumstances

Attached to this application is information in support of my/our application. *[Attach to this application appropriate supporting information such as medical certificate(s), and/or statutory declaration(s) that detail the circumstances that evidence that the leaseholder is unable to perform the condition of residency due to either sickness to him or herself or his or her family, or other adverse circumstances.]*

.....
Signature of applicant(s)

.....
Signature of applicant(s)

.....
Date

.....
Date

Address to which notices are to be sent:
Lord Howe Island Board
PO Box 5
Lord Howe Island NSW 2898

- 13 Form 2 - Application to pursuant to section 21(7A) of the *Lord Howe Island Act 1953* to suspend the condition of residency by an Islander who holds two leases either solely or jointly**

Suspension of Condition of Residency on Perpetual Leases Policy

Form 2 – Application suspend the condition of residency by an Islander who holds two leases either solely or jointly

Lord Howe Island Act 1953, section 21(7A)

RECEIVED

Date: / /

.....
Administration Officer, Lord Howe Island Board

Pursuant to section 21(7A) of the *Lord Howe Island Act 1953*,

I, *[full name]*

of *[address]*

am the holder of two perpetual leases:

- 1. Perpetual lease *[lease number]* *[lot or portion number]*
- 2. Perpetual lease *[lease number]* *[lot or portion number]*

I am an islander as defined by section 3 of the *Lord Howe Island Act 1953* *[attach evidence of Islander status]*.

I wish to apply to the Minister for approval to suspend the condition of residency that attaches to:

Perpetual lease *[lease number]* *[lot or portion number]*

for a period of *[insert length of time]*

This application is being made on the basis of the special circumstances detailed in the information attached to this application.

Attached to this application is information in support of my application. *[Attach to this application appropriate supporting information such as statutory declaration(s) that detail the circumstances that evidence the special circumstances that form the basis of the application.]*

.....
Signature of applicant

.....
Date

Address to which notices are to be sent:
Lord Howe Island Board
PO Box 5, Lord Howe Island NSW 2898