



**Guidance Notes for Part VI of the Bermuda
Immigration and Protection Act 1956 and related
policy for the acquisition of land by restricted persons**

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Section 1 Introduction

The Ministry of Labour and Immigration recognizes that this important legislation and policy relating to land-holding in Bermuda may well have profound effects on persons who hold or acquire land in Bermuda or may wish to do so. It is also understood that the law and related policy is complex hence these guidance notes have been compiled purely as an aid to understanding the regulatory framework surrounding land-holding in Bermuda and some of the reasons behind it.

These guidance notes are not the law and are not meant to be used to interpret the law. Where there is any conflict between this document and the legislation, the latter prevails.

The underlying philosophy of Part VI of the Bermuda Immigration and Protection Act 1956 (the “1956 Act”), the Regulations made pursuant to that Act and the related policy is to preserve the majority of land in Bermuda for ownership by individuals who possess Bermudian status by:

- requiring restricted persons (e.g. non-Bermudians) to have licences to hold or acquire land in Bermuda and by preventing them from appropriating it
- requiring trustees of trusts to have licences to hold or acquire land in Bermuda for the benefit of restricted persons, and
- preventing corporations from acquiring or holding land except in accordance with Part VI of the 1956 Act

With the foregoing in mind, these guidance notes:

- examine matters that are thought to be of public interest and attempt to provide insight into the application of Part VI of the 1956 Act and policy positions related to land-holding by restricted persons. Specifically, the guidance notes summarise:
 - important concepts relating to Part VI of the 1956 Act;
 - significant portions of Part VI of the 1956 Act by making reference to key sections of that Act;
 - regulations made under Part VI of the 1956 Act;
 - the Government’s policy for the acquisition of land by restricted persons; and
 - the transitional provisions as set out in the Bermuda Immigration and Protection Amendment Act 2007,
- are to be read in conjunction with Part VI of the 1956 Act, the associated regulations and the policy statements. As the law, regulations and policies change so will these guidance notes

Anyone who has questions arising from these guidance notes or relevant portions of the 1956 Act is invited to email:

Chief Immigration Officer at mbrewer@gov.bm

Please note that questions and responses in writing lead to greater clarity than does oral communication.

The relevant legislation listed below can be found under the heading “Land Acquisition” at the following web address:

<http://www.immigration.gov.bm>

The Bermuda Immigration and Protection Amendment Act 2007

The Government Fees Amendment Regulations 2007

The Bermuda Immigration and Protection (Licence Application) Regulations 2007

The Bermuda Immigration and Protection (Territorial Restrictions) Regulations 2007

The Bermuda Immigration and Protection (Minimum Annual Rental Values) Regulations 2007

The Bermuda Immigration and Protection (Rental and Use) Regulations 2007

The Bermuda Immigration and Protection (Designation of Eligible Condominium Units) Regulations 2007

The Bermuda Immigration and Protection (Land-Holding Charges) Regulations 2007

The Bermuda Immigration and Protection Act 1956 can be found at the following web address:

<http://www.bermudalaws.bm/home.html>

Section 2 Important concepts

Listed below are a number of the more important concepts which are defined in Part VI of the 1956 Act. A clear understanding of these notions is critical to comprehending their inter-related and far-reaching effects in the administration of the 1956 Act.

2.01 Appropriation

The meaning of the term “appropriate” is given in subsection 78(3) of the 1956 Act. A person appropriates land by assuming any of the rights of an owner of the land, whether at law or in equity. The same is true where a trustee holds the land in trust and a restricted person assumes at least some of the rights of an owner of the land. However, appropriation is not relevant where a restricted person or a trustee holds a deferral certificate or a licence in respect of the land.

This notion of “appropriation” is fundamental to describing the relationship which a restricted person has to the land in cases of “fronting” either by individuals or through trusts and is discussed at some length in section 3.03.

2.02 Financial assistance

The term “financial assistance” is defined in section 72 (1) (Definitions) of the 1956 Act as the provision, either directly or indirectly, of value to, or for the benefit of, another. The principal reference to the term “financial assistance” is to be found in section 78 (Appropriating land) of the 1956 Act.

Given below are three examples of transactions that would fall within the definition of financial assistance in the context of Part VI of the 1956 Act.

Example 1: A non-Bermudian gives his Bermudian son a gift of money to buy a house in Bermuda. If the non-Bermudian father first obtains the Minister’s permission in writing before he provides the funds he will not offend the prohibition against appropriation (see subsection 78(5) of the 1956 Act).

Example 2: A non-Bermudian settles a trust for the benefit of his Bermudian nephew with the stipulation that the trustee uses these funds to purchase land in Bermuda. This transaction constitutes financial assistance and results in the trustee appropriating the land. Provided the non-Bermudian uncle receives no benefit from the land trust the appropriation is not unlawful (see subsection 78(2A)(a)).

Example 3: A non-Bermudian and the Bermudian spouse are required to be co-signatories on a bank loan used to purchase land in Bermuda. This circumstance constitutes financial assistance by the non-Bermudian spouse. The result of this activity would be that the Bermudian spouse becomes a trustee of the non-Bermudian spouse’s equitable interest in the land and would then need to obtain a licence to hold or acquire land so as to avoid contravening the prohibition against appropriation (see subsection 78(6)).

2.03 Restricted person

A “restricted person” in the old definition was any of the following:

- An individual who although a Commonwealth citizen does not possess Bermudian status
- An individual who is an alien (i.e. a person who is not a Commonwealth citizen and does not possess Bermudian status)
- A corporation incorporated outside Bermuda

In the new definition, the first two have been combined by removing the distinction between Commonwealth citizen and alien so that the criterion is that an individual does not possess Bermudian status. To that newly defined group and a corporation incorporated outside Bermuda has been added:

with respect to corporations —

- an exempted company within the meaning of the Companies Act 1981

with respect to partnerships —

- an overseas partnership within the meaning of the Overseas Partnership Act 1995
- an exempted partnership within the meaning of the Exempted Partnership Act 1992
- any other partnership if one or more of the partners is a restricted person

in any other case —

The reason for expanding the definition of restricted person is to include all entities that are clearly not “Bermudian”.

2.04 Scheme

A “scheme” is defined in section 72 (1) of the 1956 Act in two parts: firstly as an agreement, arrangement etc whether express or implied and whether or not it is enforceable in the law courts; secondly as a plan, proposal etc. This notion is taken from Australian legislation for which there is a considerable body of case law.

2.05 Trustee

A “trustee” is defined in section 72 (1) of the 1956 Act so as to include any person who owns land in Bermuda against whom a beneficiary, or a person directly or indirectly deriving rights from a beneficiary, may enforce rights at law or in equity such that the owner is not able to dispose of the property as a beneficial owner absolutely entitled to the property.

This definition is deliberately wide so that it will, amongst other things, catch all relationships that involve a land trust, local company or Bermudian individual “fronting” for a non-Bermudian.

Subsection 72(2) sets the conditions in which a land trust exists, i.e. when land in Bermuda is held directly or indirectly by a trustee as defined in subsection (1). To this has been added for greater clarity a statement that wherever the word “trust” occurs in Part VI of the 1956 Act it is to be read as a reference to a “land trust”.

Section 3 Part VI of the Bermuda Immigration and Protection Act 1956

Notes on a number of the more important sections of Part VI of the 1956 Act are given below:

Prohibition on Holding, Acquiring or Appropriating Land

3.01 Restricted person holding or acquiring land without a licence

Section 76 of the 1956 Act prohibits a restricted person from holding or acquiring land in Bermuda without a licence or a deferral certificate.

3.02 Trustee holding or acquiring land without a licence

Section 77 of the 1956 Act prohibits a trustee from knowingly holding or acquiring land in Bermuda in trust for a restricted person without a licence or a deferral certificate.

3.03 Appropriating land

Section 78(1) of the 1956 Act establishes the general prohibition on restricted persons appropriating land in Bermuda. The meaning of the term “appropriate” is given in subsection 78(3). A person appropriates land by assuming any of the rights of an owner of the land, whether at law or in equity. The same is true where a trustee holds the land in trust and a restricted person assumes at least some of the rights of an owner of the land. However, appropriation is not an offence where a restricted person or a trustee holds a deferral certificate or a licence in respect of the land.

This notion of “appropriation” is fundamental to describing the relationship which a restricted person has to the land in cases of “fronting” either by trusts, companies or individuals.

Subsection 78(1) further requires that, in order for appropriation to reach the standard of a criminal offence, restricted persons must have the **intention** of occupying or of using or developing the land for profit for themselves or someone else. Therefore, where restricted persons are concerned, one must show not only that there is appropriation in accordance with the definition at subsection 78(3) but that the necessary intention also exists.

Subsection 78(2) prohibits the appropriation of land in Bermuda by a trustee for the benefit of a restricted person. In the case of trustees, no intention is stipulated because trustees are acting in accordance with trust settlement deeds and do not exhibit any intentions of their own.

Subsection 78(2A) Prohibits a trustee from appropriating land in Bermuda for the benefit of a Bermudian at the direction of a restricted person unless either:

- (a) the restricted person receives no benefit from the appropriation; or
- (b) the restricted person is the parent or grandparent of the Bermudian beneficiary of the trust and the trustee receives the Minister’s prior written approval.

This provision seeks to allow for the bona fide situations where non-Bermudian relatives and friends of Bermudians are concerned. However, this provision is not intended to allow restricted persons who are the parents of Bermudian children to devise a scheme to acquire a property to be

used for their benefit with the illusion that the child will benefit at some unknown time in the future. Such schemes are known to be used to purchase properties that are not available to restricted persons or to evade the payment of the land-holding charge on properties that are eligible for purchase by restricted persons.

Subsection 78(4) is a rebuttable presumption in which a restricted person is deemed to have the intention referred to in subsection 78(1) if:

- (a) the restricted person directly or indirectly provides financial assistance for the acquisition of land; or
- (b) the land is held by a person under a scheme for the benefit of a restricted person such that a reasonable person knowing all the facts would conclude that the person was acting for the restricted person and not as absolute owner of the land.

Subsection 78(5) states that subsection 78(1) does not apply where a restricted person provides financial assistance to his child or grandchild and has obtained the prior written permission of the Minister.

Subsection 78(6) states that section 78 does not apply to a restricted person who possesses a licence or a deferral certificate as appropriation of the land in such circumstances must be lawful.

3.03.01 Appropriation of land by Parent or Grandparent

Background

Subsection 78(2A) of the 1956 Act provides for a non-Bermudian to give financial assistance to a trustee of a land trust whose beneficiary is a Bermudian.

Subsection 78(5) of the Bermuda Immigration and Protection Act 1956 provides for a parent or grandparent, who is a restricted person, to give financial assistance to a child or grandchild, who holds or is married to a person who holds Bermudian status, and to avoid the prohibition on appropriation (subsection 78(1)).

Subsections 78(1), (2A) and (5) are reproduced below:

Appropriating land

78 (1) No restricted person shall appropriate land in Bermuda with the intention of occupying it, or of using or developing the land for profit at any time whether for his own benefit or for the benefit of another person.

...

(2A) No trustee shall appropriate land in Bermuda for a beneficiary who possesses Bermudian status, at the direction of a restricted person, unless —

- (a) the restricted person receives no benefit from the appropriation; or
- (b) the beneficiary is the child or grandchild of the restricted person and the trustee obtains the Minister's approval in writing before appropriating the land.

...

(5) Subsection (1) does not apply in the case of a restricted person who provides financial assistance to his child or grandchild for the acquisition of the land, if the restricted person obtained the Minister's approval in writing before providing the assistance.

Where financial assistance takes the form of a mortgage or charge on land then the following sections of the 1956 Act come into play.

Taking a mortgage or charge on land

80 (1) No restricted person or trustee of a trust which is holding or acquiring land for the benefit of a restricted person, and no agent or nominee of a restricted person or of such a trustee shall, without the prior approval of the Minister, accept or take, directly or indirectly, any mortgage or charge on land in Bermuda, whether legal or equitable.

Subsection 80(1) requires a non-Bermudian who wishes to take a mortgage or charge on land in Bermuda to obtain the prior written permission of the Minister to do so.

No offence under sections 76, 77 and 78

82 (1) Subject to subsection (2), no person contravenes section 76, 77 or 78 by reason only that the person —

- (a) holds or acquires land as a mortgagee or holds or acquires a charge on land, if the person has obtained the approval of the Minister under section 80;

Subsection 82(1)(a) states that any non-Bermudian who holds a mortgage or charge on land in Bermuda does not contravene sections 76, 77 or 78 if the person has the prior written permission of the Minister to do so under subsection 80(1).

Applications for licences

84 (1) A restricted person or a trustee to whom section 76 or 77 applies who intends to hold or acquire land in Bermuda shall apply to the Minister for a licence.

- (2) The application shall be accompanied by —

- (a) the application fee prescribed in the Government Fees Regulations 1976;
- (b) the prescribed information, documents and attestations; and
- (c) such other information or documents as the Minister may require for the purpose of considering the application.

- (3) This section does not apply to a restricted person or a trustee who holds, acquires or leases land as described in section 82(1).

Subsection 84(3) exempts a non-Bermudian holding a mortgage or charge on land, with the Minister's prior written permission, from being required to obtain a licence for that interest in land in Bermuda.

Hence, a non-Bermudian who, pursuant to subsection 80(1), obtains the Minister's prior written permission to take a mortgage or charge on land in Bermuda does not contravene sections 76, 77 or 78 and does not require a licence to acquire or hold such an interest in land in Bermuda.

Implications

The following examples illustrate the general case covered by subsection 78(2A)(a). Any use of the term “gift” in these examples shall be taken to mean “any voluntary transference of property without consideration”.

- The land is held in trust for the benefit of a Bermudian and the trustees receive financial assistance from a non-Bermudian, whether related to the Bermudian or not, for the purpose of holding or acquiring land in Bermuda. The trustees, as owners, are then clearly appropriating land at the direction of a restricted person:
 - where the financial assistance is a gift then, provided no benefit accrues to the non-Bermudian, subsection 78(2A)(a) permits the appropriation. In such a case, the non-Bermudian has no interest in, or claim over, the property so that no licence is required
 - where the financial assistance is not a gift but the non-Bermudian receives no benefit, other than that arising out of the financial assistance, then:
 - subsection 78(2A)(a) permits the appropriation
 - however, in these circumstances, the non-Bermudian does have an interest in the property such that the trustees would require a licence pursuant to section 77 as constructive trustees of the non-Bermudian’s equitable interest in the land
 - in order for a licence not to be required, the restricted person must obtain permission, in accordance with subsection 80(1), to take a charge or mortgage on the land. If the Minister grants the permission, then, as provided by paragraph (a) of subsection 82(1), no licence is needed

Set out below are some of the most common instances involving a Bermudian child and grandchild (“child”) of a non-Bermudian parent or grandparent (“parent”):

- The land is held in trust for the benefit of a child. The parent provided the financial assistance to the trustees of the trust for the purpose of holding or acquiring land in Bermuda. The trustees, as owners, are appropriating land at the direction of a restricted person:
 - where the financial assistance is a gift, then, provided no benefit accrues to the parent, subsection 78(2A)(a) permits the appropriation. In such a case, the parent has no interest in, or claim over, the property so that no licence is required under section 77
 - where the financial assistance is not a gift, the appropriation is permitted if, pursuant to subsection 78(2A)(b), the trustees have received the prior written permission of the Minister to accept the financial assistance:

- further, in these circumstances, the parent acquires an equitable interest in the property. Therefore, the trustees would be required, by section 77, to obtain a licence as constructive trustees of the parent’s equitable interest in the land
- in order for a licence not to be required the parent would need to obtain permission, in accordance with subsection 80(1), to take a charge or mortgage on the land. If the Minister grants the permission, then, as provided by paragraph (a) of subsection 82(1), no licence is needed
- The land is held by an adult Bermudian child. The parent provided the financial assistance to the child for the purpose of holding or acquiring land in Bermuda with the intention that the child benefit from the use of the land. With regard to subsection 78(1) the question remains whether in the following circumstances the parent also appropriates the land:
 - where the financial assistance is a gift subsection 78(1) does not apply, provided, in accordance with subsection 78(5), the parent first obtained the written permission of the Minister to give the financial assistance. In such a case, as the parent has no interest in, or claim over, the property, no licence is required under section 77
 - where the financial assistance is not a gift then the parent acquires an interest in the land which results in appropriation by the parent. However, if the parent has received the prior written permission of the Minister pursuant to subsection 78(5), then subsection 78(1) does not apply:
 - further, the child is the constructive trustee of the parent’s equitable interest in the land and therefore would require a licence under section 77
 - in order for a licence not to be required pursuant to section 77, the parent must obtain permission, in accordance with subsection 80(1), to take a charge or mortgage on the land. If the Minister grants the permission, then, as provided by paragraph (a) of subsection 82(1), no licence is needed

The following cases cover those situations where the non-Bermudian parent or grandparent (“parent”) of the non-Bermudian spouse of a Bermudian provides financial assistance to the non-Bermudian spouse for the purchase of land in Bermuda with the intention that the non-Bermudian child benefit from the use of the land. With regard to subsection 78(1) the question remains whether in the following circumstances the parent also appropriates the land.

- The land is held by the Bermudian spouse:
 - where the financial assistance is a gift subsection 78(1) does not apply if the parent has received the prior written permission of the Minister pursuant to subsection 78(5). Since the financial assistance is a gift, no constructive trust arises between the non-Bermudian spouse and the parent hence no licence is required

- the non-Bermudian spouse contributes the money to the purchase of the property thereby acquiring an interest in the land. Consequently, the Bermudian becomes the constructive trustee of the non-Bermudian spouse's equitable interest in the land, and as such requires a licence under section 77
- The land is held jointly by the Bermudian and the non-Bermudian spouse who holds a licence:
 - where the financial assistance from the parent is a gift and the parent has received the prior written permission of the Minister pursuant to subsection 78(5) then subsection 78(1) does not apply. The non-Bermudian spouse then contributes the money to the purchase of the property. There is no constructive trust for which a licence would be required
- The land is held by the Bermudian spouse:
 - where the financial assistance is not a gift then the parent acquires an interest in the land thereby appropriating it. However, if that parent has received the prior written permission of the Minister pursuant to subsection 78(5) then subsection 78(1) does not apply
 - the non-Bermudian spouse receives the money to purchase the property thereby becoming the constructive trustee of the non-Bermudian parent's equitable interest in the land and therefore would require a licence under section 77
 - in order for a licence not to be required pursuant to section 77, the parent must obtain permission, in accordance with subsection 80(1), to take a charge or mortgage on the land. If the Minister grants the permission, then, as provided by paragraph (a) of subsection 82(1), the parent does not need a licence
 - as the non-Bermudian spouse contributes the money to the purchase of the property, the Bermudian is the constructive trustee of the non-Bermudian spouse's equitable interest in the land and therefore requires a licence under section 77
- The land is held jointly by a Bermudian and a non-Bermudian spouse who holds a licence issued under section 76:
 - where the financial assistance is not a gift, then there is appropriation by the parent but if that parent has received the prior written permission of the Minister pursuant to subsection 78(5) then subsection 78(1) does not apply
 - the non-Bermudian spouse contributes the money to the purchase of the property. The non-Bermudian spouse is the constructive trustee of the non-Bermudian parent's equitable interest in the land and therefore would require a licence under section 77
 - in order for a licence not to be required pursuant to section 77, the parent must obtain permission, in accordance with subsection 80(1), to take a charge or mortgage on the land. If the Minister grants the permission, then, as provided by paragraph (a) of subsection 82(1), the parent does not need a licence

When considering an application made pursuant to subsection 78(2A)(b) or 78(5), the Minister will not approve those applications where he believes the non-Bermudian, who provides the financial assistance, is using it as part of a scheme to evade Part VI of the 1956 Act.

In those instances where a restricted person holds a licence or a trustee holds a licence on behalf of a restricted person, including a constructive trustee, only one licence will be issued in relation to any given restricted person. This policy allows for an individual to have an interest in one property only.

3.04 Taking a mortgage or charge on land

Subsection 80(1) of the 1956 Act prohibits the taking, directly or indirectly, of a mortgage or charge on land in Bermuda, whether legal or equitable, without the prior approval of the Minister, by a restricted person or a trustee holding or acquiring land for a restricted person or the agent or nominee of a restricted person or of such a trustee.

One way in which a restricted person can “indirectly” take a mortgage or charge on land is for the restricted person to open an account with a bank or deposit company. The restricted person advises the bank to hold those funds in that account as security for a mortgage given by the restricted person’s Bermudian agent as the direct mortgagor. The control of the land at all times resides with the restricted person whose funds are in effect securing the mortgage.

Subsection 80(2) exempts banks, deposit companies and non-resident insurance undertakings from subsection 80(1).

In order to receive the Minister’s consent, applicants should write to the Chief Immigration Officer setting out the details of the mortgage agreement including the address of the land in question. There is no prescribed form or fee relating to this application.

3.05 Scheme to defeat purpose of this Part

Subsection 81(1) of the 1956 Act prohibits any person from participating in a scheme which he knows, or has reasonable grounds to suspect, will enable a restricted person or a trustee directly or indirectly:

- (a) to hold or acquire land in Bermuda contrary to the purpose of Part VI; or
- (b) to appropriate land in Bermuda contrary to section 78 of the 1956 Act.

Subsection 81(2) sets out the things the court must have regard to in determining whether there was a scheme referred to in subsection (1), namely:

- (a) the manner in which the scheme was entered into;
- (b) the form and substance of the scheme, including powers or rights of a restricted person in regard to it;
- (c) in relation to the operation of Part VI, the result that would be achieved by the scheme; and
- (d) the benefit that will, or could reasonably be expected to, accrue to the restricted person or the trustee holding the land for the benefit of the restricted person.

Licences

3.06 Applications for licences

Subsection 84(1) of the 1956 Act requires a restricted person or a trustee whose beneficiary is a restricted person to apply to the Minister in writing for a licence.

Subsection 84(2) states that the application must be accompanied by:

- under subsection 84(2)(a), the application fee
- under subsection 84(2)(b), prescribed information, documents and attestations. The word “prescribed” means prescribed under the regulations which are enabled by new subsection 102D(1)(a)
- under subsection 84(2)(c), such other documents or information which the Minister may require to make a determination. This is a catch-all provision to allow additional information as each case may require.

Subsection 84(3) exempts a restricted person who holds, acquires or leases land as described in subsection 82(1) from the need to apply for a licence. Subsection 82(1) states that a restricted person who holds, acquires or leases land as described there does not contravene the 1956 Act. This subsection states that such a restricted person does not need a licence either.

3.07 Licensing requirements deferred

Section 85 of the 1956 Act provides for deferral of the licensing requirement. The purpose of these provisions is to allow the affected person time to regularize his situation.

Subsection 85(1) provides deferrals for a period of three years for the following cases where:

- (a) restricted persons acquire the land by devise or inheritance;
- (b) restricted persons acquire the land by a judgement of foreclosure or as mortgagees in possession;
- (c) persons who hold land subsequently become restricted persons or where trustees hold land for persons who subsequently become restricted persons. This is required because of the extension of the meaning of restricted persons: partnerships and other entities can start off as non-restricted persons but, because of the change in the status of partners or of members, can become restricted persons;
- (d) persons acquire land without knowing that they are restricted persons but later find out that they are. The deferral runs from the time they learned that they are restricted persons (or might reasonably be expected to have done so);
- (e) restricted persons acquire land without knowing about it but later find out that they have. The deferral runs from the time that the persons learned that they had acquired the land (or might reasonably be expected to have done so);
- (f) trustees hold or acquire land in trust for beneficiaries whom they do not know are restricted persons but later find out that they are. The deferral period starts from the

date when the trustee learns that the beneficiary is a restricted person (or might reasonably be expected to have done so); or

- (g) a trustee holds land, which was acquired by devise or inheritance and which is held under a licence for the benefit of a restricted person who is a minor and the licence lapses in accordance with a condition of the licence. The deferral period begins on the date the licence lapses.

Subsection 85(2) provides deferrals for a period of one year for the following cases where:

- (a) an estate representative acquires land and, either the estate representative or a beneficiary is a restricted person. The deferral period starts on the date of death of the person whose estate he represents;
- (b) the licence held by a restricted person is revoked. The deferral period starts from the date of revocation;
- (c) a partnership becomes a restricted person. The deferral period starts on the date the partnership becomes a restricted person; or
- (d) an entity or group that is not a corporation or a partnership becomes a restricted person. The deferral starts on the date the entity or group becomes a restricted person.

Subsection 85(3) allows the Minister to extend a deferral period for an additional period that is not longer than the original deferral period. This gives the Minister some discretion.

These rules do not apply for deferral situations, which arise out of subsections 81(2) or 82(2) of the former Part VI i.e. that exist on 22 June 2007. Appendix item A.01 provides additional guidance for such cases.

Deferrals under section 85 of the new Part VI of the 1956 Act arising on or after 22 June 2007 take immediate effect as the situations they cover do not fall within the ambit of the three-year grace period provided for by section 14 of the Bermuda Immigration and Protection Amendment Act 2007.

3.08 Deferral certificate

Subsection 86(1) of the 1956 Act provides for a person to apply for a deferral certificate. The application should include the person's identity, a description of the land, the date the land was acquired and the reasons why the applicant believes that there is an entitlement to a deferral certificate.

Subsection 86(2) requires the Minister to issue a deferral certificate to every person whom he determines is entitled to one.

Subsection 86(3) exempts from prosecution any person who has made an application for a deferral certificate while the Minister is considering the application. This provision is required, because otherwise the person by not having either a licence or a deferral certificate would be in breach of the law.

3.09 Territorial restrictions

Section 89 of the 1956 Act sets out the aggregate acreage limits of land situated in Bermuda that may be held by restricted persons and defines the term “licensed land” as land in respect of which a licence has been issued and includes land for which a licence has been approved but not yet issued.

Subsection 89(1) specifically limits the ability of the Minister to approve an application by or on behalf of a restricted person to obtain a licence to acquire land situated in Bermuda in the case where the area of the land to which the application relates and the area of all licensed land in:

- (a) Bermuda total no more than 2,000 acres; and
- (b) the parish where it is located total no more than 400 acres.

The acreage limits shown above came into being with the passage of the Alien Act 1907. At that time members of the Legislature gave extensive consideration to setting the levels of land ownership in Bermuda by aliens. It should be noted that, in the first quarter of the twentieth century, the total acreage of land held by aliens was small, as the following quote from the House of Assembly debate, on 9 February 1926, regarding a Bill entitled the “Alien Act 1926”. The Hon. F. G. Gosling stated:

“...[in Paget Parish] the amount now is something like 81 acres which is actually alienated. In no other parish has more than 30 acres been alienated, and in some none at all. In St. George one lot of 3 acres has been sold.”

However, today this total has materially changed and figures kept by the Registrar-General indicate some 2,220 acres are lawfully held by non-Bermudians. This number exceeds the 2,000-acre limit as it includes the land held by British Commonwealth citizens. Up until now, that acreage was not included with the acreage held by aliens.

Subsection 89(2) specifies that the calculation of land areas for the purpose of the territorial limits is to be determined in accordance with The Bermuda Immigration and Protection (Territorial Restrictions) Regulations 2007.

While subsection 89(2) sets out the guiding principle and general rule, subsection 89(3) of the 1956 Act states that the Minister **is not barred** from approving applications for licences where:

- the land is already held under licence. This is because approving such a licence does not add to the total amount of licensed land, or
- the first disposition, by the developer, of a condominium unit that is designated in the Bermuda Immigration and Protection (Designation of Eligible Condominium Units) Regulations 2007 as eligible to be acquired by restricted persons. This is because the developer of such a condominium has permission to sell units to restricted persons, (unlike those condominium developments which are not designated for foreign ownership but are nevertheless open to special minority groups of restricted persons, with close Bermuda ties namely: spouses of Bermudians; permanent residents; and residential certificate holders). The units within the development have been designated as eligible for non-Bermudian ownership, although not to the exclusion of Bermudians.

Further, subsection 89(4) provides another key exception to the territorial restrictions and states that the Minister **is not barred** from approving applications for a licence from or on behalf of:

- (a) the non-Bermudian spouse of the owner of the land where the owner is Bermudian or holds the land under licence. In the former case the applicant is part of a Bermudian family which should not be disadvantaged; in the latter case the land is already licensed so that no additional acreage has to be counted;
- (aa) the owner of the land where the owner holds his non-Bermudian spouse's equitable interest in the land as trustee. This arises from the intentionally broad definition of "trustee";
- (b) the non-Bermudian child of the Bermudian owner of the land. Again, the applicant is part of a Bermudian family which should not be disadvantaged;
- (c) the non-Bermudian parent of a person who possess Bermudian status and owns the land. Likewise, the applicant is part of a Bermudian family; or
- (d) a person to whom the Minister could have granted a licence under (a), (b) or (c) within the three years ending with the date of application. This preserves the privileges of (a), (b) and (c) for three years after the relationships in (a), (b) or (c) have ended either through divorce or death, giving potential applicants a period of grace in which to exercise their privileges.

3.10 Restriction on acquiring undeveloped land

Section 90 of the 1956 Act prohibits the Minister from approving a licence to hold undeveloped land by restricted persons as there is no advantage to Bermuda for such persons to hold and control undeveloped land. In addition, this section discourages speculation in land by restricted persons.

However, exceptions are made where there are close family ties to Bermuda namely where the application is made by, or in respect of, an individual who is a restricted person described in subsections 89(4)(a) to (d) namely:

- (a) the spouse of the owner of the land where the owner is Bermudian or holds the land under licence. In the former case the applicant is part of a Bermudian family which should not be disadvantaged; in the latter case the land is already licensed so that no additional acreage has to be counted;
- (aa) the owner of the land where the owner holds his spouse's equitable interest in the land as trustee. This arises from the intentionally broad definition of "trustee";
- (b) the child of the Bermudian owner of the land. Similarly, the applicant is part of a Bermudian family which should not be disadvantaged;
- (c) the parent of a person who possess Bermudian status and owns the land. The applicant is part of a Bermudian family which should not be disadvantaged; or
- (d) a person to whom the Minister could have granted a licence under (a), (b) or (c) within the three years ending with the date of application. This preserves the privileges of (a), (b) or (c) for three years after the relationships in (a), (b) or (c) have ended either through divorce or death, giving potential applicants a period of grace in which to exercise their privileges.

3.11 Restriction on acquiring residential valuation units

Subsection 91(1) of the 1956 Act states the general case allowing the Minister to grant licences to, or in respect of, restricted persons for residential valuation units that have an annual rental value (“ARV”) at or above the minimum prescribed in regulations.

The section is designed to prevent property with an ARV below the current minimum from being passed on from generation to generation of restricted persons. If uncontrolled, a very large number of properties could continue to be held by restricted persons. At five-year intervals, the Land Valuation Department conducts a revaluation of all properties in Bermuda, for tax purposes pursuant to the Land Valuation and Tax Act 1967. At the time of the revaluation, the land policy’s minimum ARVs are adjusted to take account of the changes in ARVs in the new Valuation List. Properties held under licence that fall below the new minimum ARV as a result of such revaluations become ineligible to be sold to a restricted person and can only be sold to a Bermudian.

Subsection 91(2), despite subsection 91(1), allows the Minister to approve an application by, or in respect of, a restricted person, for a licence in respect of residential land that has an ARV below the prescribed minimum applicable to that restricted person only if the application is made by, or in respect of, a restricted person who is described in subsections 89(4)(a) to (d) namely:

- (a) the spouse of the owner of the land where the owner is Bermudian or holds the land under licence. In the former case the applicant is part of a Bermudian family which should not be disadvantaged; in the latter case the land is already licensed so that no additional acreage has to be counted;
- (aa) the owner of the land where the owner holds his spouse’s equitable interest in the land as trustee. This arises from the intentionally broad definition of “trustee”;
- (b) the child of the Bermudian owner of the land. Similarly, the applicant is part of a Bermudian family which should not be disadvantaged;
- (c) the parent of a person who possess Bermudian status and owns the land. The applicant is part of a Bermudian family which should not be disadvantaged; or
- (d) a person to whom the Minister could have granted a licence under (a), (b) or (c) within the three years ending with the date of application. This preserves the privileges of (a), (b) or (c) for three years after the relationships in (a), (b) or (c) have ended either through divorce or death, giving potential applicants a period of grace in which to exercise their privileges.

Paragraph (a) recognizes that a restricted person who is the spouse of the landowner, often a joint-contributor to the property, may also be a joint owner.

Paragraph (aa) takes account of the non-Bermudian spouse’s equitable interest in the land that that person acquires by assisting with the payment of the mortgage, or is a guarantor of a loan etc. The Bermudian spouse in such a case becomes a trustee under the broad definition of “trustee” in Part VI of the 1956 Act.

Paragraph (b) allows a restricted person who is the child of a Bermudian to hold the property after inheritance.

Paragraph (c) allows the parent of a person who possesses Bermudian status to own the land jointly with the Bermudian child.

Paragraph (d) allows the persons described in paragraphs (4)(a), (b) or (c) of section 89 to hold property after the death of the former owner and also allows a restricted person who is a divorcé(e) to acquire property held by the former spouse. However the application for a licence has to be made within three years of the death or divorce, as the case may be.

Subsection 91(3) allows the Minister to approve an application to hold or acquire more than one valuation unit on the same parcel of land if it is made by, or in respect of, a restricted person who:

- (a) is an individual described in subsections 89(4)(a), (b) or (c), i.e. the spouse of a landowner; the child of a Bermudian landowner; or the parent of a Bermudian landowner;
- (b) acquires the land by devise or inheritance from the Bermudian spouse; or
- (c) is to own the land jointly with a spouse, parent or child who possesses Bermudian status.

Subsection 91(3) supports the rationale that ownership by restricted persons of multi-unit dwellings is incompatible with the notion that properties acquired by restricted persons are for their own private residential use rather than for income purposes. With exceptions being made for restricted persons with close Bermudian ties, the regulations seek to preserve as many dwelling units as is practicable for ownership by individuals who possess Bermudian status.

Subsection 91(4) allows the Minister to approve an application for a land licence to hold or acquire more than one valuation unit on the same parcel of land if:

- (a) the restricted person is an individual;
- (b) at least one of the valuation units has an ARV above the prescribed minimum; and
- (c) the land is already licensed.

Subsection 91(4) is a “grandfather” clause which permits multi-unit dwellings, which are already in possession of restricted persons, to be sold to other restricted persons. However this is only true for those dwellings where one of the units has an ARV in excess of the minimum in force at the time of application.

3.12 Restriction on acquiring condominium units

Section 92 of the 1956 Act sets out who is eligible to hold or acquire condominium units and which condominium units are available.

Subsection 92(1) allows the Minister to approve an application by, or in respect of, a restricted person for a licence to hold or acquire a condominium unit if the restricted person is:

- (a) eligible to hold or acquire a condominium unit as defined in subsection (2); or
- (b) an individual and the condominium unit is an eligible unit under subsection 92(3).

Subsection 92(2) defines the following individuals as eligible to hold or acquire a condominium unit:

- (a) an individual described at subsection 89(4)(a) to (d), namely the spouse of a landowner, including the case where the owner of the land holds his spouse's equitable interest in the land as trustee; the child of a Bermudian landowner; the parent of a Bermudian landowner; or an individual who could have so acquired in the three year period ending with the date of application;
- (b) an individual who is a permanent resident may hold or acquire a condominium unit if it is in a privately developed complex; not one sponsored by Government; and
- (c) an individual who has a residential certificate may hold and acquire a condominium unit if the ARV is greater than the prescribed minimum.

Section 92 reflects a long-standing policy designed to prevent Bermuda from being developed into an apartment complex for restricted persons. The policy prevents Bermuda's scarce land resources from being used for the benefit of restricted persons at the expense of Bermudians.

Exemptions from the limitations against acquiring apartments or condominium units were extended to restricted persons who are the spouses of owners, as the spouse is often a joint contributor to the property and there should be no restriction against spouses owning a property together or inheriting it. The policy also recognizes that the restricted person who is the child of a Bermudian should not be impeded from enjoying any inheritance.

It is also recognized that restricted persons who are permanent residents or who hold residential certificates are special categories of restricted persons and they are allowed to buy apartments or condominium units under certain stipulated conditions.

In summary, permanent residents are not limited by any ARV minimum where apartments or condominium units are concerned. Although residential certificate holders may hold or acquire apartments or condominium units anywhere in Bermuda they are limited to units with an ARV at or above the prescribed minimum (currently \$32,400).

3.13 Restriction on acquiring subdivided land

Section 93 of the 1956 Act prohibits the Minister from approving a licence application from a restricted person who wishes to hold or acquire land that was previously licensed and passed to a Bermudian individual in the circumstances described at section 100 (Variation of licence condition – subdivision of land) of the 1956 Act.

Section 100 is an exception to the rule that land held under licence cannot be subdivided. The exceptional circumstances are:

- (a) the land has more than one residential unit on it;
- (b) after the subdivision, the restricted person retains at least one residential unit that has an ARV above the prescribed minimum; and
- (c) each of the other lots created by the subdivision is transferred to a Bermudian individual.

The logic behind this is that where a restricted person owns a large estate under a licence, it may be in the interest of Bermuda and Bermudians if a portion of that land were to come back into Bermudian hands. In such a case the restricted person is allowed to subdivide the land under the

conditions mentioned above and sell the subdivided lots to Bermudians. In order to ensure that Bermudians benefit from this exercise in perpetuity, section 93 prevents the land that was subdivided and sold, from being placed on the non-Bermudian market again.

3.14 Restrictions on acquiring land – Special Cases

3.14.01 Devise or inheritance

Subsection 94(1) of the 1956 Act embodies the long-standing policy requiring inherited properties to be vested in individuals and ensures tight control over ownership of property by restricted persons.

Despite the general rule at subsection 94(1), subsection 94(2) recognizes the need to accommodate special cases in order to ensure responsible administration of land-holding. To this end, provision has been made for land acquired by devise or inheritance to be held in trust for the benefit of restricted persons when the restricted person is a minor or is infirm.

Subsection 94(2)(a) makes a concession for restricted persons who are minors or young adults by allowing such land to be held in trust for the restricted person under a licence issued by the Minister.

Pursuant to subsection 94(2)(b) a trustee may apply for a licence to hold land for the benefit of a restricted person who is not able to manage the property rationally as a result of infirmity. This provision is limited to those non-Bermudian individuals to whom the Minister could have issued a licence, at the time of the application, had those individuals not been infirm.

3.14.02 Land trust for infirm person

Section 95 of the 1956 Act is a parallel provision to subsection 94(2)(b) but addresses the case where the restricted person already holds land under a licence.

Where a restricted person holds land under a licence and is no longer able to manage the property rationally as a result of infirmity, the Minister may issue a licence to a trustee to hold the land for that person's benefit. In this case the licence is conditional: the licence lapses if either the person recovers the capacity to administer the property or the person dies.

3.15 Ministerial approval of applications

Section 96 of the 1956 Act sets the process the Minister is to follow should he approve a licence and requires the applicant to pay the land-holding charge within a six month period of the approval.

Subsection 96(1) states that upon approval of an application, the Minister shall sign and date the licence. He must then notify the applicant of the approval and advise him of the conditions of the licence.

Subsection 96(2) prevents the Minister from issuing the licence until the "land-holding charge" is paid. The land-holding charge replaces what was formerly the land licence fee. As the size of the former land licence fees were so large, e.g. 22% of the value of a house, they really cannot be

called fees which generally are levied to cover the administrative costs of processing and issuing. Hence they are now termed land-holding charges.

Subsection 96(3) states that the Minister's approval of an application for a licence lapses if the land-holding charge is not paid within six months after the application was approved. However, the Minister may extend the period of validity of the licence.

3.16 Time limit for acquiring land

Section 97 of the 1956 Act stipulates that a licence lapses if the land is not acquired within six months of the day on which the Minister approved the application, i.e. the day on which the Minister signed and dated the licence.

However, the Minister is allowed to extend an existing licence for one additional period of six months. Of course the application for an extension has to be made by the licence holder before the initial six-month period elapses.

Any person who holds a lapsed licence must return it to the Chief Immigration Officer.

If a licence lapses it does not prevent the Minister from considering a new application. Of course a new application fee would have to be paid with the new application.

Clause 4 of the Bermuda Immigration and Protection (Land-Holding Charges) Regulations 2007 addresses the situation where a land licence has been issued to a restricted person but that licence subsequently lapses without the land, to which the licence refers, being conveyed to the licence holder.

The situation arises because the land-holding charge must be paid in order for the licence to be issued. Although the Minister has limited discretion to extend the period of validity of the licence, it can nevertheless occur that the licence lapses without the land being conveyed to the licence holder.

This clause permits a restricted person who finds himself in this position to apply to the Minister for a refund of the land-holding charge setting out the reasons for the application. Where such an application is received the regulations require the Minister to refer the application for the refund of the land-holding charge to the Cabinet for a decision.

This is not a new provision: the fees regulations had long contained a similar one. Paragraph (11)(a) of Head 5 of the Fees Regulations finished with the statement that:

“In any given case the fee paid under sub-paragraph (a)(ii) less the fee payable under paragraph (10) [the application fee] is to be refunded on the instruction of Cabinet.”

3.17 Licence conditions

Section 98 of the 1956 Act lists the standard conditions of a licence, namely:

- (a) the land may only be used for the purpose set out in the licence application;
- (b) the land may not be developed or altered so as to add to the number of potential residential valuation units;

- (c) the land may only be rented out or used for profit with the prior written consent of the Minister;
- (d) the land may not be subdivided or the boundaries changed; and
- (e) the licence holder shall dispose of any other land in Bermuda held by him or on his behalf, to an independent third party, within 12 months of the date of approval of the licence application.

However, under this section the Minister may impose such other conditions on a licence as he thinks fit.

3.18 Variance of licence conditions

Section 99 of the 1956 Act allows the Minister to vary the conditions of a licence on application by a licence holder. In the case of non-Bermudian spouses of Bermudians, the policy has always been to keep the conditions of the licence in abeyance unless the non-Bermudian spouse becomes the sole owner of the land. The following paragraph precedes the standard conditions on a licence issued to non-Bermudian spouses holding or acquiring land jointly with their Bermudian spouses:

“That, in the event that the Property should become vested solely in the person of [the name of the non-Bermudian spouse] his heirs or successors while he or they do not possess Bermudian status, the Property remain as purchased without alteration of any type unless specific permission is obtained from the Minister of Labour and Immigration and in particular:”

This modification will appear on all licences where the non-Bermudian spouse owns land jointly with the Bermudian spouse.

Subsection 99(2) states that if land is held under licence, but owing to any change a licence is no longer needed, then the licence lapses and the conditions of the licence cease to have effect. Such an occurrence is where the non-Bermudian spouse of a Bermudian obtains Bermudian status. Further, subsection 97(3) of the 1956 Act requires any person who holds a lapsed licence to return it to the Chief Immigration Officer.

3.19 Revocation of licences

Section 101 of the 1956 Act gives the Minister power to revoke a licence if the licensee:

- (a) contravenes a provision of Part VI, the regulations or a condition of the licence;
- (b) submits false information in a licence application or in a registration under the 1956 Act;
or
- (c) is convicted of a criminal offence.

Registration of Land

3.20 Registration required

Subsection 102(1) of the 1956 Act requires a licensee to register the land, which is held under licence, within three months of acquiring the land or the issuance of the licence, whichever occurs later.

The subsection then lists the things which are to be deposited with the Registrar-General, namely:

- (a) a copy of the licence;
- (b) a description and area of the land and the person's interest in the land;
- (c) a copy of the lot plan and the grid reference of the approximate centre of the lot; and
- (d) copies of any other documents prescribed under regulations.

Subsection 102(2) requires a non-restricted person who acquires licensed land to register the acquisition within three months of the acquisition of the land. This requirement is necessary so that the area of the land can be subtracted from the parish and island-wide acreage totals held by restricted persons. This provision requires any documents prescribed under regulations to be deposited with the Registrar-General for registration and recording.

Subsection 102(3) states that if land is held under licence but as a result of any change in status or circumstances a licence is no longer required then the person who holds the land shall notify the Registrar-General of the change within three months of its occurrence. Further, under subsection 97(3) of the 1956 Act, a person who holds a licence that is lapsed shall return it to the Chief Immigration Officer.

Subsection 102(4) allows the Minister, in writing, to extend the three-month period.

Subsection 102(5) provides for a person, who is required to register under this section, to pay a fee under the Government Fees Regulations.

3.21 Register to be kept

Section 102A of the 1956 Act requires the Registrar-General to maintain a register, by parish, of land held or acquired under licence. The form of the register and particulars to be contained in it are prescribed in regulations.

Reports to Minister

3.22 Reports from banks and deposit companies and others

The provisions of Section 102B of the 1956 Act are similar to the "know your customer" rules which are used to detect money laundering and with which financial institutions are already complying.

Subsection 102B(1) requires a licensed bank or deposit company to make a written report to the Minister if the institution knows, or has reasonable grounds to suspect, that a licence, which is required under Part VI for a transaction or an aspect of a transaction in which it participates, has not been obtained.

Subsection 102B(2) requires a written report to be made to the Minister by any person who knows, or has reasonable grounds to suspect, that a transaction or an aspect of a transaction in which the person participates is part of a scheme to defeat the purpose of Part VI. This obligation to report rests only with those individuals who are part of the transaction and include the vendor, conveyancing lawyer, the real estate agent and, a trustee, if any.

Subsection 102B(3) states what must be included in the report, namely:

- a description of the land
- the names and addresses of the parties to the transaction or scheme
- the particulars of the knowledge or grounds for the suspicion

Subsection 102B(4) protects a bank, deposit company or other person from civil prosecution for breach of confidentiality, fiduciary duty or duty arising under law or contract where information is given under subsection (1) if:

- (a) the informer believes that the information may relate to a transaction or scheme to circumvent the licensing requirements of Part VI; and
- (b) the information is given in good faith.

Penalties

3.23 Indictable offences

Subsection 102G(1) of the 1956 Act makes contravention of certain provisions indictable offences. On conviction a person is liable to a maximum fine of one million dollars or to imprisonment for five years, or to both. A person commits an indictable offence by contravening any of the following provisions of the 1956 Act:

- section 76 by holding or acquiring land without a licence or a deferral certificate while being a restricted person
- section 77 by knowingly holding or acquiring land without a licence or a deferral certificate as a trustee for the benefit of a restricted person
- subsection 78(1) by appropriating land while a restricted person
- subsection 78(2) by appropriating land as a trustee for the benefit of a restricted person
- subsection 78(2A) by appropriating land as a trustee for the benefit of a Bermudian, at the direction of a restricted person, if:
 - the restricted person gains a benefit from the appropriation of the property; or
 - the restricted person is other than the parent or grand-parent of the Bermudian beneficiary or the trustee does not have the Minister's prior written permission to receive the financial assistance from the parent or grandparent
- subsection 79(1) by knowingly aiding or abetting the holding, acquiring or appropriation of land by a restricted person or by a trustee for the benefit of a restricted person

- subsection 80(1) by taking a mortgage on land in Bermuda without the prior approval of the Minister while being a restricted person or a trustee holding or acquiring land for the benefit of a restricted person
- subsection 81(1) by participating in a scheme that the person knows, or has reasonable grounds to suspect, will allow a restricted person to hold, acquire or appropriate land in Bermuda directly or indirectly, contrary to Part VI

Subsection 102G(2) empowers the courts to make an order for forfeiture of the land (under section 102M) in addition to any penalty imposed in subsection (1).

The heavy penalties are meant to demonstrate that the Government is serious about protecting land for Bermudians and that anyone who is caught trying to circumvent, or help someone else circumvent, the land protection laws will be dealt with severely.

3.24 Summary conviction offences

Subsection 102H(1) of the 1956 Act makes certain acts an offence, punishable on summary conviction to a fine of \$50,000 or imprisonment for twelve months, or to both fine and imprisonment if that person:

- (a) fails to register the acquisition or holding of land which is or was held under licence within the period allowed or provides false information or documents in registration under section 102;
- (b) contravenes a condition of a licence;
- (c) fails to return a licence that has lapsed; or
- (d) fails to make a report under subsection 102B(1) or (2) either as a bank or deposit company that is a participant to the transaction, or any person who is party to a scheme.

Subsection 102H(2) provides for a fine of \$50,000 on summary conviction for a corporation that fails to get Ministerial consent to hold land in Bermuda under any other Act.

3.25 Offence by corporation

Where a body corporate commits an offence against Part VI, section 102J of the 1956 Act deems any director, officer, employee or other person acting on behalf of the body corporate to have committed the same offence as the body corporate and is liable:

- (a) on conviction on indictment to the same penalty as the corporation or to imprisonment for 5 years or both; or
- (b) on summary conviction to the same penalty as the corporation or to imprisonment for 12 months or both.

Making individuals liable to penalties as well as the company will make company employees less likely to get involved in schemes to evade the land licensing regime.

Although section 142 of the 1956 Act provides penalties for offences against the Act by these same groups of persons, that provision has had to be copied, amended and brought into Part VI

so that the greater penalties under Part VI will apply to offences committed against provisions of that Part.

Restraint Orders and Forfeiture of Land

3.26 Restraint order

Section 102K of the 1956 Act makes provision for the application and execution of a restraint order. The restraint order is to prevent the sale or other disposition of land by a person who is suspected of committing an offence against particular provisions of Part VI.

Subsection 102K(1) empowers the Director of Public Prosecutions to apply to the Supreme Court for a restraint order in cases where he has reason:

to believe that an offence has been committed by contravening any of the following provisions of the 1956 Act:

- section 76 – a restricted person holding or acquiring land without a licence or a deferral certificate
- section 77 – a trustee holding or acquiring land for the benefit of a restricted person without a licence or a deferral certificate
- subsection 78(1) – a restricted person appropriating land
- subsection 78(2) – a trustee appropriating land for the benefit of a restricted person
- subsection 78(2A) by appropriating land as a trustee for the benefit of a Bermudian, at the direction of a restricted person, if:
 - the restricted person gains a benefit from the appropriation of the property; or
 - the restricted person is other than the parent or grand-parent of the Bermudian beneficiary or the trustee does not have the Minister’s prior written permission to receive the financial assistance from the parent or grandparent

and

to believe that upon conviction for the offence the land is liable to forfeiture under section 102M

Subsection 102K(2) makes provision for the application for a restraint order to be made to a Judge in Chambers without the other party having to be present.

Subsection 102K(3) provides for the court, if satisfied that the grounds for the restraint order application have been met, to make a restraint order prohibiting any person from dealing in the land.

Subsection 102K(4) enables the court to specify, in the order, any conditions it considers reasonable. The subsection suggests that such a condition could be that the land be maintained in the same state as it is on the day the restraint order is made. Such a condition would prevent the suspected offender from deliberately allowing, or causing, the value of the land to fall.

3.27 Forfeiture

Subsection 102M(1) of the 1956 Act enables the Director of Public Prosecutions to apply to the Supreme Court for forfeiture of the land where a person has been convicted of an offence with respect to that land under the following provisions of the 1956 Act:

- section 76 – a restricted person holding or acquiring land without a licence or a deferral certificate
- section 77 – a trustee knowingly holding or acquiring land without a licence or a deferral certificate as a trustee for the benefit of a restricted person
- subsection 78(1) – a restricted person appropriating land
- subsection 78(2) – a trustee appropriating land for the benefit of a restricted person
- subsection 78(2A) by appropriating land as a trustee for the benefit of a Bermudian, at the direction of a restricted person, if:
 - the restricted person gains a benefit from the appropriation of the property; or
 - the restricted person is other than the parent or grandparent of the Bermudian beneficiary, or the trustee does not have the Minister’s prior written permission to receive the financial assistance from the parent or grandparent

Subsection 102M(2) requires the Director of Public Prosecutions to send a copy of the application for forfeiture to any person that he knows holds an interest in, or security against, the land. He must also publish the application for forfeiture in the Official Gazette.

Subsection 102M(3) enables the court, subject to third party claims, to declare that any right, title or interest in the land be forfeited to the Crown. The court in doing so must be satisfied that the land being forfeited is the land in respect of which the offence was committed.

Subsection 102M(4) states that the judgement declaring forfeiture operates to vest in the Crown all the estate and interest in the land. This means that the judgment serves as the conveyance to the Crown.

Section 4 Regulations made pursuant to Part VI of the Bermuda Immigration and Protection Act 1956 and consequential amendments to the Government Fees Regulations

4.01 The Government Fees Amendment Regulations 2007

The Government Fees Regulations prescribe a fee for the consideration of all applications. This is a flat fee (currently \$1,271) which is payable on application. There is no further fee or land-holding charge to be paid if:

- the land is acquired by devise, inheritance or voluntary conveyance; or
- the non-Bermudian is acquiring the land jointly with a Bermudian spouse

In all other cases, besides the application fee, a land-holding charge is levied. The land-holding charge for the issue of a licence is set in the Bermuda Immigration and Protection (Land-holding Charges) Regulations 2007, currently:

- for a house 22% of the value of the property
- for a condominium 15% of the value of the property
- for a tourist accommodation unit or fraction of a unit 15% of the value of the property
- for land of any other type (i.e. commercial land) 5% of the value of the property

4.02 The Bermuda Immigration and Protection (Licence Application) Regulations 2007

These regulations are made pursuant to paragraph (1)(a) of section 102D of the 1956 Act and set out the information to be provided to the Minister of Labour and Immigration in an application made by or on behalf of a restricted person for a licence to hold or acquire land in Bermuda.

The regulations recognize four classes of applicant:

- a restricted person who is an individual
- a restricted person who is not an individual
- a trustee, who is an individual, who is making an application on behalf of a restricted person; and
- a trustee, who is not an individual, who is making an application on behalf of a restricted person

and customizes the information needed in each case.

4.03 The Bermuda Immigration and Protection (Territorial Restrictions) Regulations 2007

These regulations are made pursuant to paragraph (1)(b) of section 102D of the 1956 Act and prescribe rules for calculating areas of land for the purposes of section 89 of the 1956 Act. The regulations set out the various formulae for calculating the land areas that are held by or on behalf of restricted persons.

Of particular importance are the following regulations:

4.03.01 No buildings or only one residential unit

Regulation 4 deals with the situation where the land is a vacant lot or there is a single residential valuation unit (i.e. a house with one land valuation assessment number). In such a case the area of land to be counted as “licensed land” is the total area of the lot.

4.03.02 More than one residential unit

Regulation 5 takes account of the case where there are: two or more houses on the lot; or a house with apartments; or condominium units that are not designated as available to non-Bermudians and there are no designated condominium units or commercial premises on the land.

The licensed land is the total area of the lot divided by the number of land valuation assessment numbers (the number of separate residential units). This provision deals primarily with the special cases of the non-Bermudian spouse of a Bermudian, a permanent resident or a residential certificate holder buying into a condominium development that is not designated for acquisition by restricted persons in general. Where that happens, the amount of licensed land associated with the non-Bermudian’s unit, is the total area of the development divided by the number of units in the development.

4.03.03 Condominium developments

Regulation 6 provides for the calculation of areas for designated condominium developments such that the entire land area of the designated condominium development is treated as licensed land at any time when any of the units is held by a non-Bermudian. The reason for this is that the developer of a designated condominium has permission to sell units to non-Bermudians, unlike those condominium developments which are not designated for foreign ownership but are nevertheless open to special minority groups of restricted persons, namely: spouses of a Bermudians; permanent residents; and residential certificate holders. The units within the development have been designated as eligible for non-Bermudian ownership, although not to the exclusion of Bermudians. For this reason, under the regulations, the entire acreage of a designated condominium development is counted as licensed land as soon as one non-Bermudian owns a unit. Therefore the approval of additional licences does not increase the area of licensed land.

4.03.04 Non-residential units

Regulation 7 provides for commercial land where there are no residential units or designated condominium units associated. The licensed land attributable to the commercial premises for which a licence exists, or is being sought, is the area of the lot of land divided by the total floor area of all the commercial property on the site multiplied by the floor area of the premises in question.

4.03.05 Mix of units

Regulation 8 deals with the situation where there is mixed usage on the same lot of land.

Residential land: the area of any licensed land attributable to a residential unit is the area of the lot of land that is attributable to all residential units on the site divided by the number of such units with separate land valuation assessment numbers. The land that is attributable to residential use is the area of the lot of land divided by the total floor area of all buildings on the lot multiplied by the total floor area of all residential units on the lot. Units in condominium developments which are not designated under the regulations as available to non-Bermudians are treated like any other residential unit.

Designated condominium: the area of licensed land in which a designated condominium unit is situated is the area of the lot of land divided by the total floor area of all buildings on the land multiplied by the total floor area of the designated condominium development which includes floor areas of the units and the common areas.

Commercial premises: the licensed land attributable to a non-residential unit (i.e. a commercial unit) is the area of the lot of land divided by the total floor area of all buildings on the land multiplied by the floor area of the premises in question.

4.03.06 Land in more than one parish

Regulation 9 provides for the distribution of licensed land between two or more parishes where the lot in question straddles parish boundaries. The area of the lot that is in a given parish must be added to the total area of licensed land for that parish.

4.04 The Bermuda Immigration and Protection (Minimum Annual Rental Values) Regulations 2007

These regulations are made pursuant to paragraph (1)(c) of section 102D of the 1956 Act and are designed to ensure that only the highest valued properties are available to restricted persons in general who are permitted to hold or acquire houses with an annual rental value (“ARV”) of or greater than \$153,000 (currently). They may also hold or acquire designated condominium units with an ARV of \$32,400 (currently). On the other hand permanent residents may hold or acquire houses with a minimum ARV of \$63,600 or greater and condominium units of any ARV. No ARV limits apply to the spouse of the owner of the land or to the child or parent of the landowner who possess Bermudian status.

At five-year intervals, the Land Valuation Department conducts a revaluation of all properties in Bermuda, for tax purposes pursuant to the Land Valuation and Tax Act 1967. At the time of the revaluation, the land policy’s minimum ARVs are adjusted to take account of the changes in ARVs in the new Valuation List.

During the years that follow a revaluation exercise, new houses are built and existing ones are renovated sufficiently to increase their ARVs above the policy minimum. Over a five-year period this “drift” can cause 50 or more houses to be added to the stock available to the non-Bermudian market.

At the time of these revaluations, the Ministry of Labour and Immigration has often taken the opportunity to reset the minimum ARV figure so that about 200 to 240 houses (the most valuable 1% of the stock of houses) are made available for the non-Bermudian market. This does not exclude such housing stock from Bermudian ownership.

These properties are at the top end of the market and are attractive only to very wealthy people who are allowed to buy them for their personal and private use. The benefits to Bermuda of allowing wealthy people to own these houses are:

- the wealth they bring to the Island
- the prestige they bring by their choice of Bermuda as their home

These factors enhance Bermuda's image as a desirable place to visit.

4.05 The Bermuda Immigration and Protection (Rental and Use) Regulations 2007

These regulations are made pursuant to paragraph (1)(c) of section 102C of the 1956 Act and make provision for the Minister to allow restricted persons to rent out their residential property under certain circumstances.

The standard licence condition shown at subsection 98(1)(c) of the 1956 Act recognises that owners may, from time to time, wish to rent out their property when travelling abroad. The granting of permission by the Minister to rent out or use for profit residential land is by way of an exception to the general rule that allows restricted persons to own residential property only for their personal and private use.

4.05.01 Houses

Restricted persons who wish to rent out a house that they hold under licence can do so:

- for up to twelve (12) months in the first instance, if:
 - they remain outside Bermuda during the period of rental; and
 - the house has an ARV that is equal to or in excess of the minimum ARV in force at the time; and
 - the restricted person who owns the property is not a resident of Bermuda.
- for up to six (6) months in any twelve (12) period if:
 - they remain outside Bermuda during the period of rental; and
 - the house has an ARV that is less than the minimum ARV in force at the time;
or
 - the owner of the house is a resident of Bermuda.

These limitations on letting a house:

- while the owner is still in Bermuda supports the fundamental philosophy that the property is for the personal and private use of the owner and letting the property must not become a business

- which has an ARV below the policy minimum underpins the logic of the policy that allows only the most valuable houses to be available to restricted persons. Where the restricted person seeks to let such a property for extended periods, it would appear that the property has become surplus to the owner's needs. The prohibition on long-term letting of such properties seeks to encourage the owner to consider whether the time is right to sell the property to a Bermudian. Conversely, if the property is not surplus to requirement, the owner must still need the property for private residential purposes of his or her household. In these circumstances it will not be necessary to let the house for more than six months in any twelve month period
- by a Bermuda resident follows from the fact that the policy requiring the owner to be off the Island when the property is rented out cannot be enforced against such a person. Further, if a person is a resident of Bermuda then there should be no need for that person to want to rent out the property for long periods. Hence the restriction on the letting of properties by such persons for a maximum period of six months in any twelve month period

The rental of property, which is owned by a restricted person, to bona fide visitors to Bermuda attracts a Government tax which is based on the hotel occupancy tax. The rental tax at present is 7.25% of the rent paid, or \$72.50, whichever is the greater and must accompany the application for permission to let. This tax is levied to eliminate unfair competition, by this type of tourist accommodation, with commercial properties such as hotels and guest houses which pay the hotel occupancy tax.

4.05.02 Apartments and condominium units

Apartments and condominiums units are seen to be a part of the residential housing stock and therefore are prohibited from being rented to tourists. Otherwise the rules are the same as for houses excluding any limitations established with regards to ARVs.

When apartments and condominium units which are:

- associated with tourist accommodation and are leased back through the manager of the guest property, the guests will pay hotel occupancy tax through the hotel management company. When such a property is let privately to tourists, the owner, or the agent will pay rental charges to the Department of Immigration. Rental charges are a percentage of the rent paid. The percentage figure is the same as that applied to the rack rate to determine the hotel occupancy tax. Currently the rental charge is 7.25% of the rent paid or \$72.50 whichever is the greater
- part of tourist accommodations and are held by way of fractional ownership, the owners may only be let their units to transient guests through the manager of the guest property

4.06 The Bermuda Immigration and Protection (Designation of Eligible Condominium Units) Regulations 2007

These regulations are made pursuant to paragraph (1)(b) of section 102C of the 1956 Act and designate condominium units that are eligible to be held or acquired by restricted persons.

Part I of the Schedule to these regulations lists eligible condominium units in completed condominium developments by:

- parish
- development name
- land valuation assessment number of each unit

Part II of the Schedule gives the total number of condominium units that are approved to become eligible units, in incomplete condominium developments by parish. When an incomplete development becomes complete, all the eligible units within it will be designated by their land valuation assessment numbers and the condominium development will be moved to Part I of the Schedule.

4.07 The Bermuda Immigration and Protection (Land-Holding Charges) Regulations 2007

These regulations are made pursuant to paragraph (1)(a) of section 102C of the 1956 Act and govern land-holding charges payable under subsection 96(2) of that Act, and in particular provide for:

- the charge to be a percentage of the value of the land in respect of land acquired by purchase. The regulation reproduces what was previously embodied in the Government Fees Regulations as a land licence fee
- different charges in different circumstances and different charges for different groups of restricted persons. Examples of different charges for different circumstances are that houses attract a fee of 22% of their value, whereas condominium units attract a fee of 15% of their value. Examples of differences in fees between different groups of restricted persons are that restricted persons in general pay the regular fee whereas the non-Bermudian spouse of a Bermudian, who is acquiring land jointly with the Bermudian spouse, pays a much lower flat fee for a licence and a nil land-holding charge
- a reduction, deferred payment or refund of land-holding charges in particular cases. As an example, this provision allows the land-holding charge to be refunded to a would-be purchaser in the case where the vendor withdraws from the sales agreement

The regulations make lawful any concession provided under section 4 of the Hotels Concession Act 2000 (“the 2000 Act”) with respect to the reduction or deferral of a land-holding charge. Without this provision, any apparent entitlement, under section 4 of the 2000 Act, to a hotel developer (as defined in section 2(1) of that Act) would have no effect.

It should be noted that concessions under the 2000 Act are to the hotel developer not to the purchaser of units in hotel developments.

The regulations address the situation where a land licence has been issued to a restricted person but that licence subsequently lapses without the land, to which the licence refers, being conveyed to the licence holder.

This situation arises because the land-holding charge must be paid in order for the licence to be issued. The land licence lapses six months after the Minister approves the land licence application by signing and dating the licence. Although the Minister has limited discretion to extend the period of validity of the licence, it can nevertheless occur that the licence lapses without the land being conveyed to the licence holder.

A restricted person in this position can apply to the Minister for a refund of the land-holding charge setting out the reasons for the application. Should the Minister support the application for the refund of the land-holding charge, the Minister is required to refer the matter to Cabinet for a decision.

The regulations provide for a restricted person who is acquiring an interest in a “fractional” unit or a “condo hotel” unit. Such units are not “residential valuation units” because all the units come under a single assessment number in the same way that hotel rooms and suites are all assessed together. It is for this reason that a separate entry has been made for these “tourist accommodations”. The land-holding charge in this case is 15% of the value of the proportional interest in the property except on first disposition by the developer when the land-holding charge is 10% of the proportional interest in the unit.

The regulations also provide for a land-holding charge of 5% of the value of the property where the land is other than a residential unit or a tourist accommodation, i.e. commercial land. This provision is necessitated by the widening of the definition of restricted person to include certain corporations and other entities that are not individuals.

Section 5 Policy

5.01 Policy governing the holding or acquiring of an interest in land in Bermuda by non-Bermudian spouses of Bermudians

5.01.01 Background

Although married to a Bermudian, the non-Bermudian spouse is still a non-Bermudian and cannot expect to be treated as a Bermudian. Nevertheless, the 1956 Act discriminates in favour of the spouse of a Bermudian compared with non-Bermudians in general. The non-Bermudian spouse of a Bermudian has a number of privileges with respect to land ownership in Bermuda, namely:

- the ability to own one property (under licence) jointly with the Bermudian spouse. Such land includes:
 - any residential land no matter what the annual rental value;
 - any condominium unit; and
 - vacant land
- in the event of a divorce, or death of the Bermudian spouse, has three years in which to obtain a licence to hold the property that was previously held jointly by the married couple
- is not subject to the territorial limits, i.e. the “2,000/400 acre rule” as set out in section 89 of the 1956 Act
- is relieved of the high land-holding charges and pays a small, flat application fee only

In other areas, also, the non-Bermudian spouse of a Bermudian enjoys certain privileges, namely:

- is allowed to work in Bermuda outside work permit control
- being the wife: has the right of abode in Bermuda under the Constitution
- being the husband: has the right of abode under the 1956 Act
- after ten years of marriage and seven years of residence in Bermuda during the marriage is eligible to apply for the grant of Bermudian status

Because of the privileges granted to the non-Bermudian spouse of a Bermudian with respect to the holding and acquisition of land, the non-Bermudian spouse of a Bermudian is in direct competition with Bermudians for land. Such direct competition is not offensive where the non-Bermudian who is married to a Bermudian is assisting in acquiring the family home. The primary objective of this policy is to protect Bermudians from undue competition when they attempt to acquire land while at the same time allowing a non-Bermudian spouse to hold an interest in one property, with the benefit of a licence, jointly with the Bermudian spouse. In this way the non-Bermudian who is married to a Bermudian is able to acquire an interest in one property i.e. a family home: any additional properties would normally be considered to be held for investment purposes. The preamble to the Bermuda Immigration and Protection Amendment Act 2007 states:

“ land in Bermuda is regarded by Bermudians as a sacred trust for their use and enjoyment”

For the purposes of Part VI of the 1956 Act, land in Bermuda is therefore not to be regarded primarily as a commodity or investment vehicle.

While non-Bermudian spouses are restricted from owning multiple properties this restriction exists for those individuals only until such time as they are granted Bermudian status. Should a non-Bermudian spouse not wish to obtain Bermudian status then that person should not expect to be treated like a Bermudian.

Where a non-Bermudian spouse provides financial assistance to the Bermudian spouse to acquire land, that non-Bermudian spouse acquires an interest in the property. The Bermudian automatically becomes the trustee of the non-Bermudian spouse's equity interest in the land. That interest is a real one and Part VI of the 1956 Act requires the Bermudian to obtain a licence as trustee, even though the non-Bermudian spouse's name does not appear on the deed of conveyance. The rule that limits a non-Bermudian to one parcel of licensed land, restricts to a single property the amount of land in which a non-Bermudian spouse can have an interest.

Many ordinary Bermudians struggle a lifetime to acquire one property and it would seem unjust to allow non-Bermudian spouses to acquire multiple properties and deprive Bermudians of even the meagre opportunity they have to acquire their first "piece of the rock".

With respect to any alleged discrimination against the Bermudian spouse of a non-Bermudian, there is no discrimination. Bermudians are free to acquire any number of properties in Bermuda provided they use their own resources to purchase them and do not rely on the wealth of their non-Bermudian spouses.

5.01.02 Policy Statement

In the case of a Bermudian married to a non-Bermudian, the Minister will issue a licence to the Bermudian for each parcel of land which that person held or acquired prior to 22 June 2007 where, by reason of the circumstances, the Bermudian became a constructive trustee for the non-Bermudian spouse's equitable interest in the land ("constructive trustee").

The Bermudian spouse, as constructive trustee, has three years from the 22 June 2007 to obtain a licence for each of the properties acquired before 22 June 2007. At the end of the three-year grace period, Bermudian spouses, who are constructive trustees, must have complied with Part VI of the 1956 Act.

However, from 22 June 2007, the Bermudian spouse as constructive trustee or the non-Bermudian spouse, who wishes to acquire or hold land as joint tenants with the Bermudian spouse, may obtain a licence for only one property.

Notwithstanding the stated policy, should a Bermudian spouse wish to acquire land on or after the 22 June 2007, in circumstances where the Bermudian would become a constructive trustee, and the Bermudian satisfies the Minister that he will suffer hardship if he cannot hold or acquire the land, then the Minister will consider granting an additional licence.

Subsection 98(2) permits the Minister to impose any conditions on a licence that he deems fit.

Note: Where a married couple is purchasing a home, it is common practice for lenders to require both spouses to have their names on the mortgage document even if the land is to be in the name

of only one spouse. In such cases and where one of the spouses is non-Bermudian, the Bermudian spouse will, under Part VI of the 1956 Act, be a constructive trustee for the non-Bermudian spouse's equitable interest in the land ("constructive trustee"). The same is true where the non-Bermudian spouse provides financial assistance to the Bermudian spouse to acquire or hold land in Bermuda. As a result, when the new Part VI came into effect, Bermudian spouses who are constructive trustees require licences as trustees to hold or acquire the land.

Before 22 June 2007, Part VI of the 1956 Act did not have a definition of trustee so that only formal trustees were addressed in that Part of the 1956 Act.

From 22 June 2007, as has been, and still is, the general case, policy will continue to limit a non-Bermudian spouse to one property and may set conditions on the disposal of the property. In this context, Lloyd G. Barnett, who is an expert on constitutional matters, when consulting on the drafting of Part VI of the Bermuda Immigration and Protection Amendment Act 2007, has advised as follows:

"In such cases the questions which may arise relate to the constitutional protection of the right of property and against discriminatory treatment. The protective provisions of the Constitution with respect to property relate to the deprivation or compulsory acquisition or taking possession of property and not to preventing the acquisition of property. Accordingly it is only in relation to the impact of the proposed legislation on existing property rights that the fundamental right to the protection of property becomes relevant."

In summary the policy provides:

- for the issuance of a licence to the Bermudian spouse, as a constructive trustee, with respect to each property that the Bermudian acquired before 22 June 2007; and
- from 22 June 2007, for:
 - the non-Bermudian spouse of a Bermudian to acquire or hold, directly or indirectly through their Bermudian spouse, as constructive trustee, only one property under licence; and
 - the Minister, in cases of hardship, to consider applications that would allow a Bermudian spouse, as constructive trustee, to hold more than one property under licence

5.02 Tourist accommodation condominium policy

For a development to be classified as bona fide tourist accommodation, all units at the development must meet that criterion either in the form of traditional hotel accommodation as defined in section 1 of the Hotels (Licensing and Control) Act 1969 **or** in the form of units to be held under fractional ownership **or** under the condominium hotel model **or** under the hotel residence model.

The policies for each of these types of tourist accommodation are detailed below.

5.02.01 Policy on fractionally owned tourist accommodation

For ease of reference, fractionally owned tourist accommodations will be referred to here as fractional condominiums. The criteria for bona fide fractional ownership of fractional condominiums are:

1. All units in a fractional condominium development must be sold on a fractional basis by dividing each unit into equal fractions which shall be acquired by each owner on the basis of a conveyance.
2. The tourist development that contains the fractional condominium development must be of such a scale that it is fully serviced. The development will include ancillary buildings and uses typical of a traditional hotel such as restaurants, reception office and housekeeping buildings. This criterion limits fractional condominiums to bona fide tourist developments.
3. No one person shall hold an entire legal estate in a unit other than the development company, which may hold either the entire legal estate or any unsold fractions in a unit pending their sale, provided that any such units or fractions in the possession of the development company may only be used by the development company [or any property management company which may be set up by the development company to manage the development] for the use of paying transient guests and not let as residential accommodation.
4. The form of the conveyance that will operate to transfer the fractions must be approved by the Minister of Labour and Immigration [“the Minister”] before any fractions are offered for sale whether by the development company or by a subsequent owner. No other form of conveyance may be used without the Minister’s prior written approval.
5. There must be at least four (4) fractions in each unit.
6. The licensed owner of a fraction can occupy a fractional condominium unit for no more than a 30-day length of stay, with total annual use of no more than 90 days. The manager of each property is required to make a timely report to the Chief Immigration Officer of any stay greater than three weeks.
7. There must be a defined reservation schedule governing the use of the units in the development.
8. An owner of a fraction will contract with the property management company:
 - (a) to manage the unit for the use of paying transient guests when the owner does not use all of his allocated time;
 - (b) to share the proceeds from the use of the unit by paying transient guests; and
 - (c) to be the sole agent to market, promote, advertise and manage the fraction for the use by paying transient guests.

Schedule

The following are designated as fractionally owned tourist accommodation units that are eligible to be held or acquired by restricted persons, provided the number of units does not exceed the maximum number of units for that development as indicated below:

Parish: Paget

Development: Newstead

Number of Eligible units: 46

Parish: Hamilton

Development: Tucker's Point Club — Golf Villas, Private Residence Club

Number of Eligible units: 20

Parish: Hamilton

Development: Tucker's Point Club — Harbour Court Residence Club

Number of Eligible units: 14

5.02.02 Policy on tourist accommodation under the condominium hotel model

The criteria for a bona fide condominium hotel are:

1. The tourist development that contains the condominium hotel must be of such a scale that it is fully serviced. The development will include ancillary buildings and uses typical of a traditional hotel, such as restaurants, reception office and housekeeping buildings. This criterion limits condominium hotels to bona fide tourist developments.
2. An individual shall hold an entire legal estate in a unit which comprises a hotel suite:
 - (a) Any such unit in the possession of the development company may only be used by the development company [or any property management company set up by the development company to manage the development] for the use of paying, transient guests and not let as residential accommodation; and
 - (b) All units must be sold to individuals who acquire them on the basis of a conveyance.
3. The form of the conveyance that will operate to transfer the units must be approved by the Minister before any units are offered for sale, whether by the development company or by a subsequent owner. No other form of conveyance may be used without the Minister's prior written approval.
4. The units are part of the hotel's room inventory and are managed by the hotel.
5. The owner of a unit will enter into a contractual agreement with the property management company:

- (a) for limited access to the unit by the owner;
- (b) to manage the unit for the use of paying transient guests;
- (c) to share the upkeep expenses of the unit and the revenue from the use of the unit by paying transient guests; and
- (d) to be the sole agent to market, promote, advertise and manage the unit for the use by paying transient guests.

Schedule

The following are designated as condominium hotel tourist accommodation units that are eligible to be held or acquired by restricted persons, provided the number of units does not exceed the maximum number of units for that development as indicated below:

Parish: Hamilton

Development: Tucker's Point Club — Condominium Hotel

Number of units: 65

5.02.03 Policy on tourist accommodation under the hotel residence model

The operation of a hotel residence is similar to that of a condominium hotel, except that it is generally more luxurious than a condominium hotel unit. Criteria for a bona fide hotel residence are:

1. The tourist development that contains the hotel residence must be of such a scale that it is fully serviced. The development will include ancillary buildings and uses typical of a traditional hotel such as restaurants, reception office and housekeeping buildings. This criterion limits hotel residences to bona fide tourist developments.
2. An individual shall hold an entire legal estate in a hotel residence.
3. All hotel residences must be sold to individuals who acquire them on the basis of a conveyance.
4. The form of the conveyance that will operate to transfer the units must be approved by the Minister before any units are offered for sale, whether by the development company or by a subsequent owner. No other form of conveyance may be used without the Minister's prior written approval.
5. It is expected that the property management company will market hotel residences to high net-worth individuals who are most likely to want to use their hotel residence for a relatively short period during the year and to give incentives to such prospective owners to have their hotel residences used as part of the hotel inventory for paying transient guests when the owners are not in residence.
6. When a prospective or existing owner of a hotel residence intends to place his unit in the hotel inventory when he is not in residence, he will enter into a contractual agreement with the property management company:

- (a) to manage the residence for the use of paying transient guests when the owner is not occupying the hotel residence;
 - (b) to share the upkeep expenses of the hotel residence and the revenue from the use of it by paying transient guests;
 - (c) to be the sole agent to market, promote, advertise and manage the residence for the use by paying transient guests when the owner is not in residence; and
 - (d) to confirm that persons, who are neither the owners nor paying transient guests of the property management company, are permitted to occupy a hotel residence only when the owner is also in residence.
7. Where a prospective owner applies to the Minister for a licence to acquire or hold a hotel residence, he will be required to indicate whether or not he intends to place the hotel residence in the hotel inventory.
 8. Where the prospective owner indicates that he intends to place the residence in the hotel inventory when he is not in residence, the land-holding charge will be calculated as if the hotel residence were a condominium unit and will be subject to the lower fee [currently 15% of the value of the property] and to any applicable relief under a hotels concession order.
 9. Where the prospective owner indicates that he wishes to hold the hotel residence solely as a private residence then the land-holding charge will be calculated on the basis that the unit is a private residence exclusively and be subject to the higher land-holding charge [currently 22% of the value of the property]. The property will not be eligible for any relief under a hotels concession order.
 10. Where an owner of a hotel residence wishes to change the status of the residence with respect to its being part of the hotel inventory or not, the owner will be required to apply to the Minister for an amended land licence.
 11. Where the owner of a hotel residence opts out of an agreement to place his residence in the hotel inventory, upon the issuance of an amended licence, he will be required to pay back to Government any relief he received, under a hotels concession order and to pay the difference between the lower land-holding charge that was paid when the initial land licence was issued and the higher land-holding charge that is applicable for a private residence. The latter land-holding charge is calculated on the value of the hotel residence at the date of the amended licence.
 12. Where the owner of a hotel residence contracts to place his property in the hotel inventory after having held it under licence as a private residence, the owner is not eligible for any relief under a hotels concession order or for a partial rebate of the land-holding charge.

Appendix Transitional provisions pursuant to Part II of the Bermuda Immigration and Protection Amendment Act 2007

For the purposes of the following guidance notes, all references to sections and subsections should be taken to be references to provisions in the Bermuda Immigration and Protection Amendment Act 2007 unless otherwise stated.

A.01 Deferral of requirement to obtain a licence

Section 14 provides for deferral of the requirement to obtain a licence in respect of land held on transition day, namely 22 June 2007.

Under subsection (1) the requirement for a licence is deferred for a period of three years from 22 June 2007 if the land was acquired by the person without the issue of a licence under the former Part VI, or any previous Act and the person was not a restricted person under the former Part VI or any previous Act. This gives a person, who lawfully held land up to the 22 June 2007, three years in which to apply for a licence or dispose of the land. Without this provision such a person would be in contravention of the 1956 Act as of 22 June 2007.

Under subsection (2) a Commonwealth citizen who on 22 June 2007 held land that had been acquired:

- by devise or inheritance
- by a judgement of foreclosure, or
- as a mortgagee in possession

is entitled to a three-year deferral from 22 June 2007 even though the person was a restricted person before 22 June 2007.

Until the late 1980s, Commonwealth citizens who acquired land by one of the three paths listed under subsection (2) did not require a licence under the 1956 Act. As there is now no distinction between non-Bermudians who are Commonwealth citizens and those who are not, Part VI treats them equally. However subsection (2) is required to allow Commonwealth citizens in this position to be saved from being in breach of the law through no fault of their own.

Under subsection (3) a restricted person under the former Part VI of the 1956 Act, who had begun holding land in accordance with a deferral which began before 22 June 2007, in circumstances described in subsection (2), is allowed to continue that deferral period as if the provisions of the former Part VI continued to remain in force. The requirement to have disposed of the land, or to have acquired a licence under the new Part VI, does not apply until the deferral period under the former Part VI expires. In these circumstances where a restricted person is already in a deferral period, the consequence is that such person must apply for and obtain a licence or dispose of the land before the expiry of that deferral period. This means that the three year transition period provided for by section 14 does not apply.

A.02 Entitlement to licence

Section 15 provides an entitlement to a licence for certain persons who hold land on the 22 June 2007.

Subsection (1) makes it mandatory for the Minister to issue a licence to a person, who applies during the deferral period, in respect of land acquired before 22 June 2007, where the Minister is satisfied that the person is entitled to a deferral under subsection 14(1) or (2) namely:

- held land without a licence and was not an alien or a restricted person before 22 June 2007, or
- is a Commonwealth citizen who, although being a restricted person, had acquired land lawfully without requiring a licence, either: by devise or inheritance; by a judgment of foreclosure; or as a mortgagee in possession

Subsection (2) gives the Minister discretion to issue a licence to a person referred to in subsection 14(3), namely: a Commonwealth citizen who was enjoying a deferral under the former Part VI.

Subsection (3) requires the Minister to issue a licence to a corporation who applied for one within the three-year deferral period following 22 June 2007. There is a proviso that the corporation acquired the land for a specific purpose provided for under another Act e.g. the Companies Act 1981 or a private Act, and the corporation continues to hold the land exclusively for that purpose on the date of application. This provision applies whether or not the corporation is in compliance with any requirement of the former Part VI. The logic behind this provision is that, where a corporation was given permission to hold or acquire land for a specific purpose and the corporation is still holding the land for the same purpose, then that permission ought not to be disturbed. Therefore the corporation is entitled to a licence to continue to hold the land.

Subsection (4) permits the Minister to refuse to issue a licence to a corporation who applied for one within the three-year deferral period following 22 June 2007 where the corporation acquired the land for a specific purpose provided for under another Act e.g. the Companies Act 1981 or a private Act, but the purpose for which the land was acquired is different in whole or in part from the purpose for which the corporation now holds the land on the date of application or if the members of the corporation have changed. The reasoning behind this provision is that where a corporation held or acquired land in Bermuda for a specific purpose but is no longer using it for that purpose, then the corporation cannot expect to be granted a licence to hold the land for a purpose different from the original one.

Subsection (5) makes provision for the new Part VI to apply to licences issued under this section except that the restrictive provisions do not apply, namely:

- section 89 of the 1956 Act – Territorial restrictions
- section 90 of the 1956 Act – Restriction on acquiring undeveloped land
- section 91 of the 1956 Act – Restriction on acquiring residential valuation units
- section 92 of the 1956 Act – Restriction on acquiring condominium units
- section 93 of the 1956 Act – Restriction on acquiring subdivided land
- section 94 of the 1956 Act – Restriction on acquiring land by devise or inheritance
- section 95 of the 1956 Act – Land trust for infirm person, and
- subsection 98(1) of the 1956 Act – The standard licence conditions

The reason for issuing licences that are not subject to the usual restrictions is so that the enjoyment of the land that was acquired under a permission granted pursuant to another Act in the past should not now be encumbered by new restrictions.

Subsection (6) waives the application fee, the land-holding charge and the registration fee that would otherwise apply under the new Part VI for licence applications made under this section. Again, the person either did not need permission to hold or acquire land, or had been granted such permission, in the past. Such a person should not now have to pay fees and charges where the new requirement for a land licence has come about through no action of that person.

A.03 Applications made before 22 June 2007

Subsection 17(2) prohibits the Minister from approving applications or issuing licences under the new Part VI for three years after the 22 June 2007 except where an application is made under section 15 (Persons entitled to a licence for land held on 22 June 2007; or unless:

- (a) the Minister had approved the application before 22 June 2007;
- (b) the land in question was already licensed land;
- (c) the application is made by, or in respect of, a restricted person with close Bermudian connections, namely:
 - (i) the spouse of the owner of the land where the owner is Bermudian or holds the land under licence. Where the owner is Bermudian, the applicant is part of a Bermudian family which should not be disadvantaged; where the owner is a non-Bermudian the land is already licensed so that no additional acreage has to be counted;
 - (ii) the child of the Bermudian owner of the land. Similarly, the applicant is part of a Bermudian family which should not be disadvantaged;
 - (iii) a parent of the Bermudian owner of the land. Again, the applicant is part of a Bermudian family; or
 - (iv) a person to whom the Minister could have granted a licence under (i) to (iii) within the three years ending with the date of application. This preserves the privileges of (i) to (iii) for three years after the relationships there have ended either through divorce or death, giving potential applicants a period of grace in which to exercise their privileges;
- (d) the licence application is for a condominium unit that was designated under policy before the 22 June 2007, or under regulations after that date, as being available to restricted persons; and the unit is being transferred from the developer for the first time; and
- (e) the licence application is to acquire an interest in tourist accommodation directly from the developer. The interest in the land must not have been transferred to any other person. Tourist accommodation includes fractionally owned units, condo-hotel units or hotel residences which are part of a tourist resort.

A.04 Validation of licences issued prior to 22 June 2007

Section 18 provides for the validation of licences issued prior to 22 June 2007.

Subsection (1) deems licences, which were issued under the former Part VI, to be licences issued under the new Part VI provided that the licences are validated by the Registrar-General before 22 June 2010. Given the proviso, the following licences are to be deemed as licences under the new Part VI:

- (a) a licence which was issued under the former Part VI and which was in effect immediately before 22 June 2007; and
- (b) a licence issued under Acts which preceded the former Part VI and was treated as a licence issued under the former Part VI by reason of old section 102 of the 1956 Act.

This provision ensures that all previously issued licences which are still in effect are recognised as valid licences under the new legislation.

Subsection (2) requires the Registrar-General to validate any licence referred to in subsection (1) provided the following documents are deposited with the Registrar-General:

- a copy of the deed to the land
- a copy of the land licence, and
- a written summary of changes made to the information shown on the licence

It is important that existing licences are validated so that a verifiable count of all land held under licence can be made and a database of all licensed land can be created and monitored.

Subsection (3) waives the standard conditions under the new Part VI so that the old licence continues in effect unchanged.

Subsection (4) states that if a licence that is to be deemed to be a licence under the new Part VI is not validated on or before 21 June 2010, then it will still be deemed to be a licence under the new Part VI, but the land held under a licence that has not been validated is not licensed land for the purpose of section 17 (Applications made before the 22 June 2007 or the expiry of the deferral period) or section 89 (Territorial restrictions) of the new Part VI of the 1956 Act.

This means that the licence is still valid, but that the land is not to be counted as licensed land for the purposes of the territorial limits nor can it be dealt with in the real estate market as licensed land.

A.05 Register to be kept

Section 19 provides for registration and the keeping of a register.

Subsection (1) declares that registration under section 88 of the former Part VI of the 1956 Act is deemed to be a registration under section 102 of the new Part VI of the 1956 Act, provided that the registration under the former Part VI is validated before 22 June 2010.

Subsection (2) sets out the means through which the Registrar-General shall validate a registration made under the former Part VI, namely when the person who holds the land, whether a restricted person or a trustee holding for a restricted person, deposits with the Registrar-General:

- (a) a copy of the licence;
- (b) copies of other documents that provide evidence of the person's interest or estate in the land as prescribed in the regulations; and
- (c) information concerning any changes to details provided at the time of the original registration.

Subsection (3) deems registrations under section 89 of the former Part VI of the 1956 Act (where a Bermudian acquires licensed land) and under section 90 of the former Part VI of the 1956 Act (where a restricted person who holds licensed land obtains Bermudian status) to be registrations under section 102 of the new Part VI. This brings registrations under the former Part VI of the 1956 Act into the legislation.

The acreage of land held by a restricted person (licensed land) that is subsequently held or acquired by a non-restricted person must be subtracted from the total acreage of licensed land. Hence the need to have such change of ownership reported in order to keep an accurate count of the acreage of licensed land.

Subsection (4) creates continuity between the register maintained under section 88 of the former Part VI of the 1956 Act and the register maintained under section 102A of the new Part VI of the 1956 Act.

A.06 Reports to be made by banks, deposit companies and others

The requirement under section 20, pursuant to section 102B of the new Part VI of the 1956 Act, that banks, deposit companies and others report on transactions and suspected schemes does not apply to transactions and schemes that have been completed before 25 May 2007 when the Bill received Royal assent, provided that no part or result of the transaction or scheme continues in effect after that date.

This provision relieves banks, deposit companies and others from having to report historical transactions and schemes whose effects are spent.

A.07 Moratorium on criminal proceedings for three year period

Section 21 prevents criminal proceedings in respect of indictable offences from being prosecuted until after 21 June 2010, where the land in question was acquired before 22 June 2007 and the offence continues after 21 June 2010.

This restriction on prosecutions gives persons who were not committing offences under the old Part VI and would become liable to prosecution under the new Part VI, three years' grace in which to come into compliance with the law. This moratorium does not apply to new offences committed on or after 22 June 2007.