

PERFORMANCE SECURITY COMMERCIAL AND INDUSTRIAL LEASES ON COMMISSIONER'S LAND

BACKGROUNDER

The Department of Municipal and Community Affairs (MACA) has been working over the past few years to strengthen its land management program. One initiative in particular is the February 2010 amendment to the *Commissioner's Land Act* (CLA) to make the requirement for Performance Security mandatory on all leases of Commissioner's Land issued for commercial and/or industrial use.

In addition to the amendment to the CLA, the *CLA Regulations* have been updated to provide guidance to land administrators and the public on the application of Performance Security. The amendments to the CLA and the *CLA Regulations* came into force on February 15, 2011.

QUESTIONS AND ANSWERS

What is Performance Security?

Performance Security is a financial instrument or guarantee issued by banks or other lending institutions such as irrevocable letters of credit or performance bonds that MACA can use to reclaim its land if a leaseholder doesn't leave the land in a satisfactory condition either after:

- A catastrophic environmental event; or
- After abandoning a commercial or industrial undertaking; or
- At the termination of the lease.

Leaseholders have to provide an adequate level of Performance Security before entering into leases on Commissioner's Land for commercial or industrial developments. This will provide protection to the Government of the Northwest Territories by having money available if leaseholders do not adequately reclaim the land to a satisfactory condition when they no longer require the use of the land. This will negate or mitigate the use of public funds to restore the land.

What is a commercial or an industrial use?

Any type of undertaking on Commissioner's Land where a lease has been issued that is not for recreational use (seasonal cabin) and not for residential use (permanent house) is considered a commercial or industrial use. Examples of typical commercial or industrial uses are as follows:

- Convenience store;
- Gas station;

- Machine shop or automotive repair garage;
- Restaurant;
- Clothing store;
- Mineral and hydrocarbon extraction or processing.

Why is Performance Security only required for commercial or industrial leases?

There are two reasons. First, the use of Commissioner's Land for commercial and industrial purposes creates a much greater risk that the land will be damaged over the course of the use. The greater the risk, the more it will cost to reclaim the land. Second, commercial and industrial undertakings are profit-oriented and must not rely on public funds to fulfill their environmental stewardship responsibilities.

Will I be required to provide Performance Security if I already have a commercial or industrial lease with MACA?

No. Commercial or industrial leases that are currently in place are not subject to the requirement for Performance Security. However, if you want to renew or apply for a new lease for commercial or industrial use, then you will be required to post Performance Security.

If I already have a commercial/industrial lease with MACA and I want to sell my business, can I assign my leasehold interest and will the new owner have to provide Performance Security?

Commercial and industrial leases can't be assigned because the Performance Security attached to a lease is not transferrable between lessees. The subsequent owner will have to apply for a new lease and will be required to post Performance Security.

As the existing leaseholder you will need to make arrangements that are satisfactory to MACA for the new leaseholder to accept the land in the condition it is in on the date your lease terminates (the closing day of the sale). If satisfactory arrangements have not been made, then you will be required to reclaim the land to a condition that is satisfactory to MACA.

The existing leaseholder's Performance Security will not be returned until satisfactory arrangements have been made. MACA will not enter into a lease with the new leaseholder until new Performance Security has been provided.

How much Performance Security will be required?

The amount of Performance Security will be different for each commercial or industrial undertaking. MACA has adopted a formula to calculate the amount of Performance Security. It will be calculated on the basis of five factors:

- The total area of land that will be disturbed by the development;

- The number and types of structures that are to be placed on the land;
- The presence of fuel or hazardous materials that will be used or stored on the land;
- The physical characteristics of the land (i.e. rocky, swampy, or proximity to a water body, etc.);
- The lessee's past performance and compliance with regulatory and/or contractual commitments.

Depending on the size and scope of the development, a leaseholder may have to provide a certified statement of the costs to reclaim the land from a professional engineer. If the size and scope of the development generates a Performance Security amount of less than \$1,000, then Performance Security will not be required.

What types of Performance Security will be accepted?

MACA can accept either a performance bond or an irrevocable letter of credit. Other forms of security may be considered in the future to provide flexibility for commercial and industrial leaseholders. Cash or cheques will not be accepted.

For what period of time will MACA hold the Performance Security, and will MACA pay interest on the security being held?

The Performance Security must be in place over the duration of the lease. It must be supplied at the time the lease is executed. Performance bonds and irrevocable letters of credit are not cash, and therefore interest will not be applied to the amount of the Performance Security.

Will the amount of Performance Security required ever change over the term of the lease?

It might. The amount of Performance Security will be reviewed every five years and may change as a result. The amount of Performance Security might also change if:

- Additional or new development takes place on the land;
- The development is significantly different that what is described in the lease;
- Some of the land is restored or progressively reclaimed; or
- There is a change in the type or intensity of the commercial or industrial undertaking.

What can I do if I can't afford to provide the amount of Performance Security required?

Leases cannot be issued unless Performance Security has been provided in the amounts required. However, if you want to reduce your costs you may want to consider the following:

- Reducing the area of land to be disturbed by the development;
- Adjusting or modifying the type of operation so the potential impact on the land is reduced or minimized;
- Adjusting or modifying the size and type of improvements or structures to be placed on the land; or
- Limiting the quantity of hazardous materials that are used or stored on the land.

Can the amount of Performance Security be changed if I disagree with it?

MACA will advise its applicants, in writing, of how the Performance Security amount was calculated. If after working with the applicant there is still disagreement over the amount of Performance Security, then the applicant can appeal the decision on the Performance Security amount as described in s.34 of the *CLA Regulations*.

If I decide to purchase the land rather than lease it is Performance Security still required?

No. Performance Security is only required for leases of Commissioner's Land. If the land is purchased it ceases to be Commissioner's Land and the CLA and the *CLA Regulations* do not apply.

If the land is not contaminated at the end of the lease do I still have to reclaim it?

Yes. Performance Security is required to ensure the land is reclaimed to a condition satisfactory to MACA or as close to the condition it was in before it was leased. Even if there are no environmental issues with the land, you are still required to:

- Remove the buildings and improvements from the land;
- Replant vegetation;
- Fill in excavated areas and level the area used; and
- Clear off garbage and debris.

Can I use the funds held in the Performance Security to reclaim the land?

No. Those funds are held for MACA to use in case leaseholders don't reclaim the land. Leaseholders will have to fund the reclamation work as a separate expense to their businesses. If leaseholders take steps during the term of the lease to reclaim the land that is no longer required for their operations, then MACA can reduce the funds held under the Performance Security. Reductions to the amount of Performance Security will be dealt with on a case-by-case basis.

When do I get my Performance Security back?

As long as the land has been reclaimed to a satisfactory condition the Performance Security, or any part of it that is remaining after the reclamation will be returned to you in full. If the land hasn't been reclaimed then MACA may restore the land using the funds provided for in the Performance Security. If the cost to MACA to reclaim the land is less than the amount of the Performance Security then the balance will be returned to the leaseholder. If the cost to MACA to reclaim the land is more than the amount of the Performance Security then MACA will take legal action to recover the outstanding amount from the lessee.