

Property Update

November 2009

Lessons from the Boom and the Bust

The recent global financial crisis has highlighted the need for property developers to properly plan and implement their projects.

Proper planning

There have been many instances where poor planning of the project has led to structural issues that have limited the developer's options as economic circumstances have changed. Most of these issues centre around risk management strategies to allow developers to deal with unforeseen events such as the global financial crisis. These strategies include the flexible

staging of the project and covering off on risk using various insurance and other products.

These strategies are best dealt with by having a very good team comprising appropriate advisors to plan the project. Such a team should consist of a planner, a property lawyer, a tax advisor and a finance advisor. Sadly, many developers did not do this in the boom and have shed many tears in the global financial crisis.

Obviously, funding to pay for this advice is usually an issue. However, this can be overcome

if these professional advisors are prepared to be flexible in their costing arrangements.

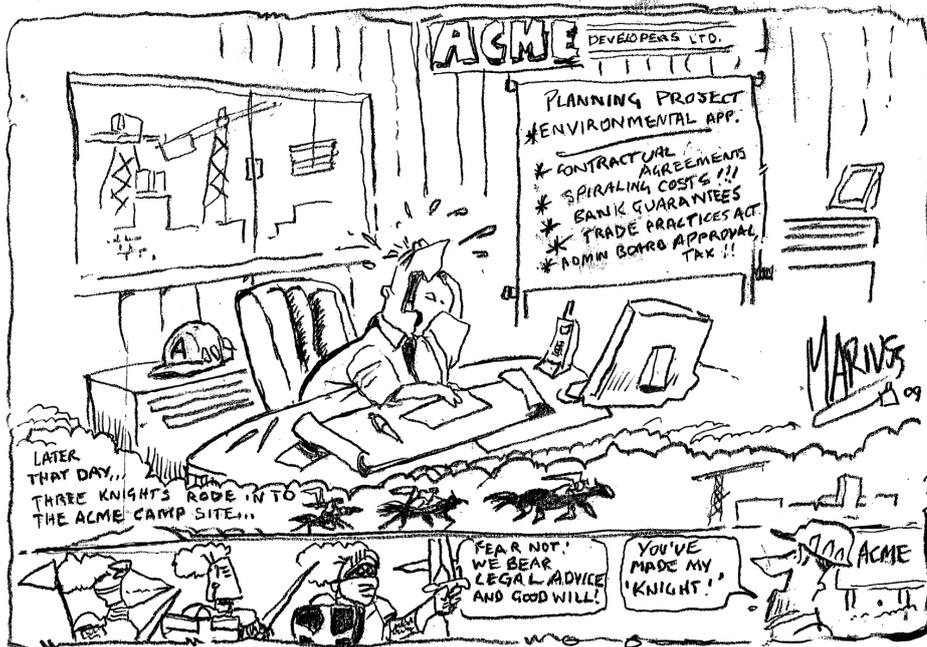
Approvals

Most, if not all planning and environmental approvals are conditional. In the recent downturn developers need to complete their projects or obtain approval for their projects as expeditiously as possible.

One of the many stumbling blocks to achieving completion has been the ability to comply with conditions of approval. Alternatively, there have been difficulties in convincing the relevant local and State authorities that compliance with the conditions has been achieved. Such issues have resulted in delay or a requirement to lodge an application with the State Administrative Tribunal.

There is often a wide gap between what the developer believes is required and what the relevant government authority believes is required to satisfy a condition. It must be remembered that a condition is generally not valid if it is vague or ambiguous. A condition is also generally invalid if it is unreasonable or does not relate to your project.

When a conditional approval is received, a close examination of the conditions is required. If there is doubt as to what is required, the reconsideration process can be used to rewrite the condition to make it clear to all parties what action is required.



About Lavan Legal:

Lavan Legal is the largest independently owned law firm in Western Australia, comprising of over 200 staff which includes 21 partners.

The Property Services Group, a division of Lavan Legal, pride themselves on being the leaders in property and planning law. Advising on all aspects of property acquisition, disposals and developments including syndications, we have one of the few accredited leasing experts available to clients who has significant Australia-wide experience on very large and complicated leasing developments.

At Lavan Legal we believe in building long lasting relationships with our clients. We provide the best legal advice and service and continue to improve our understanding of our clients' needs, staff, history, motivations and directions. We provide clients with regular industry insights, updates on changing technology and business strategies in an effort to take the relationship to a more successful position. We are committed to increased efficiency through continuous innovation and process improvement.

Making assumptions can delay the finalisation of your project.

During the boom it appears that developers were content to perform work that may not technically be their responsibility. During the bust the position changed. It is, however, very difficult to unscramble the egg. Make sure you are happy to comply with a condition that may be outside the scope of your development.

Environmental issues are sometimes complicated and can cause considerable headaches. For some it was a case of 'out of sight, out of mind'. The area of environmental issues is the one area of a project that has the potential to take a lengthy period of time to resolve.

Developers should address these issues early in the project and take a proactive approach.

Get your contracts right

The sale contracts for the offtake of the end project of the property development are a key component of a property development project - both in terms of the funding for the project and the profit for the project.

In many cases, too little attention is paid to the construction of the contract for the project.

The standard REIWA offer and acceptance document using the General Conditions are often utilised for these projects however this is generally unsuitable for large developments. For example, General Condition 13 imposes deadlines for obtaining planning approvals and registering the strata plan and other things that are inappropriate for most off the plan developments. In those circumstances, General Condition 13 should be deleted and replaced with a more suitable deadline provision.

Similarly, General Condition 9 contains a range of warranties and representations from the seller which are generally unsuitable for off the plan developments. Once again, in those

circumstances, General Condition 9 should be deleted and replaced with a more appropriate representations and warranties clause.

It is important to ensure that all of the statutory disclosure (including any disclosure under the *Strata Titles Act*, *Home Building Contracts Act* and the *Contaminated Sites Act*) is included in the contract. Failure to comply with these disclosure requirements can often entitle buyers to terminate their contracts. Developers should also be aware of any ongoing disclosure obligations (such as in relation to any 'notifiable variations' under the *Strata Titles Act*).

Care should be taken when accepting deposit bonds or bank guarantees as security for the deposit. For example, deposit bonds and bank guarantees often have expiry dates after which they will no longer be enforceable. Also, these documents (but more commonly deposit bonds) may contain strict requirements for them to be called on.

Care needs to be taken to ensure that appropriate personal guarantees are obtained in certain circumstances (such as where the buyer is a company or trust or where the buyer has not paid a large deposit).

Appropriate deposits are essential as, in many cases, the forfeiture of the deposit will be the seller's only practical remedy against the buyer for breach.

Where small companies sign up to purchase properties, guarantees should be obtained from the directors of that company.

Use the right selling agent

The real estate agent for the project should understand the disclosure requirements relevant to the contract for the project.

The agent must exercise care when making representations to buyers (such as trading figures or amenities), as buyers may hold the

seller accountable for these representations in the future.

Manage your contracts properly

Care needs to be taken to ensure that all deadlines for the obtaining of approvals and the issue of titles and other matters are strictly adhered to. To the extent notices are required to be given to buyers, then they should be given on time and in accordance with the notice requirements in the contract.

Care should be taken to ensure that any deposit bonds or bank guarantees which have expiry dates are renewed well in advance (ideally, the contract should require the buyer to provide a deposit bond or bank guarantee that either has no expiry date or which expires well after the intended settlement date).

Care should be taken to ensure that variations are kept to a minimum and that any variations are notified to the buyers under the *Strata Titles Act* in an appropriate manner.

Think before you speak

All statements about the development to prospective purchasers must be carefully considered. The *Trade Practices Act* means that incorrect information can lead to significant and unwanted consequences. There are currently a number of actions before the courts involving misrepresentation, misleading and deceptive conduct and unconscionable conduct in relation to property development.

Clearly there are lessons to be learnt from the boom and the bust. These lessons centre around obtaining good advice, undertaking good planning of your project and careful management of the implementation of your project. Lavan Legal can be an invaluable resource in all of these aspects of your project.

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Your personal details

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