

## Local Governments Undertaking or Facilitating Major Real Estate Projects

A growing number of Local Governments in Western Australia are undertaking or facilitating major real estate development projects with private sector proponents.

### Real Estate Update

One of the reasons for this trend has been the ability of Local Governments to develop key precincts despite the current financial climate in which it is difficult for developers to obtain funding for large scale developments. Some Local Governments have pursued development opportunities by contributing land and other financial incentives in exchange for the proponent delivering a built form consistent with the requirements of the Local Government.

The benefits available to Local Governments as a result of these projects may include:

- urban renewal and the revitalisation of landmark areas;
- increased economic activity within the precinct (through increased residential, retail or commercial activity);
- an increase in the rates base of the Local Government;
- the realisation of an income source other than rates (e.g. rental income) for the Local Government; and
- an opportunity to take advantage of the State Government's current policy to decentralise government office accommodation.

In our experience, these projects usually begin with the Local Government and the proponent entering into a Memorandum of Understanding, which sets out a process the parties will follow when assessing the merits of the project, but does not legally bind either party to proceed with the project. Often private developers are unaware of the *Local Government Act 1995* (WA) requirements applicable to a sizable real estate transaction.

#### Who does this affect?

Local governments and real estate project developers.

#### Article Highlights

- Local governments have the ability to develop key precincts in times when developers struggle to obtain funding.
- Consideration should be given to financial capacity, motives and objectives of the developer when selecting a transaction structure.
- Local governments and developers should agree on structure and risk allocation at an early stage.



It is important that the Local Government and the proponent agree on the transaction structure at an early stage because this will ultimately determine how risk is allocated between the Local Government and the developer. A number of possible transaction structures are available for development projects, including:

- a leasehold model (where the Local Government grants a long term lease to the private sector proponent but retains ownership of the land);
- a sale and development agreement model (where the Local Government transfers ownership (or part ownership) in the land to the private sector proponent either at the front or back-end of the project);
- a project delivery agreement model (where the private sector proponent develops but never obtains ownership of the land); and
- a joint venture model.

The implications for the Local Government under the *Local Government Act 1995* (WA) will vary depending on the transaction structure that is selected in terms of:

- the business planning process;
- the competitive tendering process;
- the requirements in relation to the disposal of land;
- the prohibition on a Local Government forming, taking part in, or acquiring a controlling interest in a body corporate; and
- compliance with the general anti avoidance requirements.

It is also important to consider the financial capacity, motives and objectives of the proponent when selecting a transaction structure. For example, the proponent may want the Local Government to transfer the land in freehold at the beginning of the project so that the proponent can possibly mortgage the land in order to finance the development. But there are risks in so doing. On the other hand, a Local Government will usually be risk averse, with a limited appetite for undertaking the development itself. Therefore, a balance must be struck between the competing interests of both parties in a way that is consistent with the *Local Government Act* and safeguards the interests of the Local Government.

Major development projects can deliver significant benefits to a Local Government. However, these projects are complicated and if structured incorrectly may expose the Local Government to an unintended and unacceptable level of risk. Therefore, any Local Government considering entering into a major development project

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should obtain legal advice at the earliest opportunity.

Jackson McDonald is a full service law firm with demonstrated experience acting for Local Governments specifically in relation to major development projects. We can assist with advice as to different structuring alternatives, legal due diligence of the private sector proponent, land valuation issues, analysis of project risks and preparation of the necessary documentation.

*Disclaimer: This publication is intended to provide general information only and should not be relied upon as legal advice. If you require legal advice on a matter please contact us.*

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