DOUBLING DOWN ON RISK

Timing matters to prevent unnecessary double duty surprises.

When clients buy property, the order in which they start land development and nominate a new purchaser can unnecessarily double the duty payable. Lawyers who provide the right advice at the right time can help avoid this.

The Legal Practitioners' Liability Committe (LPLC) has seen an increase in claims resulting from purchaser clients nominating a subsequent entity or person to take a transfer of land after applying for a planning permit or undertaking other land development activities. Under s32J of the *Duties Act 2000* (Vic) (Act) the nomination after land development results in a sub-sale and a liability to pay a second amount of duty. Double duty would not have otherwise been payable if the nomination was made before the land development activity occurred.

What constitutes land development?

The definition of land development under the Act is broad and includes applying for or obtaining a planning or building permit. It is irrelevant which party applies for the permit and the permit need not have been issued. Land development may also include:

- preparing a plan of subdivision or taking any steps to have the plan registered
- requesting an amendment to a planning scheme
- doing any building works that would require a permit or approval
- developing or changing the land in any other way that would enhance its value.

The State Revenue Office has published guidance on what constitutes land development at https://www.sro.vic.gov.au/subsales.

Common claim scenarios

A common claim scenario occurs where the practitioner is engaged after the contract of sale has been entered into by the client. The contract provides a right to nominate a substitute purchaser, but the practitioner neglects to advise the client of the double stamp duty consequence with a deemed sub-sale if land development is undertaken prior to any nomination.

The client proceeds to lodge a planning permit application oblivious to the consequences of doing so. In some instances, the practitioner is aware of the planning application but quite often they are not, as the client may be handling development issues with others and not involving the practitioner in them.

When the client later instructs the practitioner they want to nominate a substitute purchaser, we also see claims where the practitioner has neglected to check with the client whether land development had taken place since the contract was signed, and the nomination proceeded without the client being aware that double duty would be payable.

Reasons for these practitioner oversights are varied. Sometimes it is due to lack of knowledge of the law. In other claims, the practitioner knew the law but didn't turn their mind to the possibility that land development activity may have started. In one case there was a long gap between lodgement of the planning application and the client's request to nominate, and the practitioner had simply forgotten about it.

Of late, there has been a noticeable increase in claims notified to the LPLC about double duty resulting from the State Revenue Office's increased auditing of past property transactions. As well as double duty, the purchaser may also potentially be assessed with substantial penalty duty and interest.

Advising clients on double duty risks

When acting for purchaser clients, there are typically two critical points in the transaction to advise of the risks of double duty.

1. When first presented with the contract of sale.

Timely advice on the contents of the contract is vital. It is important to check whether the contract provides the right to nominate a substitute purchaser and ask the client if they intend to do so. Ask what the client intends to do with the property and if that might include land development. Ensure your letter of advice explains the double duty consequence of nominating after land development and that land development includes making an application for a planning permit or preparing a plan of subdivision.

If providing advice before the client has signed the contract, recommend the client signs in the name of the ultimate intended purchaser wherever possible.

2. Before the client nominates other entities to take a transfer of the land.

If later the client proposes to nominate a substitute purchaser, ask if any planning applications have been made or other land development steps are underway. Provide written advice on the potential duty consequences of nominating after the planning permit application is lodged, even if you have previously advised on this issue.

Timing matters when giving advice to clients about nomination under a contract of sale. Do your processes, precedents and checklists when acting for purchaser clients help avoid unnecessary double duty consequences?

TIPS

- Review and understand the requirements of s32J of the *Duties Act 2000* (Vic) in relation to nominations and duty.
- Ensure your precedent advice letters for purchaser clients provide warnings as to the potential duty consequences of nominating after a planning permit application is lodged or other land development occurs.
- Remember to provide written advice on potential double duty risks before purchaser clients enter into the contract of sale and again before nominating a new purchaser.

Further resources

LPLC checklists: Double Duty flowchart

Purchaser's Practitioner Checklist, https://lplc.com.au/uploads/main/Resources/Checklists/Purchasers-practitioner-checklist.pdf

SRO website: https://www.sro.vic.gov.au/subsales. ■

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