Stakeholders Agreements

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A trend in the strong property market Sydney experienced is for a group of vendors to join together and sell their properties collectively to a developer to maximise the value of their properties. Generally, the prices being paid are significantly higher than each of the properties involved in the sale would achieve if sold individually. Such sales can be by groups of Torrens Title owners or all of the owners in a Strata Scheme. Often in these situations, the successful developer will require an extended period and the sale of the properties by way of a put and call option.

We at CLS Legal have specialised in this type of sale as Carolyn Deigan – our property director – recognised the possibility of such arrangements several years ago. In the 1990s, Carolyn developed the documentation for a group of developers for syndicated development agreements. She realised that a significant amount of experience is required to deal with the often disparate interests and expectations of the stakeholders. As Carolyn has specialised in acting for property developers throughout her career she is also aware of what terms are required to get a deal across the line and the possible pitfalls.

At CLS Legal we developed a Stakeholders Agreement to deal with and record the issues that may arise between the Stakeholders. The type of issues that need to be considered include:

- instructions to the real estate agent regarding any sales process;

- the promotional expenses to be incurred and additional consultants to be appointed, usually by the agent, to prepare draft schemes and architects impression of a possible development on the combined site;

- whether a further Stakeholders Agreement is required between groups of vendors within the group or with another group, such as a neighbouring property;

- confirming whether everyone in the group is in agreement about selling. Some strata groups were excited about the legislation that commenced on 30 November 2016, which provides for a situation where if 75% of the owners in a strata block decide to redevelop or sell the block for redevelopment, the remaining 25% may be dragged along. This legislation remains untested and contains safeguards for dissenting owners. The approval of a plan will be in the hands of the Land and Environment Court. Until the new laws have been tested, and proved flexible enough to suit the purposes of the group, it is better to have all the willing participants join together, review individual needs, sign a Stakeholders Agreement and then approach the recalcitrant owner to find out what, if anything, can be done to entice them to join the group. In a number of buildings, one lot has been "cherry picked" by an astute developer to use as leverage against the remaining owners. It may be at the end of the day an application under the new legislation is appropriate, but that decision can be made when all other avenues have been explored. The easiest way for a strata group to sell is for all owners to agree and leave the termination of the strata plan for the successful purchaser;

- the manner in which costs, expenses and sales price are to be distributed;

- an agreement for how the purchase price, as negotiated, is to be apportioned between the Stakeholders. The most reliable and common basis is simply on a price per square metre basis (or unit entitlement basis for a block of strata units). For example:

  - there might be different zonings on different parts of the site. For example, a group of 8 houses with 4 fronting one street and 4 fronting another street with the houses on one street having a floor space ratio (**FSR**) for development of 4:1 and the houses fronting the other having an FSR 2:1. The apportionment of the price would be different for each of the two sets of 4 houses. This would usually be that one group of 4 houses is paid double what the others are paid, unless something else comes into play, such as you cannot develop the 4:1 FSR properties without obtaining access through those with the 2:1 FSR; or

  - some other consideration that makes part of the site **undeniably** more or **less** valuable than other parts. An example of this would be if one of the houses is heritage and will be required to be retained by the developer.

  What most definitely **does not** affect the value to a developer is the quality of the home built on the property. They are **only** interested in land size and FSR. They will be demolishing the houses and often the "bigger, better" house is more expensive to demolish than its "cheaper" counterpart.

  There are other ways to distribute the sales price which can be discussed if there are considerations that are outside the usual circumstances of this type of property. It may be appropriate for the group to obtain an initial valuation.

- the basis on which the Stakeholders will consider offers, including whether there is a minimum amount per square metre agreed for the sale at which amount or better they will sign the contracts. We refer to this as the "strike rate" at which parties agree that they will definitely sell. It is **very rare** for a group to decide a "strike rate" up front;

- if a "strike rate" is met and a party refuses to sign, whether there is a power of attorney authorising a third party to sign on their behalf;

- how decisions are made in the group, for example, by a special majority of 75% of Stakeholders or unanimous decision or somewhere in between;

- the sales **must be** interdependent, meaning that the developer must buy them all together – that way if they do not have sufficient funds to settle them all they cannot just settle on a couple of properties to use as leverage against the other owners or to effectively sabotage the site;

- survey issues. We have found that often the size of the individual lots vary from the deposited plan registered at Land Registry Services to the area shown on the Valuer General's valuation. The deposited plan usually shows the correct bearings for the property but the calculation of the area, particularly the conversion from imperial to metric, has been estimated and "rounded off" rather than calculated. As the properties are being sold on lot size, we recommend the group agree to a surveyor being appointed to re-calculate the areas as soon as possible after we obtain instructions;

- time periods and manner of dealing with proposed offers, which may include deemed refusal provisions;
- that the agent and CLS Legal are authorised to be transparent between the parties with respect to certain agreed matters;
- keeping the group together in the event the properties do not sell. We believe this is **crucial**. Further, if a group is able to come together at a time when development sites are not selling well it should consider the group agreeing to stay together. Then if for some reason one of the owners has to sell, for example, if they need to move into aged care or for work, then that property is sold subject to a purchaser signing a Deed of Accession to become part of the group;
- restraints and consequences of withdrawing from the group during a specific period of time;
- any absolute requirements for an individual that are non-negotiable for them to sell their property;
- confidentiality and announcement provisions;
- some criteria regarding dealing with offers, such as financial and other checks on the potential developer;
- that the Stakeholders are to act together in good faith; and
- dispute resolutions.

Contact us at CLS Legal at info@clslegal.com.au for further information, to discuss a Stakeholders Agreement or selling your property jointly with your neighbours or if you have any questions about the contents of this document.