10 November 2020

Paul Broderick
Commissioner of State Revenue
State Revenue Office

By email: consultation@sro.vic.gov.au

Dear Mr Broderick

Submission: Draft Ruling – DA-064: Meaning of Land Development

The Urban Development Industry of Australia, Victoria Division (UDIA Victoria) is a non-profit advocacy, research and educational organisation supported by a membership of land use and property development organisations, across the private sector and Victoria's public service. We are committed to working with both industry and Government to deliver housing, infrastructure and liveable communities for all Victorians.

UDIA Victoria welcomes the opportunity to provide this detailed submission on the State Revenue Office (SRO)'s draft ruling on the meaning of land development.

We would welcome the opportunity to meet with the SRO and to provide further technical input and advice on the land development process to inform the final ruling. We are strongly of the view that the current draft does not adequately reflect the practical nature and process of land development and that further advice must be obtained by the SRO to inform the final ruling.

We look forward to working closely with you on this matter.

Please contact me directly at danni@udiavic.com.au to arrange a suitable time to meet.

Yours sincerely

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UDIA VICTORIA SUBMISSION

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1. General Comments

As a preliminary comment, the discussion in the Preamble to the draft ruling uses the language "formed an intention" to describe scenarios where a purchaser of land under a contract of sale ("Purchaser") purchases land with the "intention" to undertake land development or create residential land. Evidencing a person's state of mind is an impractical, if not impossible, task to achieve with accuracy.

UDIA Victoria makes the following general comments:

A. The SRO's public ruling approach is welcomed and is considered to be a better approach than website guidance.

B. The Preamble would benefit from an introductory paragraph on why the Foreign Purchaser Additional Duty (FPAD) is also being discussed.

C. The introductory remarks would be improved by some comment on sections 32J(3) and (4). Current SRO guidance for instance repeatedly recognises section 32J(3) as below.[1]

D. A number of the examples completely ignore the potential operation of section 32J(3)(a). They are also drafted in a way that section 32J(3)(a) is more likely to operate than not operate.

E. Based an ordinary reading of the legislation it is difficult to see how the expansive view taken by the Commissioner on several of the limbs is likely to withstand judicial scrutiny.

   This is particularly the case with limb (a), which turns on the preparation of a plan of subdivision but says nothing about the numerous antecedent steps that a first purchaser might take before finally deciding whether or not to prepare such a plan of subdivision. If the legislature intended for antecedent steps to be captured in limb (a) it would have been a relatively simple matter for limb (a) to be worded in that manner. It is therefore a reasonable assumption to make, on a plain reading of the legislation, that antecedent steps were not intended to be captured.

   The idea that a first purchaser cannot discuss with council, even on an informal basis, what its options might be to subdivide land without undertaking 'land development' seems ridiculous to us. Several months, or even years, could pass between the time of such a conversation and the time a decision is made to seek to subdivide the land. The outcome of the conversation could even be that subdivision is not possible, for a range of reasons not immediately obvious to the first purchaser.

F. The commentary for limb (a), like the commentary in a number of the other limbs, almost assumes that any steps taken after a contract of sale is executed are directed at development of the land.

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[1] Under certain circumstances (for example, see sections 32J(3) and 32Q(3)) duty is not charged even where land development has occurred. Comments referring to sections 32J only equally apply to section 32Q.

G. The Commissioner's new view on antecedent steps, particularly under limb (a), is also difficult to reconcile with the past view of the Commissioner, as set out on the SRO website. In the absence of case law, we don't understand what has changed to shift the view of the Commissioner on the treatment of antecedent steps.

H. Nomination after land development to a related entity of the first purchaser (not just a natural person) should be exempt – what is the SRO seeking to address? A general exemption is consistent with original intention of the legislation as per the Explanatory Memorandum below.

I. Nomination after land development without additional consideration should also be exempt - what is SRO seeking to address?

J. As per the Explanatory Memorandum, the purpose of sub-sale rules is as below. The emphasis on third party and commercial arrangement is important. The new draft ruling takes us even further away from that stated intention by seeking to impose duty on some of the most minor steps a first purchaser might take after Contract signing. For instance, how is speaking informally to Council a 'commercial arrangement'?

> The Explanatory Memorandum to the Bill provides that the new Part 4A brings to duty transactions, evidenced through nomination, assignment, novation or otherwise of a third party to be the transferee of the land, that are the result of a commercial arrangement, the nature of which is to effect a sub-sale of the land by the person with whom the vendor has a contract or option arrangement.

K. UDIA Victoria believes the SRO's approach does not promote the original intention of the legislative scheme of the sub-sale rules.

L. Whilst it may not be expressly stated in the Explanatory Memorandum, it is clear from the scheme of the sub-sale rules that it is intended to apply to situations where there has been value added and/or additional consideration paid and the first purchaser has participated in or will profit from this.

M. As such, in interpreting and applying the sub sale rules, guiding policy should be whether the first purchaser (or an associate) participated in the land development and whether it in fact adds any value.

N. With reference to FPAD, the relevant party should be limited to the purchaser (or an associate) as to whether land development has or will result in the land being residential land. To extend it to actions of any party, or even the vendor is unnecessary. The relevant consideration is as to the actual or intended use by the foreign purchaser. s18A already provides the SRO with adequate protections should there be a change to the intended use by the foreign purchaser.

2. Specific Comments

2.1 Ruling

A. The statement,"It is irrelevant who carried out or intended to carry out the process or any part of the process" is difficult to reconcile with section 32J(3)(a)/32Q(3)(a).

B. Clearly it is a relevant consideration for the purposes of that section whether the vendor or first purchaser carried out the land development. If the vendor did or is doing, and the

contract price has been agreed to take the land development steps into account, section 32J(3)(a)/32Q(3)(a) can operate.

C. It is also relevant if the vendor did something without the purchaser's consent and knowledge. Surely a purchaser cannot be held accountable for something done by the vendor without purchaser knowledge or consent.

D. It is also relevant if a third party does something without purchaser's knowledge or consent – for example an over ambitious architect, or in the circumstances of a Precinct Structure Plan, this situation could arise without any involvement of the vendor or the purchaser.

E. The statement is therefore an unhelpful generalisation and misleading and it is submitted that for all the limbs the approach should be that it is a relevant consideration as to who participated in the actions.

F. Further, another overarching principle should be that the actions actually result in some enhancement to the value of the land.

2.2 Limb (a)

Preparing a plan of subdivision of the land or taking any steps to have a plan registered under the Subdivision Act 1988 Vic ("Subdivision Act").

The activities proposed by the Commissioner in relation to Limb (a) capture work commissioned by a Purchaser for purposes that are merely exploratory or intended to determine whether a future activity is practicable or feasible. Merely exploring an option for future land development through engaging a surveyor, draftsman or planning advisor does not add value to land in the same way that the lodgement of a subdivision plan does. It is a preliminary reconnaissance stage of potential future development.

A surveyor may be engaged to conduct a formal survey of land at the preliminary stages of an assessment of land's appropriateness for land development or its feasibility for subdivision or consolidation. There is a distinction between a surveyor drafting a formal report in readiness for preparation of a draft plan of subdivision, and a surveyor being engaged by a client merely for prospective enquiries, which may in the future culminate in land development. The language included by the Commissioner under Limb (a), which intends to clarify this position, does not adequately draw this distinction.

In the case of land that is "potential" residential land, this ambiguity is particularly problematic. A Purchaser may acquire commercial land and choose to undertake feasibility studies or obtain planning advice to determine the practicability of future applications for re-zoning of the land for residential use. In taking these steps, the Purchaser may have no intention of seeking to have the relevant land re-zoned and may merely be seeking to determine the value of the land for future sales.

Further, the activities proposed by the Commissioner as constituting land development for the purposes of Limb (a) may pose challenges for "option" agreements where a Purchaser may enter into an agreement to purchase land at a later date, which could be many years or even decades in the future. Just because a Purchaser, having signed an option agreement, elected to undertake feasibility investigations (as outlined above) between the date of the option agreement and the potential eventual transfer of land, this does not inevitably lead to future development and should not automatically trigger the duty provision.

A contract may be conditional upon environmental reports or surveys being undertaken, or upon building reports being carried out by licensed surveyors. These activities may be captured by the Commissioner's proposed activities and constitute land development. Further, the included language "routine property searches or checks" does not provide enough clarity.

2.3 Land Development Process

- At a very high level, the process for subdivision is:
    a. Rezoning (not always required) > planning permit > Plan of Subdivision (PS)
- Everything done at the rezoning and permit phase ultimately informs the PS, however the PS only comes into existence after an explicit instruction is issued to the land surveyor to prepare one
- The list of activities that precede the PS is extensive, a small sample includes:
    a. Feature and level survey
    b. Title re-establishment / boundary plan
    c. Storm water management strategy
    d. Cultural heritage management plan
    e. Urban design & master planning, including market research
    f. Geotechnical investigations
    g. Traffic investigations
    h. Flora and fauna assessments
    i. Engineering servicing report
    j. Environmental assessment
    k. etc.
- Arguably, only the top two dot points have a close association with preparing a plan of subdivision.

2.4 Additional comments

UDIA Victoria asks the following additional questions and makes the following additional comments:

- What is the legislative basis for extending the approach to consolidations?
- How have we gone from current SRO guidance as below, to what is now the considered view of Commissioner:
    - Preliminary consultative planning steps undertaken in respect of land will not ordinarily fall within the meaning of land development provided at subparagraph (a). This includes circumstances in which a party seeks advice from internal or external consultants regarding a proposed plan of subdivision that is yet to be prepared. However, additional steps taken in relation to a plan of subdivision may

be regarded as steps being taken to have the plan registered under the Subdivision Act 1988 (Vic) and accordingly will be regarded as land development.

- What is the basis for 5? A purchaser may have paid for a site with a plan of subdivision. Restricting the purchaser's ability to discuss the plan with Council or a servicing authority unduly and unreasonably restricts its entitlement to discuss aspects of the plan it has paid for. What is legislative basis for this view? Plan already prepared.
- Point 6 – practically what 'works' does SRO have in mind?
- When Commissioner says it will take 'the following into consideration' does he really mean the existence of any of these 3 things is adverse? If so, say that
- The 3 'considerations' are expansive and difficult to reconcile with the legislation.
- Difficult to reconcile 5 with second last bullet re mere process

2.5 Worked Example 1

In the context of the sub-sale rules – reference should be made to the potential operation of s32J(3)(a) / s 32Q(3)(a).

2.6 Limb (b)

Applying for or obtaining a permit under the Planning & Environment Act 1987 in relation to the use or development of the land ("P&E Act").

The Commissioner should clarify whether applications for certain categories of permits are considered to be land development. For example, an applicant may make an application for a permit under s 47(e) of the P&E Act to allow for the removal or variation of a registered restrictive covenant. As covenants run with the land through successors to title, it is not unlikely that a registered proprietor may find themselves bound by a restrictive covenant from decades past which prescribes the colour of paint they may use on the exterior walls of their dwelling or the height of the fence they may build adjacent to their neighbours' land, or whether they can erect a small garden shed on their property. In all these scenarios (as non-exhaustive examples), removal or amendment of a restrictive covenant should not constitute land development for the purposes of the Act. Further, removal or amendment of a restrictive covenant in this manner does not result in a "positive" action, but rather the removal of a prohibition.

Some applications for permits under the P&E Act invariably are rejected by the relevant authority. As a distinction in Limb (b) is not drawn between successful applications and rejected applications, this limb captures all applications, regardless of their outcome. Rejected applications do not enhance the value of land and do not lead to land development.

We make the following comments regarding Limb (b):

- Obtaining a planning permit that was substantially advanced at time of acquisition seems unfair on the basis that the purchaser has already paid for this value. However, it appears the legislation is already fixed on this point; and
- Similarly, applying for an extension to a permit that was already in place at the time of acquisition is unreasonable. The purchaser has already paid for this value.

- Example 1 – how does this reconcile with section 32J(3)? If the vendor had made application for a permit and permit outstanding at Contract date it would need to disclose it in the Contract section 32. The Developer is therefore paying for the outcome of the permit.

2.7 Limb (c)

Requesting under the P&E Act a planning authority to prepare an amendment to a planning scheme that would affect the land.

As there is no formal process set out in the P&E Act regarding to whom and how a request to amend a planning scheme can be made, this limb is very expansive.

For example, it may capture scenarios where a Purchaser meets casually in a social environment with a member of council and mentions a desire for the planning scheme affecting the land to be amended. It may also capture initial enquiries by prospective Purchasers or informal discussions which should not amount to a formal request for amendments of a planning scheme, but which may nevertheless be captured by the limb.

We make the following comments regarding Limb (c):

- The practice note suggests that participating in a scheme amendment that was already underway constitutes land development, whereas the legislation clearly states "Requesting…"
- The landowner has no decision-making power in a scheme amendment process. In a greenfield context, the Victorian Planning Authority, Council and DELWP heavily influence the outcome, but ultimately the Minister has authority.
- Furthermore, a planning scheme amendment can be abandoned at any time after it has commenced, with no appeal rights.
- The mere commencement of a scheme amendment does not generate value to a landholding. It only has value once approved and not in every case.
- Not every scheme amendment adds value to land. It is possible that land could be sterilised or devalued through a rezoning process, possibly making it less valuable than the contract price
- Lastly, it is common to see acquisitions in the Greenfields structured as follows:
    - Settlement conditional upon rezoning (sometimes with conditions); and/or
    - Price conditional upon NDA achieved through rezoning.
- Example 4 – making a submission, upon invitation, to a PSP panel is not 'requesting a planning authority to make an amendment to a planning scheme'. The PSP process is initiated by and under VPA control. A landowner or purchaser is entitled to make a submission to defend its land and avoid neighbours trying to advantage their own land utilisation. There is no direct connection between what a developer submits and what the independent panel decides. Example is unrealistic and simplistic and not reflective of the legislation.

2.8 Limb (d)

Applying for or obtaining a permit or approval under the Building Act in relation to the land.

Similar concerns are raised by Limb (d) as in Limb (b). Inevitably, some applications for permits or approvals under the Building Act will be rejected by the relevant authority. The Commissioner should clarify the scope of the limb to exclude unsuccessful applications.

We make the observation that this limb would capture the following activities:

- Applying for / obtaining a building permit for a land sales office; and
- Applying for / obtaining a building permit to demolish existing structures on site.

We make the following additional comments regarding Limb (d):

- If the building permit application was made prior to the contract date then the purchaser will be paying for the outcome of it – how does this reconcile with section 32J(3)?
- Example 5 is misleading and completely ignores the operation of section 32J(3).

2.9 Limb (e)

Doing anything in relation to the land for which a permit or approval referred to in paragraph (d) would be required.

This limb may be designed to catch people who circumvent Limb (d).

Example 7 appears to have no regard to section 32J(3).

2.10 Limb (f)

Developing or changing the land in any other way that would lead to the enhancement of its value.

The scope of Limb (f) is far-reaching and arguably captures activities that Limb (e) seems to exclude. While language intended to clarify the scope of this limb suggests that the Commissioner does not intend to capture activities that do not require a permit or approval under the Building Act (for example, undertaking repair or maintenance works), the scope of the limb should be clearly defined to reflect this and expressly exclude all activities that do not require such a permit or approval (as defined by the Building Regulations 2018).

A potential mechanism that could be used to narrow the ambit of Limb (f) may be the inclusion of an economic threshold for the "enhancement of [land] value" (meaning that all activity which "improve" the value of the land but do not exceed the threshold are not considered to be land development for the purposes of the Act).

We query the SRO's objective measure of value enhancement.

- What objective basis will be used by SRO to determine enhancement of value?
- Who is the arbiter? The SRO does not have valuation expertise.
- Discussion suggests value enhancement will be viewed within a vacuum without any consideration of other factors such as market factors, or an external event such as the COVID-19 pandemic.

- What is the rationale for gross rather than net approach to value enhancement determination? Why are any negative steps to be ignored?
- What are the determinants of enhancement of value and at what stage? Immediately or future?
- Materiality threshold to value enhancement? (eg value increase at least greater than extra layer of duty).