

The construction process



What you need to know and the potential pitfalls across residential developments and commercial projects.

Residential developments and commercial build projects are more complex in scale than your standard residential house design and build.

Given the additional complexity, those looking at embarking on projects of this scale need to ensure that they tick the right boxes to avoid potential pitfalls.

Here we've covered the stages and steps involved in ensuring a successful project with minimal disruption.

Getting started

Every project starts with a good team of consultants. These include legal, design, quantity surveyors, project management, sales, leasing, accountants and planners. Having the right people, with experience in projects such as yours, will give you the best chance of success at every stage.

The best place to start here is word of mouth – i.e. a good construction lawyer will regularly work with other consultants, good and bad, and can recommend the right people.

We will discuss upcoming projects with you at no cost. Give us a call early.

Stages of the construction process:



1

LAND ACQUISITION

Finding a site which looks fit for purpose is the first step but all due diligence should be done on the land before final purchase. Countless times, ground condition or titles have halted or drastically changed projects well before they've broken ground.

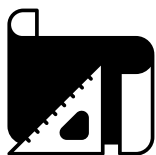
- › Secure the land with a conditional agreement before spending on due diligence.
- › You'll need to assist with understanding planning controls, geotechnical engineers to assist with ground conditions and designers to assist with building design and fit.
- › Lawyers can assist with identifying any issues with the title to the property (especially important with cross leases and unit titles) and access to the necessary infrastructure.

Case Study

A developer didn't engage geotechnical engineers to review ground conditions.

The contractor didn't take the ground condition risk.

Significant additional deep piling was required and the contractor was entitled to significant extra cost.



2 DESIGN

Not all architects are equal, so it is important to find someone with a good track record, and experience across your particular type of project.

- › To begin, engage a lawyer to ensure that the terms of engagement with architects have adequate insurance, do not exclude liability and provide for intellectual property and access to design.
- › Good quality architects should make sure Council requests for information are as few as possible and consents are issued as quickly as possible. This can save both time and money through planning and process.
- › It is often helpful to involve a preferred builder to help guide the architect with practical advice and valuable engineering ideas. Known as early contractor engagement, lawyers can draft the necessary terms of engagement.

Case study

Architectural designs were defective and cost \$800,000 to remedy. The architect's liability was limited to \$250,000 so the developer had to absorb a \$550,000 loss.



3 CONSENTING PROCESS

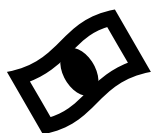
Consents take time and being planned will help to avoid idle periods while waiting on Council consents. Therefore you may wish to split up your consents – earthwork first, building subsequent. Lawyers can help if you encounter problems with Council being unreasonable



4 BUILDING CONTRACT PROCUREMENT

Take time to find a reliable construction contractor, with experience across your project type and the resource to complete it in a timely manner. Plenty of contractors will take on the job, making sure you have the right one is up to you.

- › Don't go to contract until the design has been substantially detailed, otherwise you take a price risk as the contractor will not fix the price. If the designs are not adequate, it is common for contractors to charge extra.
- › Ensure there's as little provisional pricing as possible.
- › When comparing contractors, make sure you're comparing apples with apples – the cheapest is usually the highest risk.
- › Make sure the conditions of tender enable contracts to keep offers open as long as possible, while allowing the greatest freedom for amending the process or negotiating with a preferred contractor.
- › Lawyers can help make sure that the contractors accept the usual risks under the proposed contracts and do not use tender tags or clarifications to escape responsibility.
- › Industry forms tend to favour the contractor and consultant.
- › It is important to have the right contract terms.



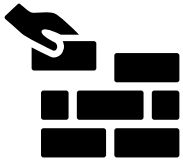
5 FUNDING

This is all done on usual market terms with little room for negotiation with banks.

- › The main risk is ensuring that the financial documents match the intended financing structure. Lawyers can help make sure this is the case.
- › Complications arise if second tier lenders are needed (i.e. finance companies or peer to peer). Lawyers can help provide the appropriate security structures.
- › A key risk area is making sure letters of offer are binding and irrevocable. If reasonable, they should look to document asap, otherwise funding may be pulled after you're committed.

Case study

The purchase of a site for development went unconditional. The COVID-19 lockdown occurred and the developers funder pulled their funding. The developer was unable to settle and defaulted.



6

BUILDING

Having the right consultants and following the steps above will help to minimise risks at this significant stage but as always, things can and often will go wrong.

- Key risks at this stage include builder delay, defective materials/workmanship and extensive variations which give rise to inflated costs. The lawyer can make sure the contract puts appropriate risk on contractors and that there is good security for contractor performance. The lawyer can also help the engineer assess contractor claims.
- An important mitigation is to make sure the contractor is adequately supervised by a quality project manager and quantity surveyor.
- Avoid paying for works in advance or for material not on site.
- The lawyer can help if disputes arise, including seeking determinations under the Construction Contracts Act.

Case study

1. Quantity surveyor failed to adequately inspect work. The contractor overcharged the developer. The contractor then went into liquidation and the developer lost \$800,000.
2. When a contractor goes into liquidation, the developer becomes merely an unsecured creditor. It is likely they will lose their payment for materials if pre-fabricated offsite or have a long lead time. A good offsite material agreement should be used and enforced.



7 SALES AND LEASING

If you're looking to tenant your property or sell it, your lawyer will assist and can have the right documents in place prior to completion of your project.

- › Your Lawyer can ensure that you use good quality documents, which ensure:
 - › You are protected against delay.
 - › Have flexibility to amend or modify the development.
 - › Have adequate deposits, guarantees and security for purchaser and tenant obligations.
 - › Have a clear pass through of additional costing incurred by tenant or purchaser variation requests.
- › Good quality documents are important to secure funding and a good sale price.

For further information contact Jeff Walters, K3 Legal Director and Property and Construction Specialist



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