

Victorian duty – new draft ruling on ‘land development’

The Victorian State Revenue Office (SRO) has recently released a draft ruling for consultation on the meaning of the term ‘land development’ (draft revenue ruling DA-064).

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The new draft ruling and the definition of ‘land development’ in a duty context is of particular relevance to:

- foreign purchasers
- purchasers involved in pre-settlement nomination arrangements

Foreign purchasers

Foreign purchasers may be liable for additional duty if they acquire:

- residential property
- property which is intended to be converted into residential property.

This additional duty impost is commonly referred to as Foreign Purchaser Additional Duty (FPAD). The FPAD rate is 8% over and above the normal duty rate.

Relevantly, the definition of residential property includes land on which a person has undertaken or intends to undertake land development to create residential property.

Nomination arrangements

The definition of land development also has relevance to arrangements involving nominations of land contracts pre-settlement. Where there has been an acquisition of a transfer right between contract/option date and settlement of a transfer, the performance of land development can be a trigger for the transfer of land being charged with multiple lots of duty under the ‘sub-sale’ duty rules. A common scenario that attracts a liability under the sub-sale provisions is where ‘land development’ occurred between the contract date and the nomination date.

What does ‘land development’ mean?

The term ‘land development’ is defined in section 3(1) of the *Duties Act 2000*. It has six alternative limbs, the satisfaction of any one of which would mean that a land development activity is involved.

These limbs are:

- a) preparing a plan of subdivision of the land or taking any steps to have a plan registered under the *Subdivision Act 1988*
- b) applying for or obtaining a permit under the *Planning and Environment Act 1987* in relation to the use or development of the land
- c) requesting under the *Planning and Environment Act 1987* a planning authority to prepare an amendment to a planning scheme that would affect the land
- d) applying for or obtaining a permit or approval under the *Building Act 1993* in relation to the land
- e) doing anything in relation to the land for which a permit or approval referred to in paragraph (d) would be required
- f) developing or changing the land in any other way that would lead to the enhancement of its value.

The purpose of the draft ruling is to clarify the SRO’s interpretation of each of these six limbs.

What does the SRO regard as land development under the above limbs?

The draft ruling indicates that the Commissioner will generally consider the following matters in determining whether any of the above limbs are satisfied:

- the facts, circumstances and contexts of each matter
- the tangible and intentional actions associated with developing and changing the use of the land
- the overall effect and consequence of the activities undertaken.

The draft also makes the observation that land development is the process (often involving multiple steps) of changing the state and/or use of land to increase its value or utility. In the Commissioner's view it is irrelevant who carried out or intended to carry out the process or any part of the process. It does not matter whether the actions are performed in-house or by external professionals. Notably, if an activity does not fit into limb (a), (b), (c), (d) or (e), the activity may still constitute land development under limb (f) if it results in enhancing the value of the land.

A number of factors are listed in the draft ruling as being evidence, in the Commissioner's view at least, that one of the 'land development limbs' referred to above is satisfied. This list (which is not exhaustive) includes items that are relatively obvious, but also includes activities like:

- engaging professional surveyors to undertake surveys and/or prepare reports for the purpose of a plan of subdivision or consolidation (limb (a))
- engaging a council or servicing authority to review or comment on a plan either inside or outside of a formal process, and irrespective of whether it results in any changes to the plan (limb (a))
- engaging with a municipal council to request that the council pursue an amendment with the Minister for Planning to rezone land in the
- planning scheme from farming to residential (limb (c))
- decontamination activities that enhance the value of land (limb (f)).

In determining whether land development has occurred under limb (a), the Commissioner states that the extent to which formalities have been involved will be taken into consideration. Such matters as the engagement of architects/draftsman to prepare building plans based on the land survey, the commissioning of feasibility studies to make recommendations on optimal use and professional town planning advice will, according to the draft ruling, be relevant.

For reference, a full list of the factors outlined in the draft ruling have been included in a table on the following pages.

Practical challenges

One of the practical challenges with the FPAD rules and the land development definition is the fact that the rule encompasses actions of the purchaser and also includes an 'intention' limb, as referred to above. This breadth may create an element of uncertainty for purchasers that are foreign purchasers.

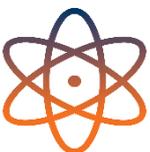
Reminder – who is a foreign purchaser?

A foreign purchaser is essentially:

- a foreign individual - an individual that is not a citizen or permanent resident of Australia (or a NZ citizen in certain circumstances)
- a foreign company - a company incorporated outside Australia or a company incorporated in Australia, if another foreign person (individual, company or trust) has a controlling interest in that company
- a foreign trust – a trust where a foreign individual, foreign corporation or trustee of another foreign trust has a 'substantial interest' in that trust. For discretionary trusts, it is important to note the SRO's recent announcement – from 1 March 2020, if a foreign person is a potential beneficiary (whether or not distributions have or will be made to such persons) a discretionary trust will be deemed to be a foreign trust.

Draft status of ruling

This ruling is currently only in draft form for consultation (consultation period ends on 7 October 2020). Submissions are expected to be made and we will keep clients apprised of any further developments in this space.



Limb of legislation	Activities that will constitute 'land development' under DA-064	Activities that will <u>not</u> constitute 'land development' under DA-064
<p>(a) Preparing a plan of subdivision of the land or taking any steps to have a plan registered under the Subdivision Act 1988.</p>	<p>The Commissioner regards initial activities with a view to, or that result in, a registration of a plan of subdivision or consolidation under the Subdivision Act 1988 as land development under limb (a). These activities include (but are not limited to):</p> <ol style="list-style-type: none"> 1. Engaging professional surveyors to undertake surveys of the property or the local area and or prepare reports for the purpose of a plan of subdivision or consolidation. 2. Drafting or re-drafting a plan of subdivision or consolidation. 3. Commissioning a professional review of a plan of subdivision or consolidation that results in substantive steps being taken towards amending the plan or preparing a new plan. 4. Lodging a plan of subdivision or consolidation for council for certification. 5. Engaging a council or servicing authority to review or comment on a plan either inside or outside of a formal process, and irrespective of whether it results in any changes to the plan. 6. Undertaking any other works required to obtain a Statement of Compliance. 7. Submitting the plan of subdivision or consolidation for registration. <p>In determining whether land development has occurred under limb (a), the Commissioner will also take any of the following into consideration:</p> <ul style="list-style-type: none"> • An architect or draftsman has been engaged to prepare building plans based on the land survey. • A feasibility study has been commissioned to make recommendations on the optimal use and project strategy. • Professional planning advice has been obtained on navigating the town planning requirements of any proposal. 	<p>Activities that will not be considered as preparing a plan for registration under the Subdivision Act 1988 include (but are not limited to):</p> <ul style="list-style-type: none"> • Preliminary research and analysis on the market and the area in order to identify the general development potential of the property, including: <ul style="list-style-type: none"> ○ consulting with real estate agents and reviewing sales data, ○ reviewing and considering any planning scheme zoning, schedules, overlays, and other council or state planning guideline, policy or requirement that applies to the property, and ○ looking into the costs involved in the process of subdividing a property. • Performing routine property searches or checks against title or an existing plan of subdivision commissioned by another party. • General and preliminary enquiries about the process involved, including to engage a party, to prepare a draft plan of subdivision or an amendment to an existing plan. • Informal surveys and measurements of a property.
<p>(b) Applying for or obtaining a permit under the Planning and Environment Act 1987 in relation to the use or development of the land.</p>	<p>There are three types of applications that can be made in relation to permits under the Planning and Environment Act 1987:</p> <ul style="list-style-type: none"> • Application for a permit to a responsible authority. • Application for an amendment to an existing permit. • Application for an extension of time before the expiry or within 6 months after expiry of an existing permit. <p>An application for a permit, and the granting of the permit or granting of the permit with conditions under the Planning and Environment Act 1987 constitute land development within the meaning of limb (b).</p>	<p>In relation to amending an existing permit, generally, municipal councils require minor amendments to be made in a Secondary Consent Form. The Commissioner takes the view that such minor amendments do not constitute land development under limb (b).</p> <p>Asking for an extension of time for an existing permit in itself may not be contemplated in limb (b). However, if the value of the land is enhanced as a result of the time extension, the granting of the time extension may constitute land development under limb (f).</p>

Limb of legislation	Activities that will constitute 'land development' under DA-064	Activities that will <u>not</u> constitute 'land development' under DA-064
(c) Requesting under the Planning and Environment Act 1987 a planning authority to prepare an amendment to a planning scheme that would affect the land.	<p>A planning scheme which is issued by the Minister has more extensive coverage than a permit referred to in limb (b). A planning scheme may apply to a municipal district, a number of municipal districts and/or any other area(s) that are not in the same municipal district.</p> <p>There is no formal process set out in the Planning and Environment Act 1987 on who and how a request is to be made to a planning authority to prepare an amendment to a planning scheme. Accordingly, anyone can make such a request and there is no prescribed form in which such a request can be made.</p>	Nothing referred to in DA-064
(d) Applying for or obtaining a permit or approval under the Building Act 1993 in relation to the land.	<p>There are two sub-limbs within limb (d):</p> <ol style="list-style-type: none"> 1. Applying for a permit or approval. 2. Obtaining a building permit or approval. <p>If a building permit or approval is issued after the contract date, land development under limb (d) has occurred even if the application was made prior to the contract date.</p> <p>Under the Building Act 1993, a permit or approval is required to carry out building work except for exempt building work. Building work is defined broadly to mean work for or in connection with the construction, demolition or removal of a building. The application and approval processes for a building permit and an amendment to an existing permit are set out in the Building Act 1993.</p> <p>An application for and the granting of a building permit or approval under the Building Act 1993 constitute land development under limb (d). Amendments to building permits could also constitute land development under limb (f).</p>	Nothing referred to in DA-064
(e) Doing anything in relation to the land for which a permit or approval referred to in paragraph (d) would be required.	<p>This limb captures works which require a permit under the Building Act 1993 but are undertaken without obtaining that permit. The Commissioner takes guidance from the Building Act 1993 and its subordinate instruments regarding the particular type of works that would constitute land development under this limb. Once again, the identity of the person who undertakes the works without a permit is irrelevant.</p>	Nothing referred to in DA-064
(f) Developing or changing the land in any other way that would lead to the enhancement of its value.	<p>The other limbs of the definition of land development identify typical steps involved in developing land. Limb (f) extends beyond those steps to capture any activities that would lead to the enhancement of the value of the land. An activity may not constitute land development under limb (a), (b), (c), (d) or (e), but if it leads to the enhancement of the land value, the activity may constitute land development under limb (f).</p> <p>Activities that do not change the physical characteristics of land may still amount to land development and these include the removal of a covenant on title or a removal from the Heritage Register. If there is an activity that leads to an enhancement of the land value, it is irrelevant whether there are any other contemporaneous activities that may have a negative impact on the land.</p>	Nothing referred to in DA-064

Any questions?

If you believe that you may be affected by the draft ruling, have any questions, or even believe that there are circumstances that would warrant a submission to the SRO during the consultation process, please contact us – either your usual ShineWing Australia contact or any of our experts below.

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