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Headaches for everyone in new growth fees

The state government has released a planning update titled 'Melbourne@5million' in which one issue addressed is funding infrastructure in new growth areas.

The government's solution is to introduce a Growth Areas Infrastructure Contribution (GAIC). It means that for any land brought within the Urban Growth Boundary in or after 2009, the GAIC will be calculated initially as \$95,000 per hectare, to be incurred on the first property transaction on either the sale or subdivision of the land. The GAIC will apply from December 2 but will take effect following enactment of the legislation anticipated in 2009.

A Growth Areas Authority information sheet gives more details, including that the GAIC will not apply to property less than 0.4 hectares in area and that in addition to sale or subdivision, the GAIC liability can also be triggered by the issuing of a building permit for major building works.

Introducing the GAIC without details on its workings is causing headaches for land owners, developers and purchasers. And at \$95,000 per hectare, it should be!

The nature of transactions for prospective development land is such that there is no such thing as a "standard agreement", but in all cases the uncertainties regarding the implementation and effect of the GAIC must be considered.

So, who should bear the GAIC liability?

It may sound obvious, but the parties need to consider and agree who among them will pay it.

The Planning Update and GAA information sheet indicate the legislation will impose the GAIC on the land owner. Despite this, the parties will need to determine whether the land owner will bear the liability, or pass this on to the developer/purchaser.

Where the developer/purchaser is to pay or reimburse the land owner, the land owner should require a provision that charges the land (post-settlement) with any liability of the developer/purchaser to pay or reimburse the GAIC, pursuant to which a caveat may be lodged on title.

When will the GAIC be payable?

If the liability is triggered by a sale, will it arise on entering into a contract or an option agreement (see below) or at settlement? If it is settlement, what happens for terms/instalment contracts where there is a preliminary and final settlement?

If the contract date is the trigger for liability, this will be particularly problematic if it is to be borne by the land owner, who is unlikely to have any sale proceeds (with the deposit unable to be released if it is a conditional contract) to pay.

What about the subdivision trigger?

The GAA fact sheet states that in the absence of a sale prior to development of the land, the GAIC will be paid as part of the development process.

It is likely that subdivision means registration of a plan of subdivision but in reality registration is only the final part of the subdivision process.

That being the case, subdivision may mean the issuing of the planning permit permitting subdivision, certification of the plan of subdivision or issuing of the statement of compliance. If it is issuing of the permit or certification of the plan, these things (particularly the permit) can happen months or years before registration. This can have significant cash-flow consequences where registration is a precondition for a settlement.

Where the GAIC is incurred on subdivision, is it calculated on all of the land in the subdivision? For example, land owner AB agrees to sell lot 1 to developer CD subject to registration of a plan of subdivision, with AB to keep the balance of the land. Will the GAIC be calculated on the whole of the land or just the part sold to CD?

There may be some circumstances where a plan of subdivision is registered with no intention of immediate sale or development of the property – for instance for personal or family reasons. In some cases properties may be transferred to related entities for little or no consideration. In those circumstances, will payment of the GAIC be deferred until the next sale of the property to a third party? Will interest accrue in the meantime?

Will an option agreement trigger the GAIC?

Will this be deemed to be the first property transaction of the land? In some legislation (for example the Sale of Land Act 1962), the definition of contract of sale includes the granting of an option.

Again, in these circumstances if the land owner will bear the GAIC, they are unlikely to have any sale proceeds – although they may have an option fee – to pay the GAIC. And if it is the purchaser/developer they may not be fully committed to the land yet but be required to pay the GAIC.

What if the contract was entered into before December 2008?

The legislation is expected to include transitional provisions that may help the parties in transactions which were finalised before December 2 – but what will be required to have been agreed before then?

The GAA information sheet confirms that a totally binding sale arrangement can take advantage of the transitional provisions, but the nature of transactions for proposed development land is such that although binding, the arrangement may remain conditional on several bases, some of which are discretionary and subjective. It is unclear whether such arrangements would qualify.

If the parties had entered into an option agreement –but not a contract itself – will that be enough? What if the option did not specify a sale price, but only a mechanism involving valuation of the land? Does it make a difference if it is a put and call option, or just a put option or call option?

At one extreme, it is unlikely that any non-binding agreement between parties would enable them to take advantage of the transitional provisions. At the other extreme, if an unconditional contract had been entered into before December 2 the transitional provisions are likely to apply.

Importantly, the transitional provisions will not make the land exempt from the GAIC, only the transaction. That is, the GAIC will be incurred on the next dealing with the land. In that case, if an exempt contract has as a condition subdivision of the land, will the subdivision be exempt also or will it trigger the GAIC? This is unknown.

How to address these uncertainties

1. The parties need to agree who will (contractually) bear the liability, regardless of where the legislation imposes it.
2. If the transaction involves a subdivision, who controls the process to ensure that any GAIC liability is managed?
3. Is entering into an option agreement more appropriate than a conditional contract, particularly whether entering into the contract is the GAIC trigger?
3. Consider when the liability may arise. If the land owner is paying the GAIC, what if the liability arises before settlement? Will the developer/purchaser fund the GAIC and deduct it (plus interest) at settlement?
4. Parties should not rely on any relief from the transitional provisions in the enacting legislation.

About the author

Victor Di Felice is a principal of Harwood Andrews Lawyers and practice group leader of the property law department. His wide experience includes commercial, industrial and residential property and his principal areas of practice are property development, subdivisions and development agreements. In 2005

Victor was recognised for his proficiency in property law when he was named the Law Council of Australia's Victorian Young Property Lawyer of the Year.

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