

Clubs Legal Update: In Brief February 2011

New Brighton Golf Club Undertaking Major Property Development Project with Mirvac

In major news on the Club property development front, in the closing weeks of December last year, New Brighton Golf Club successfully concluded the signing of a major project delivery agreement with Mirvac.

The Hospitality and Gaming Group at Thomsons Lawyers are proud to have been the legal advisers to the Club on this significant transaction.

The deal which involves the construction of between 360 and 400 residential dwellings by Mirvac on land owned by the club at Moorebank will deliver the club a brand new state of the art club house, a reconfigured championship golf course with up to nine new golf holes, a guaranteed return from the sale of house and land packages and a share in the development profits from the project.

The arrangements with Mirvac mark a major step forward for the Club and are a shining example of how asset rich clubs can turn their surplus land into viable development prospects for the benefit of members of their club and the development of the local community.

Our team guided the Club through the many steps necessary to bring the deal to fruition, including negotiating the project delivery and project financing arrangements with Mirvac and advising the Club on all of the registered club and corporate governance issues associated with the project (including the Registered Clubs Act approvals, Corporations Act and constitutionally required member approvals which the Club needed to comply with to enable the project to proceed).

The property development and regulatory issues involved with this project were inextricably linked. Without the regulatory matters being properly addressed a project such as this could not proceed without great risk to the club.

Having dedicated specialists in each of those areas within the team meant that Thomsons Lawyers was able to seamlessly ensure that not only did the agreements properly protect the Club's interests from a commercial perspective, but that the Club complied with all of the relevant regulatory matters associated with the deal.

Having done that, New Brighton Golf Club was able to enter the arrangements with Mirvac safe

in the knowledge that its commercial position was protected and that any regulatory hurdles the project had to overcome from the Club's perspective had been dealt with in an appropriate manner.

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Property Development Series

Article number 2: Legal factors to be considered in property development

In the first of our articles on property development we looked at some common development types and structures, and the initial commercial steps for clubs to take when considering a development.

In this, the second article in our series, we will be looking at the legal and regulatory requirements that clubs need to consider and what a club must do to comply with those requirements.

What are the specific regulatory requirements clubs should be aware of when carrying out a property development project?

Depending on the type of development, there are two critical regulatory requirements clubs should be aware of when carrying out a property development project, those requirements being contained in:

- (a) section 41J of the *Registered Clubs Act 1976* (NSW) (**Registered Clubs Act**); and
- (b) section 37B of the *Gaming Machines Act 1976* (NSW) (**Gaming Machines Act**).

Why is section 41J of the *Registered Clubs Act* relevant to a property development project?

If the proposed development project involves the sale, lease, licence or other disposal of any of the club's "core" property, then the process for such disposal provided for under section 41J of the *Registered Clubs Act* will need to be complied with.

What is "core" property?

A club's "core" property is defined to include:

- (a) the defined premises of the club;
- (b) any facility provided by the club for the use of its members and their guests; or
- (c) any other property declared, by a resolution passed by a majority of the members present at a general meeting of the ordinary members of the club, to be core property of the club.

In addition to the defined premises of the club, core property could include areas such as the club's car park and sporting facilities. Core property would not include any property or land that is not presently being utilised for any purpose, or land that is owned by the club for investment purposes.

What is the process for disposal of "core" property?

To dispose of any "core" property, clubs must comply with the following procedure:

- (a) the land being disposed of must be valued by a registered valuer;
- (b) the disposal must be approved at a general meeting of the ordinary members of the club (by a majority of those members approving the disposal); and
- (c) any sale is by way of public auction or open tender conducted by an independent real estate agent or auctioneer.

Are there any exceptions to the requirements of section 41J?

There are exceptions to the requirements of section 41J which are contained in clause 19 of the *Registered Clubs*

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Regulation 2009 (NSW). If the disposal of “core” property falls within any one of the exceptions contained in the Regulation, then the processes set out in section 41J will not need to be complied with. Those exceptions are as follows:

- (a) the leasing or licensing of the core property is for a period not exceeding 10 years on terms that have been the subject of a valuation by a registered valuer;
- (b) the disposal of the property to a wholly owned subsidiary of the club;
- (c) the leasing or licensing of the core property to a telecommunications provider for the purposes of a telecommunications tower;
- (d) the disposal involves the calling for expressions of interest and a subsequent selective tendering process, and the disposal and disposal process has been approved by a majority vote at a General Meeting of the ordinary members of the club;
- (e) the property is being sold by private treaty, but only after it failed to sell at public auction or open tender;
- (f) the terms and nature of the disposal are disclosed to the ordinary members of the club and the disposal is approved at a General Meeting of those ordinary members;
- (g) the Director of Liquor and Gaming has, on application by the club, approved of the “core” property being disposed of other than in accordance with the requirements of section 41J;
- (h) the disposal is to a government department, a statutory body, a state owned corporation or to a local council; and
- (i) the disposal is by way of lease or licence and the lease or licence and:
 - (i) is being granted to a person for the purpose of enabling the person to provide goods or services exclusively to members of the club and their guests and to other members of the public attending the club in accordance with a functions authority held by the club; or
 - (ii) is being granted to a person for the purpose of enabling the person to provide goods or services to members of the club and their guests and to other members of the public, and the granting of the

lease or licence has been approved at a General Meeting of the ordinary members of the club.

When is section 37B of the Gaming Machines Act 1976 (NSW) relevant to a property development project?

The matters contained in section 37B of the Gaming Machines Act will only be relevant if the proposed development includes a “retail shopping centre”.

Section 37B is critically important if a club proposes to carry out a development which includes a “retail shopping centre”

What is a “retail shopping centre” for the purposes of section 37B?

A “retail shopping centre” means “a cluster of premises promoted as, or generally regarded as constituting, a shopping centre, shopping mall or shopping arcade”.

Why is section 37B important?

Section 37B is critically important if a club proposes to carry out a development which includes a “retail shopping centre” and the development results in the removal of a club licence, or the extension of the premises of a club, to premises that are part of the “retail shopping centre”.

If an application is granted under the *Liquor Act 2007* (NSW) that results in the removal of a club licence, or the extension of the premises of a club, to premises that are part of a “retail shopping centre”, the gaming machine threshold for the club is to be set at zero.

In general terms, if a club’s premises, upon completion of the development, forms part of the “retail shopping centre”, the club would not be able to operate gaming machines from those premises.

Are there any ways to avoid the club’s gaming machine threshold being set at zero if the development includes a “retail shopping centre”?

A club’s gaming machine threshold will not be reduced to zero if the development project meets the following requirements:

- (a) the retail shopping centre must be comprised of less than 40 shops;
- (b) there is no direct access to the club's premises from the retail shopping centre;
- (c) where the club's premises are being removed to other premises, the other premises are situated in the same suburb or town as the previous premises;
- (d) where the club's premises are being extended, the club's premises remain predominantly where they were before the extension;
- (e) the gaming machine threshold for the club's premises is no more than the gaming machine threshold for the club's premises immediately before the club licence was removed or the premises were extended.

Tips for Clubs

When undertaking any property development project it is important that club's determine:

- the classification of the land upon which the development is to take place; and
- whether the proposed development will in any way affect their gaming machine entitlements.

If a club is unsure of the answer to either of those issues, or any other development related issues, then it should obtain appropriate legal advice on those matters.

For further information or a confidential discussion, please contact our team.

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