

ADAMSON

LEGAL & CONVEYANCING

PRINCIPAL:

LAWRIE B. ADAMSON B.A., L.L.B.

59 ISABELLA STREET
(PO Box 53 WINGHAM)
WINGHAM NSW 2429

TEL: 02 6553 4266
FAX: 02 6557 0342

ABN 14 221 659 660

Our ref: LA:

Your ref:

1 July 2019

The Committee
Wingham Golf Club
30 Country Club Drive
Wingham
NSW 2429

Dear Sir/Madam

**Re: Wingham Golf Club Limited – Over 55s Village
30 Country Club Drive, Wingham NSW 2429**

Thankyou for allowing us to consider the draft documents. They are complex documents and it important that the committee is fully aware of the obligations that the club may assume under the same.

Umbrella agreement

The major issues raised by the umbrella agreement are as follows:

- 2.4 if the club does not proceed with the project before obtaining consent all costs and expenses will be repaid to the developer +10% of those costs.
- 2.5 each party is obliged to do everything reasonably required to give effect to the transactions contemplated by the agreement.
- 2.5(b) Each party must provide to the other any information reasonably required to perform their obligations including any relevant financial information.
- 2.7 A partnership is expressly denied.
- 4. After the commencement date a project control group will be formed comprising up to five persons with two nominated representatives. The club can nominate two people. The other three people will be nominated by Lincoln Place. This means that the project control group will be controlled by Lincoln Place.
- 4.6 if a party is in default it cannot vote at meetings. Meetings will be held at least once a month. Note the provisions for resolving deadlocks. The decision of the independent adjudicator will bind both parties.
- 4.14- sets out your obligations of the club to keep the developer informed about the matters raised in sub-paragraphs (a)-(d).
- 5. The club grants a license to the developer (and any person appointed by the developer) to access the site for the purposes set out in that paragraph. The club can only withhold consent for access if access will materially and detrimentally interfere with the operations of the club on the relevant days (that access is sought).

6. Note the obligations in paragraph 6 to provide reports, assistance and consents.
7. The development application will be prepared by Lincoln. Under 7.3(b) the club can only withhold its approval to consent if the consent is *illegal* or constitutes a *material difference* to the project. This means that the clubs capacity to object is extremely limited.
- 7.4 It is important to be aware that the sunset dates can be extended.
- 8.2 the club is obliged to comply with its obligations *as soon as possible*. The club will need to develop a strategy/method so that it can quickly respond when required. This presents the club with some difficulty given the committee structure of the club. This means the club will need to be very flexible and responsive because it will probably be unlikely that the developer will want to wait a month or so for the club to make decisions at its monthly meetings. Perhaps the club could look at setting up a sub-committee to deal with the issues of the development.
- 8.4 Please note the obligation of the club under 8.4 to notify the developer if there are any facts, circumstances or matters that *may* result in a condition not being or becoming incapable of being satisfied. Please note the right of a party to terminate the agreement under 8.6 and the respective parties rights on termination.
- 8.7 The development costs will be costs of the project and will be ultimately be paid out of the proceeds of the development.
- 11.1 The developer may require the club to provide to a financier *security* for the purpose of financing the project. Any such obligations should be subject to your mortgagee agreeing to the same.
- 12.2 The developer may *vary staging within the project program and all milestones* by giving the club notice. The right of the developer to make such variations should probably be prescribed, for example subject to the club's consent which will not be unreasonably withheld.
- 14.1 the club acknowledges that the developer will have *complete control* of the design *construction timing and delivery* of the project. It would be preferable if there was an timetable for important stages. Construction must be commenced by 30 September 2025.
- 15.1 when development consent for the subdivision is obtained the developer will complete the purchase of the land within 90 days. We note the consideration is \$270,000 and it should be stated that the sale price is GST exclusive.
- 16.1 The operating agreement between the developer and the special-purpose people Will have precedence over the umbrella agreement.
- 16.2 The club will, if the developer requires, lease to the special purpose the land comprising the lifestyle living project for an annual rent of \$10. The clubs' obligation should be qualified by making it subject to mortgagees consent.
- 20 the club is prohibited from borrowing additional funds (*which gives rise to the registration of any security interest over the site during the term of this agreement*) without first obtaining written consent of the developer. There should be a disclosure and acknowledgement in the deed that property is subject to a mortgage and the club may not be able to carry out some of its obligations without firstly obtaining mortgagees consent (which may or may not be withheld by the mortgagee). It is a real danger to the club that the club maybe prevented from complying with its obligations because it cannot obtain mortgagees consent. This possibility puts the club at significant risk.

24. Each party indemnifies the other party against any default under this agreement (among other matters). This means that if the developer suffers a loss as a consequence of the club not able to fulfill its obligations then the club will be liable to compensate the developer for that loss.

There is provision for alternative dispute resolution throughout the agreement. Please note that whilst alternative dispute resolution is usually cheaper than litigation it is still extremely expensive. Mediation can cost up to about \$10,000 per day.

Neither party has the right to assign their interests under the umbrella agreement. A party should have the right to do so subject to the consent of the other which will not be unreasonably withheld.

Development management agreement

1. Please note the project costs listed on pages 5 and 6.
2. The agreement is conditional upon the developer obtaining consents for the project.
3. Paragraph 3- the SPV exclusive appoints the developer to develop the property subject to terms of the agreement and collateral documents.
- 4.1 Authorises the developer to do all acts, things and documents necessary to obtain the government consent and provide management services.
- 4.2 The project costs will be calculated monthly and shall be payable as part of the development costs.
- 5.1 the project will be funded through the developer obtaining a debt facility and arranging any additional funding required to complete the project which will then form part of the project costs. Ideally, all these costings should be obtained well in advance and, if possible, the club needs to guard against any cost blowout which it will ultimately have to bear part of.
- 6.2 the developer will provide updated feasibility on a quarterly basis.
- 7.1 the builder will be appointed by the developer.
- 8.1 The club will remain the registered proprietor of the property until sale.
- 8.2 the developer will have the exclusive right to undertake the project. See what the developer is authorized to do in 8.3
10. Look at the application of the profits. Please note that all project funding costs provided by the developer will be calculated daily at a rate of 12.5% and capitalised during the turn of the project. This presents a high return.
- 12.2 construction will commence as soon as practical after approval.
- 12.3 the developer will prepare final drawings plans and specifications.
- 13.3 practical completion is not defined.
- 13.5 the obligation on the SPV to produce title documents must be subject to consent of the clubs mortgagee.

Some comments:

The developers should ideally give a full indemnity to the club for any breach. Any delays and costs as a consequence of any assignment or act remission by the developer should be born by the developer.

Please note consequences of default by the SPV under 25.6.

Second schedule- you should consider the development costs set out in the second schedule which include a monthly management fund of \$12,000 plus GST. It is capped at \$96,000 plus GST. In addition, there is a development management fee of 3.75% of the development costs on monthly basis. It would be advisable that the management fee be capped.

All in all it is extremely important that the club be and remain in a position to comply with its obligations under the documentation over the term of the project which is likely to be 6 or 7 years. There are matters which are outside of the clubs control, for example your mortgagee.

Further it is desirable if there are timetables in place for performance of key obligations.

We recommend that you consult your mortgagee to see whether it consents to the project. It is important that the club satisfies itself in relation to the financial viability of the project both now and into the future. We recommend that you seek the advice from your financial advisors.

Should you have any queries please contact the writer.

Yours faithfully,

ADAMSON LEGAL & CONVEYANCING

Per:

Lawrie B. Adamson

reception@adamsonlegal.com.au