

MOUs and Property Developments – How to get a head start

Real Estate Update

In recent years there has been an increase in the number of Local Governments seeking to either commercialise surplus land or revitalise and redevelop underutilised precincts by pursuing development opportunities with private sector proponents. A Memorandum of Understanding (MOU) can be used by a Local Government seeking to formally investigate such an opportunity without committing the Local Government to proceed with the project.

A MOU (which may also be referred to as a heads of agreement or terms sheet) is a preliminary agreement, used at the beginning of a project to outline the in principle terms that the Local Government and the proponent have agreed to. Typically, the MOU will set out the process that the Local Government and proponent must follow when considering and implementing the project. If the Local Government and the proponent then decide to proceed with the project, the MOU will be replaced with a more detailed formal contract at a later date.

There is no such thing as a "standard form" MOU.

Generally speaking, in a Local Government context, MOUs fall into 3 broad types:

1. a MOU that does not legally bind the Local Government or the proponent to proceed with the project (or do anything) unless and until a more formal contract is agreed;
2. a MOU that immediately binds the Local Government and the proponent to proceed with the project regardless of whether a more formal contract is agreed; and
3. a MOU that does not legally bind the Local Government or the proponent

Who does this affect?

Local governments and private sector proponents considering joint development opportunities.

Article Highlights

- Memorandums of Understanding increase transparency in Local Government development
- MOU details must be clear and include consideration as they are classed as a legal contract.



to proceed with the project but does legally bind the parties to abide by particular clauses within the MOU (e.g. a commitment to act in good faith, confidentiality, exclusivity clauses or the undertaking of a business plan process).

In our experience, Local Governments typically enter into the third category of MOU.

The main advantage of a MOU is that it sets out a clear process that the Local Government and the proponent must follow before either party can make a formal/binding decision to proceed with the project. A MOU may have the following practical benefits for a Local Government considering a major land development project:

1. the MOU can make it clear that the Local Government must comply with the business planning process under the *Local Government Act* - in practice, many proponents are unaware that a Local Government must comply with this requirement until it is raised by the Local Government;
2. the signing of the MOU can demonstrate to the public that the Local Government is making real progress with a proposed development (even if the Local Government is not in a position to formally commit to the project at that time);
3. for complicated projects involving sensitive sites (e.g. sites that are subject to planning, environmental, cultural or heritage constraints) the MOU can set out any approvals or reports that must be obtained before the Local Government will proceed with the project;
4. for major projects that attract significant community attention, the MOU can demonstrate that the Local Government is following a transparent process before making a decision to commit to the project;
5. given that the proponent will likely be incurring significant costs conducting due diligence enquiries in relation to the project, the MOU can provide comfort to a proponent that the Local Government is committed to an agreed process;
6. the MOU can clear up potential areas of misunderstanding between the Local Government and the proponent (e.g. a proponent may want the existence of the MOU to remain confidential but the Local Government will need to disclose the contents of the MOU to Councillors and engage in community consultation);
7. the MOU can deal with issues such as whether the proponent should pay some or all of the Local Government's costs for considering the project, or whether the proponent should pay an upfront fee to the Local Government - the Local Government will have more success obtaining these concessions at the beginning of the project rather than waiting to raise these issues once it has committed to the project;

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8. even though the MOU may not be legally binding on the parties, it may still have moral persuasion which sets the tone for the negotiation of a detailed formal contract at a later date and makes it more difficult for the proponent to raise fresh issues at that time;
9. if the proponent requires access to the site to conduct due diligence investigations then the MOU can set out the terms of an access licence (with appropriate releases of and indemnities in favour of the Local Government);
10. the MOU can include a termination framework which sets out how and when either party can walk away from the project; and
11. the MOU should make it clear that the MOU does not override the Local Government's obligations and powers under the *Local Government Act*, any planning scheme or other laws that apply to the Local Government.

The negotiation of an MOU will usually take significantly less time to finalise than a detailed formal contract. However, the MOU is still a legal contract and therefore must be clear, certain and include consideration. There may also be taxation and duty consequences arising from a MOU. Therefore any Local Government that is considering entering into a MOU should obtain legal advice first.

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