

Q&S DEVELOPER UPDATE

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SUSTAINABILITY & BUILDING COVENANTS

New laws are to come into force on 1 January 2010 pursuant to the Building and Other Legislation Amendment Act 2009 ("the Act") which will:-

- limit various prohibitions and restrictions imposed by developers on what owners of a house or townhouse can construct; and
- impose disclosure requirements on sellers of residential property in the areas of energy, water, access and safety.

Limitation of prohibitions and restrictions in building covenants

The Act applies not only to contracts in broad acre developments but also to other documents entered into after 1 January 2010 including community management statements, building management statements, subleases under the Land Act 1994, specific developments (e.g. South Bank & Sanctuary Cove) and any other contract or agreement imposing a prohibition or restriction prohibited by the Act which is enforceable by someone other than the owner or occupier of a building ("the relevant instruments").

Prohibitions & requirements in building covenants

The Act does not permit relevant instruments to do the following:-

- Prohibit the use of a colour for the roof if using the colour would achieve a solar absorptance value of not more than 0.55.
- Prohibit the use of a window that is energy efficient or the treatment of a window to ensure the window is energy efficient.
- Prohibit a person from occupying the property before particular landscaping, fencing, driveways or similar work associated with the construction of the building is completed.
- Require a minimum floor area; a minimum number of bathrooms or bedrooms; the construction of the house or townhouse or any landscaping, fencing, driveways or similar work associated with the construction of the house or townhouse within a stated period; a garage ancillary to the house or townhouse.
- Require a minimum pitch for the roof of a house or townhouse or require it to be orientated on the land in a particular way.
- Prohibit the issue of a specific material or type of finish for the roof or external walls.
- Prohibit the installation of a solar hot water system or photovoltaic cells on the roof or other external surface.

The Acts states that the clauses in a relevant instrument in relation to prohibitions (a) to (d) above will have no force and effect and prohibitions (e) to (g) above will have no force or effect to the extent that the prohibition applies merely to enhance or preserve the external appearance of the building.

Restrictions in building covenants

- Roof Colours & Windows — where a relevant instrument restricts:-
 - the use of a colour for the roof if using the colour would achieve a solar absorptance value of not more than 0.55;

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 Level 28 Central Plaza One
 345 Queen Street
 Brisbane

Beenleigh
 99 George Street
 Beenleigh

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 9 Elliott Street
 Corner Morayfield Road
 Caboolture

Cleveland
 141 Shore Street West
 Cleveland

Gold Coast
 64 Marine Parade
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 Freecall 1800 652 969

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- the use of a window that is energy efficient;
 - the treatment of a window to ensure the window is energy efficient
- then the restriction is of no effect to the extent that the use of the colour or the installation or treatment of an energy efficient window :-
- minimises potential adverse effects on the external appearance of the building; and
 - does not unreasonably prevent or interfere with a person's use and enjoyment of the building or another building.

b) Other restrictions — where a relevant instrument restricts:-

- a person from occupying the building before particular landscaping, fencing, driveways or similar work associated with the construction of the house is completed;
- the use of a specific material or type of surface finish for the roof or external walls;

then the restriction is of no effect where the restriction merely applies for the purpose of preserving or enhancing the external appearance of the building; and where a relevant instrument restricts:-

- the location on the roof or other external surface where photovoltaic cells or a solar hot system can be installed;

then the restriction has no force or effect to the extent that it merely applies to enhance or preserve the external appearance of the building and prevents a person installing a solar hot water system of photovoltaic cells on the roof or other external surface of the building.

In addition, the Act does not permit consents to be withheld in the circumstances described in restrictions (a) and (b) above.

No compensation

The Act provides that no compensation is payable by the State or another person for any loss or expense arising out of the above provisions of the Act.

Disclosure requirements on sellers of residential property

Where a seller seeks to sell a house, townhouse or unit either himself or engages a real estate to offer the property for sale the seller will be required to:-

- Prepare and sign a sustainability declaration in the approved form;
- Amend the sustainability declaration as soon as practicable after becoming aware that the information is not correct;
- Not publish an advertisement for the sale of the property unless it contains information about where a person can obtain a current sustainability declaration;
- Not give a person a document advertising the property for sale unless the person already has a copy of the current sustainability statement or a copy of the declaration accompanies the document;
- Ensure that at any time the property is generally open for any public inspection a copy of the sustainability declaration is conspicuously displayed so that a person entering the house can easily read it and any person entering the house is provided with a copy of the declaration;
- Provide a copy of the sustainability declaration to a potential buyer who asks for a copy.

If a sustainability declaration is misleading or is otherwise prepared without reasonable skill and care and a buyer incurs loss or expense then the seller is liable to compensate the buyer for such loss or expense. However a buyer cannot terminate a contract on the grounds that a current sustainability declaration is incomplete or contains information that is false and misleading.

Summary

It is recommended that all relevant instruments are reviewed to check compliance with the Act.

Richie Muir, Solicitor, Quinn & Scattini Lawyers

This update is for your information and interest only. It is not intended to be comprehensive, and it **does not constitute and must not be relied on as legal advice**. You must seek specific advice tailored to your circumstances.

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