



SKRINE
ADVOCATES & SOLICITORS

**DRAFTING COMMERCIAL TERMS FOR LAND LAW
JOINT DEVELOPMENT**

BY DATO' PHILIP CHAN - 26 JULY 2018

Skrine at a Glance - Accolades and Awards

- Asian Legal Business 2016 –Real Estate Law Firm of the Year
- Asian Legal Business 2017 –Real Estate Law Firm of the Year

We acted in joint ventures involving such iconic and landmark developments in KL such as the TRX, Bukit Bintang City Centre, the Bukit Jalil Sports City and joint ventures between local developers and renowned international real estate firms like Mitusi Fudosan of Japan. We also act on behalf of MRT Corp on land matters.

Recent Developments in Joint Venture in Malaysia

Some recent trends/issues involving joint ventures include:-

- Transit Oriented Developments
- Common Estate Agreement / Community Titles
- Joint ventures involving Private Leases

Transit Oriented Development (“TOD”)

- A TOD is a type of urban development that maximises the amount of residential, business and leisure space within walking distance of public transport. TOD typically includes a central transit stop surrounded by a high-density mixed-use area.
- The Kuala Lumpur City Plan 2020 (“KLCP”) has identified Transit Planning Zone (“TPZ”) to areas within 400m of a transit station. The TPZ is a special zone where more intensified development will be encouraged (incentives such as higher density and plot ratio). The plan is to encourage TOD by proposing incentives such as bonus of additional 0.5 plot ratio for development in the priority TPZ.
- For more information on TOD in the context of the Klang Valley, please refer to the ‘Pelan Induk Perancangan Bersepadu Guna Tanah Dan Pengangkutan Awan Laluan MRT Selangor-Kuala Lumpur (Draf Akhir)’ prepared for PLANMalaysia.

Transit Oriented Development (“TOD”)

- Malaysian developers may soon be involved in the TOD surrounding the MRT and LRT stations.
- We understand that certain stations on the MRT/LRT lines have been earmarked for TOD.

TOD Joint Venture vs Usual Joint Venture

- The Station Area Development is likely to take place on, over or adjacent to the MRT/LRT stations that have already been constructed.
- The paramount consideration in a TOD JV would be the structural integrity of the stations. Whereas in a normal JV, construction on an empty piece of land is relatively easier.
- TOD JV would therefore be subject to land schemes and technical schemes imposed by the land owner being the MRT/LRT operator.

Land Scheme

- Typically, the Land Scheme will include issues such as:
 - Developer to have land development rights over Station Area Development Lands
 - the strata titles to be issued to end-purchasers
 - the stratum titles to the underground land for the stations to be issued to the transit operators
 - easements and right to pass and repass over the MRT/LRT structures and the Station Area Development Lands
 - express conditions endorsed on the document of titles to protect the MRT/LRT structure
 - Easements of right to air and light etc

Technical Scheme

- The Technical Scheme focuses more on the structural integrity of the station and usually include:
 - the right to enter, build and operate the transportation lines on certain areas of the land
 - terms which would ensure that any development-related activities would not damage or impact the structural integrity of the station
 - compliance with the relevant authorities
 - restoration of damages caused

Common Estate

- In view of the large-scale mixed-use developments and integrated projects being developed in KL (such as the TRX District), we have seen the introduction of the Common Estate Agreement (“CEA”).
- The concept of CEA arises due to the need to obtain the owners’ agreement to bear the maintenance costs of common infrastructures within the specific district. Common infrastructures would include tunnels, roads and parks.
- As long as there is no statutory legislation to regulate the operation of such projects, the arrangements for the operation and maintenance of the common areas and infrastructure would be governed under the CEA. Typically, the common infrastructures would initially be operated and maintained by the Master Developer or its subsidiary and then subsequently handed over to the owners through an Owners Corporation.
- The concept of CEA is mainly based on the Community Scheme concept practiced overseas. To avoid abuse and complications arising from contractual obligations, the government will be well advised to introduce legislation to regulate the practice.

Joint venture involving Private Leases

- In Medini, Iskandar Malaysia developers have entered into joint ventures with Iskandar Investment Berhad for developments involving the private lease scheme.
- The private lease scheme essentially involves the registered proprietor leasing the land to developers and allowing the developers to on-sell the leases to end-purchasers.

Joint venture involving Private Leases

- At the end of the lease period, the land will revert to the registered proprietor.

Joint venture involving Private Leases

- There is a recent news report (The Sun on 10 July 2018) that 107 purchasers of a property development in Medini Iskandar have commenced proceedings against a property developer for, among others, failure to issue strata titles for their respective units.
- The Purchasers were claiming damages for misrepresentation and late delivery.
- Problems with Medini Private Lease Scheme :-
 - NLC and Strata Titles Act do not contain provisions that allow such private lease schemes.
 - Section 225 of the NLC does not allow lease in favour of more than one person.
 - disputes on who has right to retention of original issue document
 - If Iskandar Investment Berhad has to keep the original title, needs to invest in infrastructure for tracking and custody of the title
 - It is understood that moves were afoot prior to May 9 Election to introduce a Bill to amend the NLC and the Strata Titles Act to regularise and regulate the Private Lease Schemes.
 - The suit by the 107 purchasers highlights the dangers of introducing novel development concepts ahead of the necessary legislative infrastructure.

How land JVs are typically documented

Types of JVs

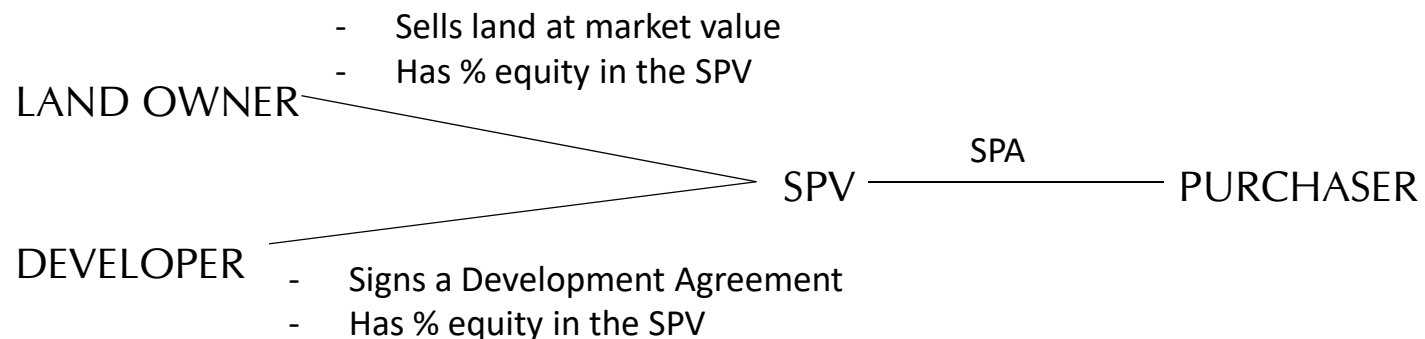
- Generally two types of Jvs:

- Unincorporated JV



An unincorporated JV is formed between the Land Owner and the Developer

- Incorporated JV



Getting to know you: Due Diligence

- One of the more crucial steps to be undertaken before drafting the documents is to undertake due diligence on:
 - Land owner
 - Land
 - SPV
- Searches:
 - Land searches
 - Company searches
 - Insolvency/Bankruptcy searches

Due Diligence: Terms of Reference

Terms of reference for due diligence would usually include:

- Status of company and subsidiaries (if any)
- Corporate information
- Business activities
- The properties/lands – e.g. request for copies of all issue documents of title, sale and purchase agreements and assignments, leases, sub-leases and tenancies
- Directors and employees
- Licences, consents and regulatory actions

Due Diligence: Terms of Reference

Terms of reference for due diligence (cont'd):

- Environment, health and safety
- Contracts - concession agreements, privatization agreements
- Borrowings
- Lending to third parties
- Related party transactions
- Litigation, disputes and other legal matters
- Intellectual property

Due Diligence Findings

Issues to consider based on DD findings:

- ❖ Whether JDA amounts to disposal that would attract Income Tax or RPGT
- ❖ Land obtained through privatization agreements – whether conditions imposed
- ❖ Land subject to acquisitions
- ❖ Existence of 3rd party claims – e.g. claims of settlers/squatters or other third parties
- ❖ Whether consultants/architects/engineers have been appointed and whether amounts are owing to them
- ❖ Existence of development order for developments on the land
- ❖ Borrowings and encumbrances on land

TOPICS

1. Principal legal documentation
2. Salient terms and conditions of principal documents
3. Exit strategies

Principal Legal Documentation

- Share Subscription and Shareholders' Agreement
- Joint Development Agreement / Joint Venture Agreement
- Power of Attorney

SHARE SUBSCRIPTION AND SHAREHOLDERS' AGREEMENT

Share Subscription & Shareholders' Agmt

Salient terms:

- Business and objective of the SPV
Co/Developer Co
- Share subscription price
- Conditions precedent – e.g.:
 - Approval of business plan & budget
 - Regulatory approvals (e.g. EPU, etc.)
 - Shareholders' approval (plcs)

Share Subscription & Shareholders' Agmt

- **Funding requirements of shareholders:**
 - Estimated development cost
 - Estimated shareholders' funding – proportionately. May be varied depending on agreed Debt : Equity ratio
 - Priority of funding:
 - 1) Advances/shareholders' loans;
 - 2) External financing;
 - 3) Increase in paid-up capital and/or issuance of preference shares.

Share Subscription & Shareholders' Agmt

- **Directors and shareholders' reserved matters**
- E.g.:
 - Approval and variations to Annual Business Plan & Budget or constitutional documents
 - Borrowings
 - Disposals and acquisitions of properties, assets and undertakings
 - Dividends
 - Appointment of senior management team, including CEO, COO, CFO, etc.

Share Subscription & Shareholders' Agmt

- **Restriction on transfer of shares**

- Tag-along rights – beneficial to *minority shareholder*. Requires the majority shareholder to include the minority's shareholding in the company in a sale to a 3rd party
- Drag-along rights - beneficial to *majority shareholder*. Requires a minority shareholder to sell its shares together with a sale of the majority shareholder's shares

Share Subscription & Shareholders' Agmt

- **Deadlock**

- Failure to come to a resolution on reserved matters
- Majority shareholder may offer to sell its shares to dissenting shareholder
- Wind-up SPV Co
- Open market tender exercise

JOINT DEVELOPMENT AGREEMENT

Joint Development Agreement

Salient terms:

- **Parties:** (1) Landowner and (2) JV Co/Developer Co
- **Landowner's consideration:**
 - Payment may be in tranches depending on the development stages of project
 - Final payment may be in the form of cash or paid in the form of 'Landowner's entitlement'

Joint Development Agreement

- **Conditions precedent – e.g.:**
 - 1) Fulfilment of CPs under the SSA
 - 2) Change of category of land use
 - 3) Rezoning approval – e.g. mixed commercial use, etc.
 - 4) Planning approval – e.g. plot ratio, public housing requirements, etc.
 - 5) Layout approval

Joint Development Agreement

- **Landowner's entitlement**
 - Landowner's right to certain parcels/units in the development.
 - T&Cs – e.g. must be contiguous in terms of units and floors
- **JV Co/Developer's entitlement**
 - JV Co/Developer's right to the entire development after full settlement of the Landowner's consideration

Joint Development Agreement

- **Matters relating to the development:**
 - Rights of JV Co/Developer to the land
 - Commencement date of construction
 - Development period
 - Financing – e.g.:
 - i. creation of charge over land
 - ii. assignment of rights under the JDA

Joint Development Agreement

- **Events of Default:**
 - Delay in commencement of development
 - Breach of payment obligations or representations and warranties
- **Consequences upon termination:**
 - To consider stage of development when the EOD occurs
 - Liquidated damages
 - Termination of existing contracts with consultants and contractors
 - Re-delivery of possession of land to Landowner

POWER OF ATTORNEY

Power of Attorney

- Power of attorney given by Landowner to JV Co/ Developer to develop the land
- Powers include:
 - To execute all documents and applications relating to any applications to State Authority
 - To appear before any relevant authorities for any applications
 - To prepare all plans, documents, forms and any other related documents pertaining to the development
 - To enter into SPAs, tenancy agreements, licence agreements with end-purchasers, lessees, tenants and/or licensees.

EXIT STRATEGIES

Exit Strategies

- Incorporation of mandatory buy-outs in SSA.
- Creates legally enforceable obligations on the shareholders to purchase or sell shares in the company, as soon as an offer is made.
- Examples:
 - **Put Option** – Party A has a right to require Party B to purchase its shares
 - **Call Option** – Party A has a right to require Party B to sell its shares to Party A

Exit Strategies

- Issues to consider:
 - Option period for put option/call option
 - Option price
 - Regulatory approvals for transfer of shares
 - Stamp duty and RPGT
 - Remedies for failure to comply with obligation – e.g. specific performance

END

Q&A