

Development Finance. Is that sale bankable?

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For a developer commencing a new project one main priority is finding purchasers and securing on-sales. However it can be easy to overlook the importance of ensuring that these on-sales will meet the specific requirements of their chosen lender and be treated as a "qualifying pre-sale". This means thinking ahead to potential funding requirements at the time of entering into such sales, which to some may seem like crystal ball gazing. Here at Cooney Lees Morgan we have extensive experience in development finance and have set out below some points to consider before entering into an on-sale.

- Form of Agreement for Sale and Purchase: all on-sales should be on the same form of Agreement for Sale and Purchase (including development specific further terms of sale). Any amendments or variations agreed with a purchaser will have to be disclosed to the lender and, if material, will need to be approved by the lender prior to signing.
- Deposit: most lenders will require that a 10% deposit has been paid, and that this is held in the developer's solicitor's trust account.
- Purchase price: the price agreed with the purchaser should not substantially differ from that budgeted in project reports given to the lender, and at a minimum be no less than any valuation provided to the lender.
- Sunset dates: although requirements on sunset dates can vary, as a general rule of thumb developers should carefully consider agreeing to sunset dates any earlier than 12 months after the anticipated date of completion of the build.
- Conditions: all on-sales must be unconditional, or if not, the remaining conditions should only relate to completion of the development or issue of title. Accordingly, when entering into conditional sales, developers need to be wary of agreeing to conditions with a long due date that are for the benefit of both the developer and the Purchaser, or solely the Purchaser. The developer needs to have the ability to waive any outstanding conditions (if required) when it comes to the point of finalising development finance.
- Purchaser identity: lenders will also look closely into who the on-sales are to. Sales of multiple lots to one party, or sales that aren't at arm's length (i.e. are to a family member or anyone related to or associated with the developer) may be excluded from the list of qualifying pre-sales.
- Citizenship or residency: unless consent has been obtained to sell the properties to other parties, there will likely be a requirement that purchasers be either New Zealand or Australian citizens or residents, or otherwise permitted to purchase under the Overseas Investment Act 2005. Evidence of this must be held by the developer's solicitor. At the time of signing an on-sale agreement developers should either obtain copies of their purchaser's passport, or have them complete an Overseas Investment Office Residential Land Statement, and provide copies of this to their solicitor.
- Guarantee: any on-sale to a trust or company must include a guarantee from the directors or trustees of the obligations of the purchaser entity.

Lenders will set a minimum aggregate purchase price which all qualifying pre-sales must amount to before finance will be made available. Developers need to be aware that this

amount will be a GST exclusive amount (while on-sales to third party purchasers will generally be on a GST inclusive basis). If a sale does not meet any of the lender's requirements it will be excluded from the pool of qualifying pre-sales, meaning it is not included in the aggregate purchase price calculation.

Ensuring on-sales are qualifying pre-sales is an essential component for any developer in obtaining development finance, and is something that developers need to have front of mind when entering into on-sales. If you are planning your next development, and would like some advice on proposed on-sales and development finance, then get in touch with us in the Property and Development Team.

*The above is based on general funding requirements, you will need to work with your funder to confirm their exact qualifying pre-sales requirements for your specific development.