



Chartered property,
land and construction
surveyors

DEVELOPMENT MANAGEMENT

1st edition, SCSI Guidance Note





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Foreword & Acknowledgements

Project Management is the management of people, time and costs by an individual or a team to achieve the efficient commencement, progress and conclusion of a project. All of these elements apply to construction projects. Chartered Project Management Surveyors (CPMS) in the construction industry are responsible for planning and managing building and infrastructure projects. Their responsibilities often include the management of design, procurement, statutory consents including planning, fire, DAC and BCAR, budget, contractors, clients, the lifecycle of the project, document management and other areas; to ensure that the construction project achieves the Client's objectives.

Project Management in the construction industry also must comply with sustainability, insurance, health & safety, and legal requirements.

This Information Paper (IP) is aimed primarily at project and programme managers, and those working in a project environment that must influence, work with and consider the views of other people.

This non-technical capability is increasingly recognised as a key success factor on projects of all sizes and across all sectors, with numerous project reviews indicating these 'human factors' are the most likely causes of problems or failure.

This paper provides the latest information and/or research, describing what happens in the 'real world' through a series of case studies, and aims to offer approaches proven as effective. With the specific intention of demystifying this topic, a series of key principles and related examples are used to illustrate the themes contributors have consistently encountered in their professional experience. Yet while the information paper covers some of the key principles of stakeholder engagement, it should not be regarded as an exhaustive 'recipe for success'.

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SCSI Guidance Note

This is a guidance note. Where recommendations are made for specific professional tasks, these are intended to represent 'best practice', i.e. recommendations which in the opinion of approving professional bodies meet a high standard of professional competence.

Although members are not required to follow the recommendations contained in the note, they should take into account the following points.

When an allegation of professional negligence is made against a chartered surveyor, a court or tribunal may take account of the contents of any relevant guidance notes in deciding whether or not the member had acted with reasonable competence.

A member conforming to the practices recommended in this note should have at least a partial defence to an allegation of negligence if they have followed those practices. However, members have the responsibility of deciding when it is inappropriate to follow the guidance.

It is for each member to decide on the appropriate procedure to follow in any professional task. However, where members do

not comply with the practice recommended in this note, they should do so only for a good reason. In the event of a legal dispute, a court or tribunal may require them to explain why they decided not to adopt the recommended practice. Also, if members have not followed this guidance, and their actions are questioned in an SCSI disciplinary case, they will be asked to explain the action they did take and this may be taken into account by the Panel.

In addition, guidance notes are relevant to professional competence in that each member should be up to date and should have knowledge of guidance notes within a reasonable time of their coming into effect. This guidance note is believed to reflect case law and legislation applicable at its date of publication. It is the member's responsibility to establish if any changes in case law or legislation after the publication date have an impact on the guidance or information in this document.

It is the member's responsibility to be aware of changes in case law and legislation since the date of publication.

Document status defined

SCSI and RICS produces a range of standards . These have been defined in the table below. This document is a guidance note.

Document status defined		
Type of document	Definition	Status
SCSI practice statement	Document that provides members with mandatory requirements.	Mandatory.
SCSI code of practice	Standard approved by SCSI, and endorsed by another professional body that provides users with recommendations for accepted good practice as followed by conscientious practitioners.	Mandatory or recommended good practice (will be confirmed in the document itself).
SCSI guidance note	Document that provides users with recommendations for accepted good practice as followed by competent and conscientious practitioners.	Recommended good practice.
SCSI information paper	Practice-based information that provides users with the latest information and/or research.	Information and/or explanatory commentary.

1. Introduction

1.1 Overview of development management

Property development is undertaken by many organisations in the private, public and voluntary sectors for a variety of different reasons. The primary legislation in Ireland is the Planning and Development Act 2000 (as amended). The Act covers a huge range of planning-related issues and combines a wide range of different legislation into the one source.

Section 3 of the Planning and Development (Amendment) Act 2010 defines development as:

‘... the carrying out of any works on, in, over or under land or the making of any material change in the use of any structures or other land.’

It is an offence to carry out development that requires planning permission, without planning permission, and the offence attaches to it can result in fines and possibly imprisonment. If a genuine mistake has been made, there is a possibility to apply for planning permission to retain an unauthorised development. Where this permission is refused, there is the opportunity to appeal to An Bord Pleanála. If ultimately there is no grant of retention obtained, the development would have to be demolished.

The type of development will vary according to the developers’ objectives and the sector in which they operate. For example, a Housing Association’s primary focus will be to provide cost effective residential accommodation, whereas a private developer will focus on achieving commercial profit. Furthermore, some developers may wish to undertake a development for mixed use purposes. Examples of this arise where planning authorities seek to encourage mixed use developments comprising residential accommodation, commercial office, retail or leisure facilities as part of a master plan to regenerate a specified area.

For the purposes of this guidance note, the term development management is defined as:

‘The management of the development process, from the emergence of the initial development concept to the commencement of the tendering process for the construction of the works.’

This guidance note does not address the construction or completion phases of the development management process. Developers may be one or more individuals or an entity with responsibility for the overall development management process.

Developers will typically appoint consultants, the number and type of, which will depend on the developer’s ability to undertake certain activities in-house and on the complexity and scale of the proposed development.

The initial phases of development management may be led or undertaken by the developers themselves or a planning and development surveyor. Furthermore, a developer may appoint an experienced construction and development adviser to act as their representative. For many developments, a project management surveyor is well placed to work closely with the developer or their adviser.

1.2 Purpose of this guidance note

This guidance note is primarily aimed at project management surveyors and it sets out to achieve the following:

1. To set out the main phases of the development management process; and
2. To provide specific guidance on the following issues that will impact upon the development process generally:
 - a. Development appraisal;
 - b. Planning application processes;
 - c. Development finance; and
 - d. Procurement.

This guidance note also contains general information which may be of interest to other parties such as clients.

2. Phases of the development management process

2.1 Introduction

The five key phases of the development management process are set out below. These phases are derived from the RIAI's Work Stages and contain additional detail on matters of particular interest to those involved in the development management process.

The phases assume that the developer is successful in acquiring a site and is successful in obtaining outline planning consent. The size and complexity of the development will determine whether all phases are followed, for example a small development may omit phases 3 and 4.

Phase 1 – Developer's initial concept
 Phase 2 – Site acquisition strategy/ Outline Proposals
 Phase 3 – Scheme
 Phase 4 – Planning Permission
 Phase 5 – Planning Grant

2.2 Phase 1 – Developer's Initial Concept

Main activities

- Commence specific market research to ascertain demand from potential investors or customers for the proposed development.
- Identify potential sites.
- Prepare rudimentary development appraisal that will comprise the design concept, cost, value and program elements of the development.
- Establish sustainability targets.
- Obtain approval from the developer's management board and other stakeholders/end user to proceed with the initial concept. Abandon the concept of the development if the market research indicates that the development is unlikely to succeed.

2.3 Phase 2 – Site Acquisition Strategy/ Outline Proposals

Main activities

- Commence strategy for finding and acquiring a site of suitable size, budget and location.
- Instruct land agents to find new sites and or investigate the possibility of acquiring existing sites for future development.
- Undertake market research to ascertain the surrounding population mix of potential sites, its adjoining owners, adjoining uses, comparable rents, any interested parties and the potential for obtaining planning consent.
- Undertake due diligence to determine planning / compliance constraints and opportunities
- Carry out a development appraisal options analysis to select the most suitable site for development.
- Select the site that best meets the development criteria, i.e., the preferred option.
- Obtain the developer's approval to engage in negotiation with the existing landowner.
- Commence negotiations with the landowner regarding a straightforward purchase transaction or commence negotiations on a development agreement.
- Acquire or take out an 'option' to purchase the land and or existing buildings for development.
- Confirm the development agreement with the landowners, investors, stakeholders and others if applicable at this point.
- Obtain approval from the developer's management board and other stakeholders/end user to proceed.

2.4 Phase 3 – Scheme

Main activities

- Consult with developer's in-house planner or planning consultant, or architects, on proposed configuration of development. In most instances both are consulted.
- Where external consultants are to be used at this stage, agree terms of initial appointment.

- Appoint the professional consultants to undertake development management services if appropriate.
- Depending on the complexity and size of the proposed development, approach the planning authority, statutory consultees and interested parties for their initial views.
- Draft sketch plans and elevations with the planning consultant and/or architects.
- Draft outline development programme plan.
- Carry out initial estimate of cost and consider potential procurement routes.
- Prepare associated development risks for project risk register and management plan.
- Unless already taken into consideration in a development agreement, undertake legal due diligence as soon as possible to ascertain if there are any covenants, lease agreements, etc. that will impact upon the proposed development.
- Update and revise the development appraisal prepared in phase 1 for the proposed development including an assessment of the cost and availability of finance.
- Where applicable, liaise with accountants to enable the minimisation of any unnecessary or unusual tax charges.
- Proceed to next phase of development management having received approval from the developer's management board and other stakeholders.
- Abort development if outline appraisal indicates that the developer's business requirements and objectives cannot be met.

2.5 Phase 4 – Planning Permission

Main activities

- Pre-planning – Depending on the size and complexity of the development, developers will consider whether it is appropriate to approach the planning authority and statutory consultees for their initial view on the proposed development. Depending on size, scale and complexity of the development, this could result in a number of pre-planning consultation meetings.
- Design – Progress the design development of the proposed scheme taking into account the developer's requirements, planning restrictions, building regulations and applicable health and safety regulations. Consider the format of the presentation of the proposed development to the planning authorities, stakeholders and interested parties.

- Procurement strategy – We recommend that this is considered and developed in further detail for the procurement of the developer's professional team, other consultants and the construction works.
- Cost control – Update or undertake detailed cost planning as the design of the development is progressed.
- Programme review – Update or undertake a further review of the master programme for the proposed development.
- Risk management – Update or undertake a further review of the risk management plan prepared in phase 3.
- Development appraisal – Update the development appraisal calculations for the proposed development including an assessment of the cost and availability of finance.
- Agree and liaise with accountants and other specialist tax advisers to enable the minimisation of any unnecessary or unusual tax charges.
- Agree proposals for arranging cost of finance with the relevant investors.
- Obtain approval from the developer's management board and submit planning application to the planning authority.

2.6 Phase 5 – Planning Grant

Main activities

- Review the planning conditions the developer will be required to satisfy in due course.
- Design – Progress the design development of the proposed scheme so that it satisfies the developer's requirements, complies with building regulations and the applicable health and safety regulations.
- Procurement strategy – We recommend that this is implemented according to the strategy agreed in phase 4 or revised to reflect any changes that have arisen as a result of obtaining outline planning consent.
- Cost control – Update or undertake detailed cost planning as the design of the development is progressed.
- Program review – Update or undertake a further review of the master program which takes into consideration the progress of the project.
- Risk management – Update the plan to reflect any potential risks. Development appraisal – Update the development appraisal if applicable.
- Finalize proposals for arranging cost of finance with the relevant investors.

3. Development Appraisal

3.1 Introduction

Developers making a commitment to acquire land and develop a site are advised to consider a range of factors before incurring any liabilities associated with a development project. To achieve this, developers will undertake initial development option appraisals to verify the financial viability of the proposed development. The purposes of these appraisals will help determine the maximum price a developer should pay for the site. We recommend that the development appraisal is reviewed and updated throughout the lifetime of the development management process to address changes in circumstances. Continuous monitoring enables developers to adapt and react to outside factors and protect the value of their investment.

3.2 Development agreement

3.2.1 Overview of the development agreement

Developers not wishing to incur the substantial costs of acquiring a site for development may instead enter into an agreement with the landowner to develop the site. Development agreements vary in their form and complexity according to the nature of development proposed and objectives of the landowner. For example, a land-owning utility company might work in partnership with a government development agency and a planning authority to implement a local development framework. Agreements involving multiple parties are likely to be complex, require substantial negotiation and significant time and resources.

A typical development agreement will address the following areas:

- The development mix;
- Quality of design;
- Infrastructure requirements;
- Agreements of sales;
- Arrangements for risk management or transfer;
- Funding arrangements for the development (particularly in large and complex developments); and
- Profit sharing arrangements (also referred to as overage).

Development agreements may be entered into at different stages of the development process depending on the parties to the development agreement. In certain large and complex developments, the funding agreement may form part of the development agreement.

3.2.2 Project management surveyors and the development agreement

In the case of some developments, the project management surveyor may have worked closely with the development surveyor during phases 1, 2 and 3 of the development management process and be familiar with the development agreement. In other cases, the project management surveyor is appointed after the development agreement has been put in place. Thus, the project management surveyor's contribution to the development agreement may vary.

We recommend that the project management surveyor:

- Requests sight of the relevant abstracts from the development agreement (or a copy of them) at the earliest opportunity;
- Assess and analyze the development agreement to determine the provisions which could impact on the proposed development;
- Manage the relevant risks and ensures that the members of the professional team are consulted appropriately and in good time.

4. Planning

4.1 Introduction

The planning process in Ireland is complex, wide ranging and a matter of significant importance to the development management process. This section of the guidance note highlights the important aspects of the pre-planning activity and planning application processes.

4.2 Key planning legislation

The Planning and Development Act, 2000 (the Principal Act) consolidated all planning legislation from 1963 to 1999 and is the primary legislation for development in Ireland. The Act codified much of what had grown up in custom and practice during that time, clarifying and simplifying the overall process into one self-contained piece of legislation. The Act has been amended a number of times since 2000 and these are out in the administrative consolidation drawn up by the Law Reform Commission.

This Act sets out:

- The legislation for regional planning guidelines, development plans and local area plans.
- It explains how Ministerial Guidelines work.
- It sets out how the process of applying for and obtaining planning permission works.
- It contains special requirements for protected structures, conservation areas and areas of special planning control.
- It explains the relationship between planning and social housing supply.
- It sets out Ireland's planning appeals and enforcement processes.
- It describes Strategic Development Zones and Environmental Impact Assessment.
- It clarifies how a range of particular planning processes, including for State development, operates.

The secondary legislation underpinning the Planning and Development Acts are the Planning and Development Regulations 2001 (S.I. No. 600 of 2001). A number of Regulations amending the 2001 Regulations have been made, which, taken together, are collectively cited as the Planning and Development Regulations 2001 to 2020.

Development as defined under Section 3 of the Principal Act is subject to development control and requires permission from either a Local Authority or An Bord Pleanála upon before it can be carried out. Some classes of development are exempt from the requirement to obtain planning permission due to their size, nature or limited effect on surroundings, or because the development is authorised under another enactment. Section 4(4) of the Planning and Development Act 2000 and Regulation 9 of the Planning and Development Regulations 2001 provides some information on this. Note that in most cases 'exempted development' loses its exempted status if an appropriate assessment or environmental impact assessment is required.

4.3 Strategic Infrastructure Development

The Planning and Development (Strategic Infrastructure) Act 2006 facilitates planning applications being submitted directly to An Bord Pleanála for certain projects. SID applications are for projects that are considered to be strategically, economically or socially important and / or projects fulfilling any of the objectives of the National Planning Framework or the Regional Spatial and Economic Strategy for the location(s) of the development and/or would have a significant effect on the area of more than one local authority. Note there are separate SID processes for private sector developments (for example, hospitals and student accommodation) and gas and electricity infrastructure or roads projects.

To qualify as a SID, a proposed development must be one of the specific classes prescribed in the Seventh Schedule of the Planning and Development and must exceed the defined development thresholds for that class. For example, a healthcare facility with over 100 beds, or a wind farm with more than 25 turbines or a total output of more than 50 megawatts.

If the project does qualify for a SID, a direct application is made to An Bord Pleanála, rather than the local authority, following the required pre-application consultation. The Local Authority still retains a role in the application and makes a report to An Bord Pleanála noting their own observations within 10 weeks of the application being made. Given their size, all SID application must be accompanied by an Environmental Impact Assessment

and, in some cases, a Natura 2000 assessment regarding the projects impact on flora and fauna.

4.4 Development Plans

Under planning legislation, it is mandatory for Local Authorities to make Development Plans every five years. These are open to public consultation and once adopted by the Local Authority sets out policies and objectives to guide how and where development will take place in the Local Authority's area over the lifetime of the Plan. Typically, this relates to zoning for residential, industrial and agricultural land and plans to improve roads and local amenities. It also provides objectives for the conservation and protection of the environment including, in particular, the archaeological and natural heritage and the conservation and protection of European sites and any other sites which may be prescribed.

4.5 Strategic Development Zones

Under Section 169 of the Planning and Development Acts 2000 (as amended), the government can designate certain areas as Strategic Development Zones where the development is considered to be of strategic national economic and social importance. A SDZ is often used to control the form of development within a specific area, so that the area is regenerated and or continues to be economically viable and prosper in the long term. A SDZ can be used on large sites where actual development can be brought forward in separate parcels to ensure each stage works appropriately to provide an overall cohesive site. This allows flexibility as planning consent is not as onerous as full consent. In considering applications under a SDZ, the local authorities will aim to ensure that any proposed new development complies with and contributes to the aims of the SDZ.

4.6 Local Authority Applications

Local Authorities can compile their own applications for developments they self-deliver through a process that is often referred to as 'Part 8' development, referring to Part 8 of the Planning and Development Regulations 2001, as amended, which sets out the procedure for carrying out such developments. Typically, this process would be used for housing, roads, swimming pools, public toilets and more.

4.7 Planning Inspectorate

The enforcement of planning is the responsibility of the Local Authority. Upon discovering a breach in planning, the local authorities planning enforcement officer may direct:

- To bring unauthorised development under control;
- To remedy any undesirable effects of unauthorised development including, where necessary, the remediation of negative effects of the development, the removal or cessation of unacceptable development; and
- To take legal action, where necessary, against those who ignore or flout planning legislation.

4.8 Planning Applications

4.8.1 Overview of planning process

Each Local Authority has established a planning portal website which allows professionals and members of the public to apply for planning permission electronically. The planning portal website also includes useful information on the planning system and building regulations that are applicable.

Local authorities are required to determine each planning application within eight weeks from when they have acknowledged receipt of the application for planning permission. Upon receipt of a decision to grant there is a further four-week period for appeals. If no appeal is received the local authority can issue their final grant, which permits the development to proceed. During the application, and no later than five weeks into the process, the local authority may request further information during an application, in which case the decision period is suspended until the further information is submitted. After 8 weeks it can grant or refuse a planning application. A developer may appeal a refusal to An Bord Pleanála through judicial review.

Other planning processes may be implemented, for a period, to address particular planning demands e.g., Strategic Housing Development applications.

4.8.2 Submission of the planning application

Some or all of the following documents may be required when submitting a complex planning application;

- Architectural drawings (plans and elevations) or other visual aids to explain the concept of the



proposed development.

- An environmental impact assessment (if applicable);
- The design concept and access principles;
- A sustainability report;
- A transport assessment;
- A travel plan and service management plan;

4.9 Some additional planning matters

This section sets out a number of specific matters arising in relation to planning which are of particular relevance to project management surveyors.

1. Anyone may apply for planning consent in respect of a particular site. In circumstances where the applicant is not the owner, the consent in writing of the owner must be received prior to the application being submitted. Additionally, any adjacent lands not in the interest of the applicant must be indicated as a blue line on an Ordnance Survey map that accompanies the application.
2. The appointment of a planning consultant is often one of the key steps at the early stages of the development management process. Developers should consider the engagement of a planning consultant to ensure that the site is utilised to the maximum extent allowed within the framework of the local authority's requirements. Some developers may also seek specialist legal planning advice in complex and large projects. The planning consultant and the architect for a development will work closely together to achieve the objectives of

the developer.

3. Project management surveyors are advised to be aware that any pre-planning discussions with a local authority are not binding. Note this differs with SID's where pre-application meetings are formal and minuted.
4. Project management surveyors are also advised to be aware of potential delays and time constraints that may have an effect on the development programme including the following:
 - (a) As previously noted, the local authorities are required to determine each planning application within an eight-week statutory period. However, the eight-week period will commence from the time when the correct fee is paid and the application validated.
 - (b) Planning applications will also be delayed if the relevant forms are not completed properly or if they require additional or amended information and the eight-week statutory period for consideration can re-commence from when the new information is submitted.
 - (c) Project management surveyors should confirm, through the design team compiling the application, that the application is complete and that no additional supporting information is required. A complete planning application will assist in minimising delays.

- (d) Approvals often include conditions relating to elements of the proposed development which are not fully detailed on the planning drawings or cannot be determined until later.
- (e) Timely submission of correctly supporting documentation to the local authority will reduce the likelihood of increased cost and delays for the developer and can increase the efficiency of the overall development programme. Project management surveyors are advised to allow adequate time in the development programme to obtain quotations for specialist services, commission such work and to understand the implications of the specialist findings.
- (f) The level of supporting documentation required to accompany a submission for planning application should not be underestimated in terms of time and cost.

4.10 Planning Consultation

It is important that project management surveyors are aware of the variety of local and government agencies and statutory consultees involved with planning. The main point of contact with this planning system is through the local authority and the starting point will be the Local Development Plan Documents.

4.11 Environmental considerations

The protection of natural heritage is also addressed in the Act and it provides the statutory basis for protecting our natural and architectural heritage and the carrying out of Environmental Impact Assessment and Appropriate Assessment.

Developers are advised to submit the appropriate supporting documentation to accompany their planning applications. A significant amount of supporting documentation will relate to environmental matters.

4.12 Environmental impact assessment

Developers may be required to prepare an environmental impact assessment (EIA) as part of a planning application through the preparation of an

Environmental Impact Assessment Report (EIAR). The EIA is intended to identify the social and environmental impact of proposed developments. Developers can find out from the local authority or the planning consultant if they must provide an EIA before lodging their planning application. It is important to note that in circumstances where an EIA is required the local authorities will increase the period available to them to determine planning applications by 16 weeks. This extended period allows the local authorities additional time to consider the additional information provided in the EIA in connection with the application.

4.13 Sustainability statement

The developer may also be required to provide a sustainability statement. The purpose of the sustainability statement is to indicate how the development will address sustainable development issues such as sustainable urban quality design, air quality control, sustainable water drainage, etc. Developers may also have to commission specialists to prepare certain aspects of these statements, e.g. traffic management experts, acoustic consultants, etc.

4.14 Waste management

The government also has stated policies to increase the recycling of materials and decrease waste. Accordingly, developers are required to demonstrate their commitment to recycling, e.g. prepare waste management plans.

4.15 Topographical surveys, etc

Topographical surveys and other investigative searches will assist in ascertaining whether the proposed site contains archaeological remains or other sensitive features such as trees that are subject to tree preservation orders. The result of such surveys may affect the costs and timetable for a development. All recorded archaeological monuments are protected under the National Monuments Acts 1930-2004 and compels developers of sites with potential significant archaeological remains to carry out archaeological excavations on site before the development can proceed. A specific licence is required from the National Monuments Service prior to carrying out any archaeological works on site.

4.16 Building control and regulations

Project management surveyors are advised to check that all the relevant members of the professional team are aware of new and pending legislation in respect of building control and regulations. This is especially important where it can be reasonably foreseen that the proposed measures would have a significant effect on the design or cost of developments the construction of which are not likely to start for 12 or more months after commissioning.

4.17 Third party rights

Developers are advised to ensure that their development takes into consideration rights of third parties such as party wall rights, rights of light, restrictive covenants, wayleaves, etc. Boundaries, party walls and rights of light are discussed in more detail below.

4.18 Boundaries and Party walls

Common law sets out the law concerning the carrying out of works on or near shared boundaries or party structures. The Land and Conveyancing Law Reform Act 2009 gives clarity to an owner who wants to carry out such works, in addition to the rights of any adjoining owners. It may not be possible to commence some or all of the construction works for a development if the relevant boundary issues have not been agreed and adjoining owners may be able to halt construction work

on site through a court injunction. For this reason, it is recommended that the project management surveyors endeavour to maintain a good working relationship with the adjoining owners and their surveyors. Failure to adhere to any legal agreements of the boundary or party structure may result in the development being halted by a court injunction.

4.19 Rights to light

In Irish Law, a right to light was traditionally acquired under the Prescription Act 1832. This was repealed by the Land and Conveyancing Law Reform Act 2009 and reduced the required period of use and enjoyment of the right to light from 20 years to 12 years. A right to light may be implied where (a) it is necessary to the reasonable enjoyment of the part of the land disposed of, and (b) was reasonable for the parties to assume at the date the sale took effect as being included in the sale.

A party who claims rights to light may apply for a court order to reinforce this right. The obstruction must amount to a nuisance for an appellant to be successful in claiming their right.

The right to light is very important to individuals living in high density urban areas. Project management surveyors are advised to be aware that right to light is a civil matter between neighbours. Note also that grant of outline or detailed planning permission does not negate a neighbour's right to light.



5. Development Finance

5.1 Introduction

Development finance will typically comprise either equity or debt (or both). The form of finance used to complete a development and the requirements of its providers will have significant implications for the parties to a development and the conduct of the development process. Property development requires finance for acquisition of the site (if not already owned by the developer), professional fees, construction costs, etc.

5.2 The Development Vehicle

Virtually all large developments (the principal exception being private developments by certain owner-occupiers) will be conducted through a legal entity formed for the purposes of completing and financing the project. Such entities are used for a variety of purposes, some of the most important of which are:

- Isolating the interested parties from risks and liabilities which may arise in the course of the development;
- Putting the project into a form which will receive well-established treatments as regards key legal issues such as entering into certain types of contracts, the creation of certain types of mortgages and other security interests and insolvency; and
- Achieving particular tax outcomes as regards the costs of and profits from the development for its sponsors and investors.

Complex developments are often conducted through entities which are specially created for the sole purpose of the project, which engage in no other activities and which are dissolved on completion of the development. Such entities are commonly referred to as special purpose vehicles (SPVs or Section 110 Companies) and are used to limit the exposure of investors and finance to activities other than the project itself such as the general business activities of the construction firm involved in the project.

Development vehicles formed in offshore jurisdictions are not uncommon in complex projects particularly where international investors are involved.

The most commonly used types of development vehicles are corporate vehicles and partnerships.

5.2.1 Corporate Vehicles

Private limited companies provide a familiar and simple structure for carrying on businesses such as construction development. Such companies benefit from the long-established legal principle of 'separate legal personality' under which they are treated as entirely distinct for all legal purposes from their shareholders. Its shareholders liability is limited to the number of shares that they own.

5.2.2 Partnerships

Irish Limited Partnerships are not legal persons but are structures created by private contract. Partnerships involve at least two parties one of whom will act as general partner and manage the day-to-day activities of the partnership. The others will be limited partners, will be relatively passive participants in the partnership and (depending on how the partnership is constituted) can be protected from the general liabilities of the partnership under specific legislation. The limited partner contributes a stated amount of capital and is not liable for debts that are beyond that amount. Partnership structures are relatively complex and are usually employed for tax or stamp duty land tax planning purposes.

5.3 Equity

'Equity' is a rather nebulous concept but at its most simple it means the net investment of the owners or shareholders in a business. Every business has equity and development is no different. Equity can take a wide variety of forms:

- Contributions of assets (in the case of development, most likely to be the site);
- Cash injections of capital contributions;
- Subscriptions for shares of various types (or partnership interests); and high interest rate subordinated loans.

Well-advised investors are most likely to take shares in any project in which they may invest (subordinated loans add considerable complexity and may be viewed unfavorably by finance providers). Shares may be issued for cash or in return for contributions of assets.

Company law allows companies to issue different types of shares to different investors. For example, companies may issue preference shares, carrying preferential rights to receive fixed dividends, to particular investors and ordinary shares which will be paid dividends only after the preference shareholders have received amounts due to them but the dividends on which will be unlimited to other investors.

In certain cases, the shareholders of a company may enter into shareholders agreements regulating their rights inter se and vis-à-vis the company. Such arrangements provide a convenient means of forming a joint venture. For example, a site owner and a construction firm may create a joint venture company to complete a development on the site. The site owner would contribute the site and receive an amount of shares in the company proportionate to the value of the site. The construction firm would agree to provide materials and staff for the construction and would also receive shares proportionate to the value of the same. The shareholders agreement between them would set out matters such as: the type of any debt finance they might want to obtain; arrangements for distributions of profits; dispute resolution procedures; and procedures for either party selling its interest in the project.

Shareholders will ultimately receive a pro rata share of all of the profits of the issuing company but are also subject to substantial risks, particularly on insolvency of the company where they will receive only a share of what is left of the company's assets after all of its creditors have been paid in full.

5.4 Debt

The most important characteristics of debt finance are as follows:

- It has to be repaid before equity investors (although some debt finance may allow limited dividends to be paid);
- Debt finance providers will usually require certainty as to the priority of their claim to those of other creditors particularly trade creditors such as suppliers;
- Debt carries interest which will usually fluctuate with changes in base rates;
- Debt finance providers will require substantial amounts of information on the project before lending and on an ongoing basis during the term of the financing;
- Debt finance providers will want rights to take over the project if the developer is unable to complete the development for financial or operational reasons;
- Debt finance providers will usually want to have a mortgage over the site and security over the other assets associated with the project.

Debt finance can take an almost infinite variety of forms. However, a number of fundamental distinctions can be drawn.

5.4.1 Secured v. Unsecured

Virtually all debt finance is secured. Debt finance providers require security to ensure that if the developer (or the development vehicle) becomes insolvent, it will be repaid ahead of other interested parties such as trade creditors and the equity investors.

Security is usually taken over all of the project assets: the site, the materials, insurance policies, project bank accounts and important contracts such as contracts with suppliers. Legal rules associated with perfecting this security may result in restrictions being placed on the ability of the developer to do certain things such as replacing suppliers or withdrawing money from bank accounts without lender consent.

One of the aims of a debt finance provider in taking security over project assets is to ensure that on developer default, it can appoint a receiver to take control of the project assets and either sell them or use them to complete the development.

Unsecured debt finance is unusual and normally appears only as a form of quasi-equity for the equity investors.

5.4.2 Senior v. mezzanine v. junior/equity

Most projects involve a single form of debt finance (usually a loan) from a single provider (usually a bank). However, traditionally, banks limit the amount of debt finance that they will provide to a single project to a percentage of the value of the completed project (normally limited to a maximum of 60 per cent to 70

per cent). Large or complex developments may require higher levels of debt than banks would normally provide. Such debt may be available from non-bank sources but at higher interest rates.

Developers of such projects are likely to seek the maximum possible amount of relatively low-cost bank debt and borrow the minimum amount of additional, more expensive, funds from non-banks. In such situations, the bank lender will require arrangements to be in place to preserve its first priority claim on the project and its assets and to subordinate the claim of the non-bank lender. Such subordinated loans are known as mezzanine debt, the term 'mezzanine' refers to such debt being positioned between the senior bank debt and ahead of any junior debt or equity.

Intercreditor agreements between senior lenders and mezzanine lenders will restrict payments to the mezzanine lenders and prevent the mezzanine lenders from exercising rights against the borrower (the project development vehicle) while the senior debt is outstanding.

5.4.3 Construction v. long term

Construction debt finance is seen as a specialised activity carrying complex risks for lenders.

This level of specialisation has led to the development of a distinction between the finance for the construction phase of a project and the permanent finance for the completed project. The cost of funds for construction finance and the restrictions imposed on the project parties by the debt providers differ substantially (usually being more onerous) than those that would apply to a 'stabilised' income-producing completed development.

For this reason, construction finance is normally repayable on completion of the project either from the proceeds of sale of the completed project or via a refinancing from another finance provider.

5.4.4 Niche forms of finance

Debt finance is a constantly evolving technique and new forms of debt continue to emerge. A detailed discussion of these is beyond the scope of this guidance note. However, some forms of debt which may be encountered from time to time include:

- *PPP*: Public Private Partnership structure continues to be a major source of finance for public sector infrastructure development. Such projects involve a complex array of contracts and agreements seeking to reconcile the diverging interests of the Irish public sector (seeking objectives such as value for money and paying only for 'useable' facilities) with those of the developers and their finance providers.
- *Capital markets finance*: The complexity of construction finance has restricted the ability of developers to raise funds in the capital markets. Such instruments tend to be similar from the perspective of the parties to a project to other forms of debt finance but involve additional parties such as rating agencies and mono-line insurance companies who will require additional information on the progress of the process and may have rights to take control of the project in particular circumstances.
- *Hedging*: Sophisticated developers may enter into derivative contracts with banks or specialised providers to protect themselves against increases in interest rates or decreases in property values.

5.5 Debt providers

A variety of lenders provide debt finance for construction projects. The nature and identity of a debt finance provider will affect its requirements for the terms of the finance it provides and the way in which it will interact with the project parties:

- *Banks*: Banks have always been the principal source of finance for construction. Their requirements are well documented and are briefly discussed above.
- *Private funds*: Private unregulated fund vehicles backed by sophisticated investors (often large institutions and wealthy individuals) may seek to fill the gap in the finance market left by banks which have been adversely affected by prevailing economic conditions. Such funds are actively managed by a professional manager whose objective is to seek a minimum return on its investment. Such funds are likely to be more flexible and innovative than banks have traditionally been.
- *Public sector*: Depending on the nature of a project, particular public sector entities (such as housing associations) may contribute to the financing of the development. Such entities will behave very differently to private sector lenders and will be more interested in achieving the social or other objectives

which they are set up to achieve than seeking a commercial profit on the transaction.

- **REITS:** Real Estate Investment Trusts or 'REITs' are an internationally recognized investment model, having originated in the USA in the 1960s. The tax regime for the operation of REITs in Ireland was introduced via the Finance Act 2013. In essence they allow smaller scale investors the opportunity to invest in commercial property and gain returns in a regulated environment.
 - A REIT is a quoted company, used as a collective investment vehicle to hold rental property. A REIT generally has a diverse ownership requirement, so no one person or group of connected persons can control the REIT. A REIT is exempt from corporation tax on qualifying income and gains from rental property, subject to a high profit distribution requirement to shareholders. In Ireland this requirement is set at 85% of rental profits.
 - REITs are specifically designed to focus on the long-term holding of income producing property.
 - Key features of the REIT regime include the following:
 - Liquid investment – listed shares can be sold far more easily, more quickly, and at lower cost than a sale of an investment property.
 - Income producing investment – regular dividend streams are produced due to distribution requirement on the REIT company.
 - REITs provide access to investment in real estate without buying property directly. The minimum investment is the price of a single share in the REIT, so it is accessible to small investors in addition to large institutional investors.
 - A REIT allows an investor to participate in both the rental returns (via the distribution requirement) and the capital gains (via the appreciation of share value) of the property market.
 - It also allows wider access to returns from investment grade commercial property that previously were restricted to large institutional investors only.
 - The investor can diversify their risk by investing in a REIT holding a variety of properties, in contrast to concentrating risk in the purchase of an individual rental property.
 - As public limited companies, REITs have a transparent structure with strong corporate governance and reporting standards.

5.6 Finance and the development management process

The process of arranging finance for a development and the involvement of finance providers with a project may have the following implications for project management surveyors:

1. Project management surveyors and other advisers are likely to be asked by developers to assist with finance providers' 'due diligence' in connection with the arrangement of the finance. This is likely to involve making reports, plans, documents and other information available to prospective finance providers and meeting with them to discuss the project. Project management surveyors are advised to ensure that allowance for this process is built into the project timetable and account is taken of it in all tenders and quotations submitted.
2. Finance providers are likely to require that all formal professional reports, opinions and surveys be made available to them and addressed to them. While the overall monetary liability of the providers of these should not increase under normal rules of negligence, the providers of this information may wish to consider the protective wording in the terms of their engagements and the cost implications of increased litigation risk.
3. Liability caps remain a controversial area and some finance providers will insist on their removal from any terms of engagement.
4. Finance providers will usually require extensive ongoing reporting of progress or project monitoring on the project. This may well include detailed financial and technical information and may be required as frequently as monthly. Project management surveyors should take account of developers' requirements in this regard when setting timetables and estimating costs.
5. Some finance providers may require project management surveyors and other key project parties to commit to co-operate with them if the developer defaults and the finance provider takes over completion of the project. Such 'step-in' rights are likely, if exercised, to place increased burdens on project management surveyors and other professionals to assist finance providers who may not be as expert as the original developer or as familiar with all aspects of the project. In periods of economic disturbance, step-ins by finance providers may become increasingly common.

6. Procurement

6.1 Introduction

This section addresses four specific aspects:

- Overall aim of the procurement strategy;
- Composition of the developer's professional team;
- Tendering and selection process; and
- Forms of appointment available

6.2 Procurement strategy

It is important that the procurement strategy for a development should be prepared as soon as practicable in the development management process. The overall aim of this strategy is to enable the development to be completed on time, to budget, to the specified quality, and to minimise and mitigate risk. It should cover the following aspects of the development:

- Procurement of the services of the professional team referred to below;
- Procurement of all goods and services necessary to complete construction works;
- Tendering process of the above services and goods whether negotiated or competitive;

- Forms of contract to be used; and
- Arrangements for risk management.

6.2.1 European public procurement

Project management surveyors are advised to consider and, if necessary, take specialist advice, as to whether the European public procurement rules apply to the development. A variety of technical requirements and timeframes may have to be considered.

It is important for project management surveyors to be aware that where a development is fully or partially funded by the public sector, specific additional terms and conditions may be attached to the award of funding that could impact on the procurement strategy.

The Office of Government Procurement's website provides detailed guidance on public procurement <https://ogp.gov.ie/>

6.3 Composition of the developer's professional team

The composition of the developer's professional team will vary according to the nature of the proposed development. Also, the level of involvement of each team member will change as the development progresses. A typical development team for a large development, but would not be limited to, include the following:

- Developer's representative;
- Planning & Development surveyor;
- Project management surveyor;
- Valuation surveyor;
- Planning consultant
- Accountants;
- Legal and tax advisers;
- Land and New Homes agents;
- Architect;
- Landscape architect;
- Project supervisor for the design process (PSDP);
- Interior designer;



- Quantity surveyor;
- Mechanical, electrical and public health services engineer;
- Structural engineer;
- Building surveyor;
- Geomatics surveyor;
- Assigned Certifier
- Environmental consultants (including specialists in acoustics, catering, traffic management and planning);
- BIM consultant; and
- Specialist consultants including ecology, arborist, conservation/ archaeologist, sunlight/daylight etc.

6.4 Tendering and selection process

The developer's team can be selected in a variety of ways. Many professional body websites contain portals for searching for registered professionals, for example the RIAI and EI. It is important when choosing a professional that they are registered with a relevant professional body and hold the necessary insurance. A full scope of services, including all required services, should be prepared and issued to the tendering parties. A minimum of three fee proposals should be sought for price checking. Advertisements can be placed in the relevant magazines and journals to attract interest from professionals. Where a development is subject to European procurement law, it may be necessary to place an advertisement in the *Official Journal of the European Union (OJEU)* for the professional teams' services. Within the UK there is additional guidance available from , the Construction Industry Council's (CIC) 'Selecting the Team' (see www.cic.org.uk/services/SelectingtheTeam.pdf), CABE's 'Creating excellent building: A guide for clients' (see www.cabe.org.uk/publications/creating-excellent-buildings). For public sector projects in Ireland, the Office of Public Procurement provides guidance and model forms (<https://ogp.gov.ie/public-procurement-guidelines-for-goods-and-services/>)

6.5 Forms of appointment available

6.5.1 Bespoke forms of appointment

Some developers may require the professional team to sign their form of contracts rather than a recognised industry standard form of contract.

Project management surveyors are advised to check the unusual and or onerous terms and conditions of a bespoke contract do not infringe or negate in some way their existing professional indemnity insurance.

6.5.2 Standard forms of appointment

Several professional bodies including the SCSi, the Association for Project Management (APM), RIAI, CIOB and Engineers Ireland (EI) publish information on the procurement of consultants and or provide further guidance on the various forms of contracts that may be used to engage consultants.

The main standard forms of contract available for the appointment of project management surveyors or project managers are available from the following organisations:

- SCSi
- RIAI
- EI, and
- APM

The SCSi publishes a standard form of contract for various types of surveyors, e.g., valuation, planning, quantity surveyors, party wall, etc. RIAI and EI also publish standard forms of contract for the engagement of Architects or Engineers.



References

1. Stakeholder/ end user = the person or entities with a vested interest in all or part of the development, e.g. a commercial office tenant operating and occupying an office development. A stakeholder/ end user may also contribute to the costs of the development.
 2. Developer's professional team = this term is a subset of the concept of 'professional team' as used in RICS's *Form of appointment for project manager services* and is equivalent to the term 'project team' as used in the CIOB's *Code of Practice for Project Management for Construction and Development*.
 3. Investor = person, persons or institution that make a financial contribution to the cost of the development but is not directly responsible for the development management process. As well as private persons and companies, the investors may include central government departments, local authorities, funding institutions, etc.
 4. Planning consultant = a professional with expertise in planning matters, such as an architect, chartered planning surveyor, town planner, etc.
 5. Interested party/ies = the persons or entities which are not making a direct financial contribution to the cost of the proposed development but are affected by it in some way, e.g., residents living nearby.
 6. Department of Finance, Real Estate Investment Trusts, Irish Real Estate Funds and Section 110 Companies as they invest in the Irish Property Market, Tax Strategy Group – 19/02, July 2019
- SCSI guidance note on 'Right to Light' deals with easements known as rights of light and outlines current best practice for surveyors in this field. www.scsi.ie/rights-of-light.



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