

FACILITATING MAINTENANCE OF STORMWATER DEVICES ON COMMUNALLY OWNED LAND

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ABSTRACT

The location of low impact stormwater features on individually or communally-owned private land is regarded as a potential solution to reducing ecological and economic costs of public infrastructure. Currently in New Zealand, bodies corporate, created under the Unit Titles Act 1972, are usually responsible for management of stormwater features on communally-owned property. However, alternative models are increasingly being put in place by developers for freehold sites where provision needs to be made for management of common property.

This paper explores the various models for management of communally-owned property in three countries, New Zealand, Canada and Australia, where stormwater features are being managed by owners and residents. It compares the relevant legislation across the three jurisdictions and reviews key features of the entities that can be established to manage communally-owned properties. Four types of New Zealand entities, namely bodies corporate, incorporated societies, residents' associations and companies are then considered in more detail. The paper draws on interviews with New Zealand property lawyers, developers and council staff who have relevant experience in the establishment and operation of these entities. Preliminary findings are presented and some critical issues raised.

KEYWORDS

Multi unit housing, incorporated societies, bodies corporate, joint venture, stormwater, low impact design

ACRONYMS

ICS Incorporated Societies Act 1908

UTA Unit Titles Act 1972

1 INTRODUCTION

New Zealand district and city councils express concern about the maintenance, practicality and liabilities of low impact stormwater devices and corridors located on individually or communally-owned private land. These concerns lead some councils to avoid a 'low impact' approach to the design and construction of stormwater systems as this approach requires source control of stormwater on these private landholdings. At the same time however, councils are burdened by the necessary construction and maintenance of required stormwater systems on public land. The latter could be substantially reduced by source control.

In Auckland, particularly, there has been a rapid increase in the extent of multi-unit housing in the last decade. Most multi-unit housing comes under a form of title called strata titles, created under the Unit Titles Act (UTA) 1972. With a strata title bodies corporate become the governing vehicle to deal with the administration and management of communally-owned property. Bodies corporate are thus usually responsible for the management of stormwater devices, should these be located on communally-owned property. However, for freehold sites, the body corporate model does not apply. Thus developers constructing multi-unit and single lot dwellings in gated or non-gated developments which includes land in freehold title need to find alternative management mechanisms for new owners. In Ontario, Canada similar stormwater systems, on communally owned private

land, are managed under the Condominium Act 1998 while in Victoria, Australia, bodies corporate arrangements are used, similar to New Zealand.

Preliminary research indicates that these newer alternative mechanisms in New Zealand include incorporated societies, residents' associations and companies. Recently the operation of bodies corporate has undergone particular scrutiny and criticism leading to a review of the Unit Titles Act 1972 that is now underway (Dupuis et al., 2002; Department of Building and Housing, 2004; Glaister Ennor and Auckland Regional Council, 2003) while in Australia the Victorian State Government is also conducting a review of provisions in the Subdivision Act 1988 for bodies corporate (Consumer Affairs Victoria, 2004). However, the alternative mechanisms now being established in New Zealand are largely untested.

This paper reports on the variety of mechanisms used to manage communally-owned housing where stormwater devices are located. As a basis for our exploration, we look at five sites, three in Auckland, New Zealand, one in Guelph, Canada, and the fifth in Melbourne, Australia, and highlight commonalities and differences with respect to the different types of entities put in place to manage stormwater devices. We then look in more detail at four entities being used in New Zealand to manage communally-owned property that may include requirements to manage stormwater devices. While there is a significant amount of information regarding the operations of bodies corporate, there is little information readily available in respect of incorporated societies, residents' associations and companies. We report on interviews undertaken in the preliminary stages of this research with several property lawyers, developers, professional advisors and council staff. We conclude by raising issues that need to be considered by policy makers and other stakeholders as these private arrangements become more commonplace.

2 DESCRIPTION OF SITES

In this section of the paper, we describe five sites containing multi-unit and stand alone housing where stormwater devices are being managed by the owners and residents. We outline the arrangements on these sites that are either proposed or are in place for managing communally-owned property that include provisions for managing stormwater devices. This section provides a basis for subsequent discussion on the types of arrangements being put in place.

2.1 REGIS PARK, FLAT BUSH, MANUKAU CITY

Regis Park is a low-density residential housing estate under construction in headwater subcatchments of Otaru Stream in Flat Bush, Manukau City, New Zealand¹. The designers and developers of this estate are intent on demonstrating a unique development style that includes many low impact design features and follows sound 'integrated catchment management' principles (van Roon, in review). The pre-construction site is steep and vegetated in pastoral grasses with exotic trees in stream gullies.

The design (Figure 1) includes the clustering of 66 houses in order to free open space for indigenous re-vegetation, source control of stormwater within rain gardens (on every lot) and wetlands, community sewage treatment and collection of rainwater for domestic supply. Sewage effluent will be discharged to vegetated areas on-site. Open space areas and communal facilities will be owned and managed jointly by residents. Of a total land area of 34 ha, 19.5 ha will be re-vegetated, mainly within ecological corridors, to aid evapotranspiration of stormwater, plus indigenous biodiversity and landscape enhancement (van Roon, in review).

Another design objective aimed at improving both ecological and economic sustainability has been earthworks minimisation and the exclusion of steep lands from the area developed. During the design of Regis Park difficulties were experienced with the presence of pre-existing road patterns delineated on cadastral maps. The council gave exemptions to road-gradient restrictions so that earthworks could be minimised (Scott, pers. comm., 2004). Road patterns are typically intensified during the conversion of land from rural to rural-residential. Therefore, the application of low impact principles at this stage may avoid the above difficulties.

¹ The Auckland metropolitan region comprises four cities; Auckland, Manukau, North Shore and Waitakere

Currently the proposed structure for the management of the commonly-owned land is to be an Incorporated Society which would include a Residents' Society responsible for the costs and operation of the stormwater management system. It is possible that a management company, similar to those administering bodies corporate, could be employed to assist with management of the system. However, it is unlikely that the current body corporate management industry has the necessary expertise to manage the low impact design systems being put in place. As yet, no rules have been drafted up (Mason, pers. comm., 2005). It is not expected that housing construction will begin until spring 2005.

Figure 1 Layout of Regis Park, Flat Bush (plan courtesy of Denis Scott)



2.2 GOODLAND COUNTRY ESTATE, RODNEY DISTRICT

The Goodland Country Estate comprises 63 individual house lots, located on 95.6 hectares (Figure 2). Most of the property is farmed as an operational unit. Along with the farm, particular features include the management of communal facilities (tennis court, petanque court, community centre, barbeque area, children's playground), and a community wastewater facility. Stormwater features include swales, riparian planting, detention tanks and wetlands. The development is an example of where an alternative to unit titles and a body corporate has been established in a rural setting.

Figure 2 Goodland Country Estate (Plan courtesy of Goodland Group)



The Estate comprises 63 individual house lots (fee simple titles) that are individually owned. Covenants have been placed on each title that require each owner to become and remain a member of the Goodland Country Estate Joint Venture (Joint Venture Agreement, 2004). The farm property of around 70 hectares is owned by the Joint Venture comprising all the owners of the individual lots.

The Property of the Joint Venture is held in trust by the Goodland Country Estate Trustee Company Ltd. It is a bare trustee company only.² It is not the manager of the Joint Venture, it has no financial dealings of its own and only exists to hold property for the Joint Venture members as tenants in common. This trustee company is controlled by its shareholders who are the five elected members of the Joint Venture's management committee.

² A holding company for property that does not trade or have financial activities in its own right

The Joint Venture meets the costs of maintaining the farm property, owns and administers the community wastewater system and is entitled to farm income from the lease of the farm property. Profit and losses are shared on a proportional basis by the members of the Joint Venture (lot owners) The actual management of the Estate is carried out by Goodland Country Estate Management Ltd a company incorporated to manage the Joint Venture and to separately administer the farm property and the community waste water system. There is also a separate agreement between Goodland Estate Trustee Company as trustee for the Joint Venture and the Management Company employed to manage the property and designated common areas of the development (Management Agreement, 2004).

There is a set of rules in place to manage the community wastewater facility that requires compliance by each member/owner with the wastewater management plan (Rules for the Use of the Community Wastewater Facility). Rules require owners, individually and collectively, to maintain, repair and replace wastewater equipment, including the desludging of any interceptor tank if required. The rules make it clear that maintenance and repair is the financial responsibility of owners. There are no specific rules referring to maintenance of swales. The Joint Venture agreement sets out rules governing administration, setting of fees, meeting procedures, powers of the Joint Venture, roles of the manager and wastewater manager. There is, in addition, the provision during the development phase for a Principal Member (Developer) as part of the Joint Venture. The Principal Member in effect has total control under the Agreement's provisions until the project is finished and the developer no longer owns any land in the project which could be long term. This prospect is also common within bodies corporate.

2.3 POINT RIDGE, ALBANY, NORTH SHORE CITY

This development is of interest in that it is most likely New Zealand's largest, purpose-built gated community to be established to date. The developer, Urban Developments Ltd, has resource consent to construct 186 units on a six hectare site. The management of communally-owned property will be undertaken by several bodies corporate and a residents' committee with a resident, on-site manager. While only a draft set of rules have been written (Body Corporate Rules, BC No 346275), the final set of rules is expected shortly, with the granting of titles for the first stage of the development. The first group of residents will be moving in shortly. It is expected that several bodies corporate will be established as the development is being constructed in several stages. Thus owners and residents will take up occupation over a period of several years.

Photo 1: Housing Construction at Point Ridge, North Shore (photo courtesy of Penny Lysnar)



The current plan is for the on-site manager to live in one of the stage one units, and be responsible for the renting out of any units in the development, as well as running a local shop and facilitating the body corporate. A staff member on site suggested that facilitating the body corporate, a residents' committee and letting of apartments in the first stage of the development would be a matter of trial and error. The 'residents committee' will be used as an umbrella group to encompass the members of the different bodies corporate once established as well as those residents who live in the complex but who rent rather than own.

The development plan for Point Ridge approved by North Shore City as part of the resource consent process includes provision for several swales, rain gardens, underground stormwater tanks and a stormwater pond. However, this plan is being modified as development (Photo 1) of the site proceeds (Nagels, pers. comm., 2005). The draft rules for the body corporate require compliance with the specific drainage requirements of North Shore City Council as follows (Body Corporate Rules, BC No 346275, 3):

2.2 (e) Comply with the specific drainage requirements of the North Shore City Council (NSCC) as to :

- Swales and raingarden areas – purpose, maintenance (keep weed free and allow grasses to grow to a reasonable height of 150mm). Keep foot traffic and motor vehicles off swales and landscaped areas.

- Drainage system – the network of drains are common private drains and the responsibility of the Body Corporate.
- Counterfort drains – maintenance is the responsibility of the Body Corporate. Inspection points must be kept accessible.
- Permeable areas – grassed lawns, landscaping – these areas are to be kept permeable to allow rainwater infiltration and maintain coolness. Planting with native plants is recommended (Photo 2).
- Raintanks – purpose, maintenance (Photo 2).

2.2 (f) Provide the NSCC with the method of registration of drainage maintenance needs. This registration is to state that the council has the right to inspect, and the costs of these inspections are to be met by the Body Corporate.

Photo 2 Example of Permeable Areas and a Rain Tank, Glenfield (photo courtesy of Peter Nagels)



2.4 WESTMINSTER WOODS, CITY OF GUELPH, CANADA

Westminster Woods comprises a series of subdivisions providing for up to 1378 residential dwelling units, both townhouse and standalone housing (Photo 3). It is located on the urban fringes of the City of Guelph. It is likely



to cater for between 3500 to 5500 people. The development is being phased in over a number of years and the developers anticipate that the demand for a particular lot size will change over time.

A stormwater management plan provides at source filtration (rear yard infiltration trenches), water quality treatment (oil/grit separators, sediment forebays), water quantity control up to the 100 year storm, and enhanced infiltration. There are five main open spaces that function to manage and treat 'stormwater'. These spaces (Photo 4) are also utilized for public trails and enhanced landscape features (Photo 4). The project utilizes a system of greenways and infiltration galleries. The greenways have no direct outlet to a watercourse but rather collect rainwater and are constructed to encourage infiltration back into the ground. Likewise, infiltration galleries are constructed at the rear of most lots which promote infiltration rather than carry the water to some

receiving watercourse. Prior to entering the infiltration galleries, stormwater is pre-treated through a 'stormceptor' manhole. This device separates oil and grit sediments from the water before discharge. There is no treatment of water from the individual lots as this water would be deemed to be clean. The City of Guelph has zoning regulations on the affected lots which prohibit structures over the galleries. The greenways are landscaped to further encourage uptake of water.

Under previous Condominium legislation there was no effective way of involving homeowners in the

Photo 4 Greenway with swales on Westminster Woods Site



administration, maintenance and repair of features such as paving, irrigation systems and stormwater systems. Hence some municipalities have been reluctant to approve developments with upgraded features (Robson, undated). The Condominium Act 1998 provides for four types of condominiums, including standard (which includes the unit itself) and 'common elements' (which includes everything beyond the unit boundaries). Owners of parcels of land share control and ownership of a piece of land that form the 'common elements' (that is, those external features owned by all unit owners) in what is termed the 'common elements condominium'. Each owner shares an undivided percentage ownership interest in the common elements as a tenant in common with all other unit owners (Anon., 2003). Unlike the standard condominium, a common elements condominium does not comprise any units.

As development of Westminster Woods will take place over several years, there will be a number of plans of subdivision. One 'common elements condominium' will be registered with each plan of subdivision. The developer has utilized the provisions of the Act so that each 'common elements condominium' will create a corporation that will own the features and collect shares of costs from owners. The corporation will be managed by a 'mutual use committee' that has powers of decision-making and representation from each of the condominiums, each of whom has a number of votes equal to the number of homes. The standard and common elements condominiums will share control of City owned lands for the most part pursuant to a license agreement with the City (Artinger, 2004). This will ensure that each homeowner pays a fee towards the maintenance of the stormwater components, enhanced landscaping and other features. While there are other management models nearby, such as Pineridge, where the City maintains the stormwater facilities, the development company advised that they did not have the confidence that the City would look after the greenways to the standard they would expect (Artinger, 2004). They also advised that sales rates to date suggested that the concept is acceptable to the public and the residents are committed to it.

2.5 INKERMAN OASIS DEVELOPMENT, CITY OF PORT PHILLIP, AUSTRALIA

Inkerman Oasis development is a housing re-development of the former City of St Kilda Municipal depot site in Melbourne. It comprises 237 units between three to five levels in six buildings and incorporates a range of ecologically sustainable design features (Figure 4). Half of the development is completed, that is three out of six buildings. It is a demonstration project for developers and is a joint venture between the City of Port Phillip and a private developer, Inkerman Developments Pty. Ltd (City of Port Phillip, 2003). It has received several awards in recognition of its environmentally sustainable design. Stormwater and greywater is treated on the site and recycled for toilet flushing and garden irrigation. Much of the system is underground and thus not visible, except for a view through a transparent observation dome (Photo 5). The design of the wetland has been modified to enable integration into a confined courtyard.

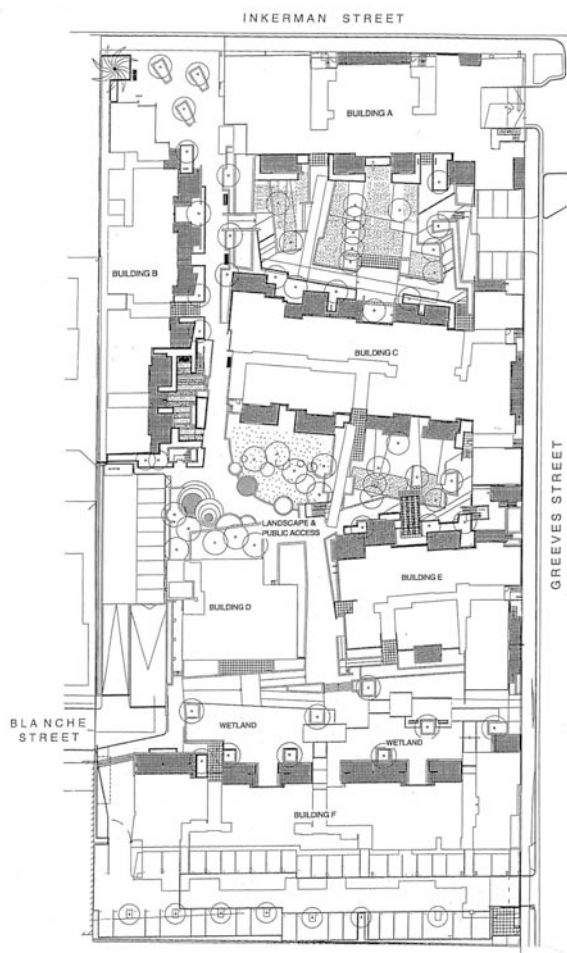
Key design features include:

- Hair and lint traps located in the greywater diversion pit
- Activated-sludge (aeration) tank
- Vertical and horizontal sub-surface flows wetlands
- Sand filter
- Membrane micro filtration and UV treatment system

In the Inkerman Oasis development, a body corporate will manage the communally-owned property. The body corporate owns the treatment plant and is responsible for on-going maintenance and servicing of the integrated water management scheme. However, for the first six years, South East Water has agreed to maintain the treatment plant. In turn, the body corporate will make an annual lump sum payment for their services. The body corporate could not readily close down the treatment plant if for any reason it was dissatisfied with performance or cost.

There is a section 173 Agreement under the Planning and Environment Act 1987 (Victoria) with the body corporate protecting the operation and access to the system and another with the developer, Inkerman Developments Pty. Ltd. setting out project deliverables including the system plus a planning permit referring to the system. So it is very well locked in. As the central Environmentally Sustainable Design feature, Council will not allow the Body Corporate to just revert to conventional mains water and sewer (Spivak, pers. comm., 2005).

Figure 4 Layout of Inkerman Oasis Development (William Boag Architects in City of Port Phillip, 2003)



INKERMAN OASIS HOUSING DEVELOPMENT - SITE PLAN

WILLIAMS BOAG PTY LTD Architects

Photo 5 Transparent Greywater System Observation Dome on Inkerman Site



3 LEGAL FRAMEWORKS

Urban growth and expansion in many countries is leading to the provision of new housing forms, which involve ownership and management of collectively-owned property. While some of these arrangements have been in place for many years, for example, leasehold in England (Blandy et al., 2005), others are more recent, such as the

establishment of purpose-built gated or non-gated communities with private governance structures to manage commonly-owned property. The types of residential developments which contain some portion of commonly-owned property are quite varied. They may comprise high rise apartments in inner-cities or a mix of stand alone housing and intensive housing in suburban areas. In addition, there is a growing trend in countries such as New Zealand and Australia where rural-residential and/or coastal properties are being established with housing clustered on suburban size residential sites. Owners own a share of adjacent open land used for farming or recreation purposes, such as golf courses and canal developments.

A comparison of the three jurisdictions in which the five sites are located (Table 1) shows that each has a similar approach to establishing private governance of communally-owned property. A statute provides the broad framework, sometimes with schedules setting out standard rules and separate regulations covering governance issues in more detail. Within these legal frameworks, private entities are established by developers with a set of rules, usually managed by committees or boards of owners. There is provision for the setting of additional rules, although changing rules can be difficult without unanimous or near unanimous support of owners. The reason for this is that changing rules may alter the property rights of individual owners who do not support proposed rule changes. Common features covered in the legislation or regulations usually include: how the entity is to be managed; structures for decision-making by the owners, including provisions for meetings; the role and obligations of the board or committee administering the development; making and changing rules; resolving disputes; enforcement; requirements for maintenance; and obligations for financial reporting.

What is also apparent in all three jurisdictions is that the development of new forms of communal ownership of property and management of related features, such as stormwater management systems, is considerably ahead of what has been envisaged by legislation. Reviews of relevant legislation pertaining to the private management of housing have been or are underway in a number of countries as the need for greater consumer protection and clarity of the roles and obligations of various stakeholder groups becomes apparent (Blandy, Dixon and Dupuis et al., 2005; Consumer Affairs Victoria, 2004; Department of Building and Housing, 2004; Ministry for Consumer and Business Services, 2005).

In New Zealand the Unit Titles Act 1972 is being reviewed for the first time by government, following pressure from the Auckland Regional Council (Glaistor Ennor and Auckland Regional Council, 2003) and other groups. While the number of bodies corporate is considerably fewer than Australia, it is estimated that by 2050 in Auckland there is likely to be 500,000 people living in unit titled property (Waghorn, 2004). Commentators have observed that wholesale problems with bodies corporate in the Auckland region could deter potential buyers of multi-unit housing thereby undermining the region's growth strategy of which intensification forms a critical element (Dixon and Dupuis, 2003). The government acknowledges that the Act has major deficiencies (Department of Building and Housing, 2004, 4). A discussion paper has been released by the Department of Building and Housing which addresses the three broad areas of technical and legal aspects of unit titles, bodies corporate, and other forms of shared ownership such as cross lease and flat owning companies (Department of Building and Housing, 2004). The review is not considering alternatives to bodies corporate that are now being used or put in place to manage communally-owned property which include freehold title.

The review being undertaken by the Victorian State Government in Australia is intended to improve the effectiveness of the current regulatory system, provide for secure and prudent management of body corporate funds, and improve mechanisms for dispute resolution (Consumer Affairs Victoria, 2004, 1). Particular proposals canvassed include provision of education and advice, together with improving the means for dispute resolution, financial reporting, professional standards for body corporate managers and disclosure requirements for developers for 'off the plan' sales. Underpinning the review are public policy objectives intended to balance the private and public interest, promote sustainable communities, and provide effective and practical solutions to promote self governance that are flexible and not overly prescriptive (Consumer Affairs Victoria, 2004, 2).

In Ontario the Condominium Act 1998 replaced the 1967 Act that was recognized as no longer meeting present day needs (Ministry of Consumer and Business Services, 2005). The purpose of the new Act was to improve the quality of information disclosed to purchasers, clarify balance of rights and responsibilities within condominium corporations, provide increased protection for consumer investments, and allow new kinds of development on leased land, vacant land and common element condominiums. There were 6000 condominium corporations, with some 500,000 units at the time the legislation was enacted (Ministry of Consumer and Business Services, 2005).

Table 1 compares a selection of some of the common features in the three jurisdictions. What is readily apparent is that the New Zealand Unit Titles Act is deficient in the lack of provision for dispute resolution, requires

matters to be taken to the High Court rather than a lower court, has no provisions for long term maintenance, and inadequate provisions for financial reporting. There has been a stronger need in Australia and Canada to review their legislation earlier than New Zealand, as the uptake of intensive housing in New Zealand has been much later. However, despite having different institutional arrangements in place, issues that arise in the ownership and management of communally-owned property are quite similar (see Consumer Affairs Victoria and Department of Building and Housing, 2004). Comparison of research undertaken of gated communities in England and intensive housing developments in New Zealand also revealed compelling commonalities (Blandy, Dixon and Dupuis, 2005).

Table 1: International Comparison of Legal Entities for Managing Communally-Owned Property

	New Zealand, bodies corporate	Melbourne, Victoria, bodies corporate	Guelph, Ontario, Condominium Corporations
Statute	Unit Titles Act 1972	Subdivision Act 1988, State of Victoria	The Condominium Act 1998, Ontario
Jurisdiction	High Court	Magistrates Court	Superior Court of Justice
Decision making and management	Body corporate (usually owners committee)	Committee	A Condominium Board is established for each standard or common elements condominium
Membership	Owners automatically members	Owners automatically members	Owners of Parcels of Tied land automatically become members
Obligations of Members	Specified in Act	Not specified in Act but in regulations	Not specified unless stated in declaration (constitution which sets out what interest each owner has in the common elements and financial contributions)
Enforcement of rules	Body corporate secretary then High Court	Body Corporate, then Magistrates Court	Condominium Board, then Ontario Superior Court of Justice
Ease of changing rules	Difficult- Mixture of unanimous and 80% approval	Moderate- Regulations set out standard rules and enable body corporate to make rules.	Moderate- Bylaws can be changed by more than 50 % owners but Board must institute a by law change. However must not contravene Declaration which requires 80-90% approval
Dispute resolution	No formal provisions, other than High Court	Act provides for disputes to be arbitrated by a Magistrates Board; also provides for appointment of an administrator to replace a body corporate	Act provides for mandatory mediation and arbitration, which if fails, can go to Court
Long term maintenance	No specific provision for sinking fund or maintenance plan	No explicit powers to plan, upgrade or maintain essential services	Act requires a reserve fund study to be done within one year of registration and updated every 3 years
Financial reporting	Minimal provisions but can be specified in First Schedule	Minimal provisions	Specific provisions

Source: Condominium Act 1998, Ontario Province, Canada; Subdivision Act 1988 and Regulations, State of Victoria, Melbourne; Unit Titles Act 1972, New Zealand

It is clear from the above comparison that New Zealand lags some way behind Victoria and Ontario in addressing some key operational issues in respect of ownership and management of communally-owned property. Certainly, Ontario seems most advanced in dealing with the management arrangements of communally-owned features such as stormwater devices. However, as its legislation is relatively new, it will be some time before it can be determined how well this model will work in practice.

4 GOVERNANCE AND MANAGEMENT

This section looks in more detail at the issues surrounding four types of entities in use or being created to manage communally-owned property in New Zealand, namely bodies corporate, incorporated societies, residents associations and companies. Table 2 (see subsection 4.4) provides a comparative assessment of some features that are important for effective operation of these entities. The material we are presenting in this paper is preliminary and subject to further modification.

4.1 BODIES CORPORATE

The recent proliferation of intensive housing, particularly in Auckland has highlighted the outdated nature of the legislation governing bodies corporate. The problems that exist now have been created unintentionally by legislation introduced in an era when the implications of a shift from individual to a form of communal ownership were not fully appreciated (Dupuis and Dixon, 2005). Particular problems relating to the operation of bodies corporate have been well documented and include (Dupuis et al., 2002; Dupuis and Dixon, 2005; Glaistor Ennor and the Auckland Regional Council, 2003):

- No oversight by a government agency and provision of education and advice for buyers and owners
- inadequate clarification of the roles and responsibilities of various stakeholders such as developers, the body corporate, owners committee, body corporate management company or managers
- difficulty of changing rules which requires unanimous or near-unanimous support of owners
- embedded power of developers and body corporate managers in long term contracts to the disadvantage of owners
- No provision for dispute resolution which means that ultimately cases may need to go the High Court for a decision
- No regulation or oversight of professional body corporate managers
- No provisions for education of owners in the operations of owners committees and responsibilities for the management of features such as swales, rainwater gardens, ponds and so on.

As previously noted, the review of the Unit Titles Act should lead to a significant improvement in the future operations of bodies corporate or whatever new entity that may emerge for much of multi-unit housing. A key challenge is to establish the right legislative and regulatory environment without being overly prescriptive (Dupuis and Dixon, 2005). However, it is clear that many of the current problems are occurring because of inadequate clarity in law and insufficient safeguards for owners. A second challenge is that New Zealanders need to become used to new forms of housing arrangements whereby they take on new responsibilities for on-site administration and management of communally-owned property.

4.2 INCORPORATED SOCIETIES

The establishment of incorporated societies under the Incorporated Societies Act (ISC) 1908 as an alternative to bodies corporate is occurring where developments include property on freehold title. In some cases developments may include property on strata title as well as freehold so that a common set of rules may be required to include all the titles and residents (including residential and/or commercial residents) who own, lease, rent, work, or live at the development. In any of the above instances, the body corporate rules that exist and operate in relation to one unit title within the development have no authority over residents or workers who occupy any other title within the development. Currently, there is a paucity of information on how well incorporated societies work as models for managing communally-owned property. Several issues have been raised in interviews undertaken to date for this research.

First and importantly, Paul states the purpose of the current ISC Act “is primarily the protection of members’ interests” (Paul, 1996,5) rather than property. One property lawyer interviewed suggested that the UTA deals largely with property issues (i.e. subdivision and stratum estates, provisions relating to leasehold lands, and proprietors’ duties and obligations with regard to commonly owned property), whereas the ISA focuses mainly

on the rules and regulations pertaining to the running of the group. In this respect it can be argued that the ISA does not deal with or provide any guidance in relation to how common property issues should be adequately managed, operated or dealt with. Another property lawyer commented:

I really couldn't see the point of an incorporated society as an equivalent to the body corporate under the Unit Titles Act - because incorporated societies are general sorts of things. You have sports clubs, charitable associations, business associations, purely social clubs like the Naval Officers' Association - that sort of thing - or Ex Naval Mens' Association- there's a whole range of things - what we need here is a framework that is a lot more geared to living in a physically defined small community - it's not like the Ratepayers' Association at all - an incorporated society is the ideal thing for Ratepayers' Association but I think it is not specific enough...so you then...for each one, if you incorporate under the Incorporated Societies Act, for each one, you are going to have to make very, very specific rules and lawyers being lawyers there will be a totally different set of rules that each law firm will want to have for each one that it does. So all you end up with maybe 300 different likely sets of rules - which is just hopeless, just hopeless.

A second issue relates to membership of an incorporated society. Another property lawyer stated that it was not possible to force someone to join an incorporated society, regardless of whether they shared in the ownership of common property. This is just one instance where certain aspects of an incorporated society could be considered ultra vires (that is, outside the law). The property lawyer also stated that various rules of incorporated societies may well be ultra vires. He had looked at the incorporated rules of an intensive housing development some twelve years ago that he regarded as strongly questionable, despite the fact the rules had been drafted by a well known law firm.

A third issue of significance for the operation of any entity managing communally-owned property is the need for regular and transparent financial reporting. While the ISA states that every incorporated society must deliver a set of financial statements to the Registrar annually (section 23), there is no provision in the ISA for the accounts of the incorporated society to be audited. In comparison, the second schedule rule of the UTA s (which can only be amended by a unanimous vote) do contain a provision for the accounts of the body corporate to be audited annually by an independent auditor (rule 12(d)). It would be possible, however, to draw up a set of second schedule rules under the UTA that contained a provision that an independent auditor was not required (though it could be argued that such an act was ultra vires). Correspondingly, it would be possible to write a rule for an incorporated society that made provision for the annual accounts of the society to be inspected by an independent auditor.

A fourth issue is that rules may be too easy to change. In this respect, compared with rule changes under the UTA, rule changes under the ISA are easier to effect. Though any change in rules must be lodged with the Registrar, and must conform with the Act itself (sections 6(2), 21(2) and 21(3)), it is left to each incorporated society to prescribe the mode in which the rules of their society may be altered, added to or rescinded (section 6(e)). Though it is often argued that it is unnecessarily difficult to change rules in the second schedule of the UTA, it can also be argued that it is too easy to change rules under the ISA, thereby creating a sense of uncertainty or instability within an incorporated society. Related to this is the point that as with the second schedules under the UTA, it would not be difficult for the developer to write and set up the rules in a way that gives the developer or manager undue advantage over future owners.

Another important dimension for sound management is the need for a mechanism to resolve disputes, interpret and enforce rules. If an incorporated society experiences problems or disputes about the way in which rules are being interpreted or applied, the Registrar appointed under the Act is not empowered to intervene in such a situation. While the ISA gives the Registrar the power to investigate breaches of the ISA by an incorporated society, the Registrar has no power over members who breach the rules of their incorporated society (section 34A. and 34B). In instances where there is a dispute within an incorporated society, the authority lies with the High Court.

There are, however, some benefits of an incorporated society compared with a body corporate. First, information is more accessible. Second, as mentioned above, rules are easier to change. Third, some legal specialists interviewed are supportive of incorporated societies as revealed in this quote:

I have never been a fan of bodies corporate as they operate on, in my opinion, now outdated concepts of participatory democracy. Many people don't have time to attend AGMs or stand for election to executive

positions. That is why there has been the development of body corporate companies who carry out the dog work..... For governance models, I am leaning towards combining the principles of incorporated societies with those of trusts. The benefit of this model is that you can get the best of both worlds. I annex the constitution of the [name of]... trust which is an example of this approach.

Another model for a rural hamlet drawn to our attention included unit title and fee simple titles and covenants that feature a management structure with three commercial companies, one management company and a ratepayers association (incorporated). It is clear that a variety of models are now being set in place to accommodate the needs of particular developments. One professional told us that in respect of rural and coastal property there are as many models being created as developments proposed (Scott, 2005).

4.3 RESIDENTS' ASSOCIATIONS

Residents' associations are many and varied and exist for multiple reasons. A common type of residents' association is that which is set up in relation to residential 'areas' such as streets, or small suburbs or perhaps (un)protected wetlands or areas requiring protection by interested parties who may live in the vicinity. For instance 'The Styx Residents Group Incorporated' exists as an entity that promotes and maintains the interests of residents in the area. However a distinctly different residents' group, The Styx Mill Country Club Incorporated, also exists, but relates specifically to The Styx Mill Country Club development and those who live in the development, rather than the wider Styx area.

While many residents' associations exist as 'incorporated societies' this is not mandatory by law. However it does provide a group or association with a legal entity and its members with protection from personal liability for legal costs should they be taken to court. A residents' association may also be referred as a 'precinct society'³ and can exist along with one or more bodies corporate that have been set up in relation to a unit title or titles (under the UTA). In fact one of the reasons for the existence of a residents' association or precinct society relates to the fact that a development may be made up of more than one body corporate, and so the precinct society allows members other than body corporate owners/proprietors. In such an instance the developer of the site could be a member of the precinct society or residents' association, as well as the on-site manager, and perhaps those who may lease private or commercial premises owned by the body corporate or developer.

A property lawyer who was interviewed for the project stated that if a residents association was not registered as an incorporated society, or under the umbrella of a body corporate, such an association would only be protected by the Privacy Act (in the case of a not-for-profit organization) or the Fair Trading Act (if the association has a fee-paid manager). While the Privacy Act comes under the jurisdiction of the Privacy Commissioner (who can only give a 'ruling'), the Fair Trading Act comes under the jurisdiction of the District Court. For comparison, both the UTA and the ISA come under the jurisdiction of the High Court.

4.4 COMPANIES

In this research, we have not investigated companies, trusts or joint ventures (in relation to communally-owned property) to the same extent as incorporated societies and residents' associations. However, setting up companies, trusts and/or joint ventures in relation to commonly owned property may allow for opportunities that are not so readily available for incorporated societies. In the instances of larger developments (e.g. rural hamlet type developments, or urban mixed use developments) where situations for profit making exist (e.g. developments including farming and rural residential properties, or developments with a mix of shops, and/or resort/time share units and private residential units) a company, trust and/or joint venture is in a better position to utilize profit (and tax) opportunities.

³ As in the Viaduct Harbour Precinct Society Inc- Melview Developments, Auckland

Table 2: Comparison of New Zealand entities for Managing Communally-Owned Property

	Bodies corporate	Incorporated Societies (including incorporated Residents' Associations)	Companies
Statute	Unit Titles Act 1972	Incorporated Societies Act 1908	Companies Act 1993
Jurisdiction	High Court	High Court	High Court
Decision making and management	Body corporate	Committee	Board of Directors
Membership	Owners automatically members	Voluntary but often made compulsory	Voluntary but often made compulsory
Obligations of Members	Specified in Act	Not specified Unless stated in rules for Inc Societies	Specified in Act
Enforcement of rules	Body corporate secretary then High Court	Association itself, then High Court	Board of Directors, then High Court
Ease of changing rules	Difficult- Mixture of unanimous and 80% approval	Easy- resolution 50%	Moderate- mix of resolution and special resolution
Dispute resolution	No formal provisions, other than High Court	No formal provisions unless provided for in rules	Formal mechanisms through company voting procedures
Long term maintenance	No specific provision for sinking fund or maintenance plan	Nothing specified as Act is designed to protect member interests	Companies Act is not about property management. Would need to be specified in agreements. Financial reserves can be provided for
Financial reporting	Minimal provisions but can be specified in First Schedule	Act acknowledges financial planning but no directive	Act requires disclosure to shareholders and for public inspection of records

Source: Unit Titles Act 1972, Incorporated Societies Act 1908, Companies Act 1993

5 REFLECTIONS AND CONCLUSIONS

Our research suggests that the development of alternative models to the body corporate is at an early stage in New Zealand. The cases examined for our research project are in the process of being established and it is too soon to determine how well the models will work in practice, in respect of day to day management of stormwater features. However, we can draw out a number of general observations. First, there is wide variation. Given the diversity in site conditions and ecological complexities, this is not necessarily problematic. However, there is little information readily available on what are established 'good practice models' for developers proposing to construct agreements, as well as for consumers looking at buying into developments. Thus, buyers are overly reliant on legal advice when purchasing properties. Similarly, developers are heavily dependent on the expertise of their advisors when setting up these arrangements.

Second, there is no systematic oversight of the creation of these models so that there is no independent assessment of how well they address the needs of owners. While the body corporate model is far from perfect, it is a mechanism that has been created for the specific purpose of property management, for example containing rules in Schedules. The other models discussed here are being drawn from legislation constructed for other purposes and have deficiencies as noted above.

Third, it is clear that the development industry in New Zealand is creating models in response to the particular management needs of their developments and using the mechanisms available under several statutes which may not always be appropriate. One lawyer working for a development company described the lack of statutory backing and the question of how to limit liability in these situations as “a time bomb waiting to happen”. In his view, all the potential options for use (such as bodies corporate and incorporated societies) were fairly blunt instruments. Whatever model is used, however, considerable scrutiny has to be given to the rights of owners which can be easily undermined by contracts and agreements put in place by developers, often in conjunction with body corporate management companies (Blandy, Dixon and Dupuis, 2005).

Finally, the real test lies in the implementation of any model through day-to-day operations once the development has been constructed and residents taken up occupation. In respect of management of stormwater features on communally-owned land (whatever model is in place), interviewees have raised some potential difficulties, which have also been identified in the research on bodies corporate (Dupuis et al., 2002). First, there is the key issue of the need to educate owners and how to ensure that they are aware of their responsibilities regarding management of rainwater gardens, stormwater ponds and rainwater tanks. One professional commented that on a visit to a housing site a member of a body corporate committee was completely unaware of the purpose of the rainwater tanks and associated reticulation pipes, then reprimanded the Council for the shoddy job of landscaping which was on private land and the responsibility of the developer. Owners frequently blame councils for failing to inform them of the need to maintain stormwater features. However, these issues should be disclosed when purchasing a property. Second, it is not uncommon for developers to renegotiate provisions for stormwater once they have obtained consent, for example to remove rain tanks or reduce the number of swales, thereby undermining the effectiveness of the stormwater system. Third, several professionals commented on the sheer complexity of consents and the difficulties for councils to follow through on active and timely monitoring, particularly when already faced with heavy workloads. Fourth, contractors may be unaware of the impacts of their work activities, as demonstrated by filling up rain gardens with rubbish, parking on swales and damaging concrete paving and drains. Finally, some new owners are of the view that in a new development they should not have to be concerned with issues relating to infrastructure management (Nagels, pers. comm., 2005).

As new models for private land management proliferate, some critical questions remain such as: what type or types of legal entities are best suited to encouraging landowners to take responsibility for management of stormwater features; who should be responsible for educating owners and other stakeholders about long term management and maintenance of stormwater features; how should rights of individual owners be protected in relation to those of the entity put in place in respect of changing rules; will councils be able to monitor conditions effectively and enforce remedial action if required; what happens if the various types of models put in place do not work in the long term? Where there is more than one body corporate on site, how do disputes in relation to stormwater management get resolved? What happens if the costs become disproportionate between the entity and community, or between the entities where there is more than one? Who picks up the costs when liability cannot be clearly identified? Achieving equity in the complex web of relationships and accountabilities in these situations requires a careful balance of public and private rights and responsibilities. Given the potential for considerable difficulties that can arise, it is an issue worthy of much closer scrutiny by policy makers, councils and other stakeholders.

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