

# MANAGING 'LOW IMPACT' FEATURES ON MULTI-OWNED RESIDENTIAL SITES

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## ABSTRACT

The private governance of common-property features, including those required for at-source stormwater management is becoming increasingly common as a practice in residential multi-owned developments in New Zealand. There are several types of entities in place that establish how owners manage commonly-owned features, such as rain gardens and swales on these sites. These include bodies corporate, private companies, incorporated societies and trusts. The paper presents findings from research that has been investigating examples of these different types of legal entities and reviewing the governance and management of 'low impact' features on multi-owned sites. Council requirements, rules of the particular entity that govern the site and subsequent contractual arrangements established to maintain and manage these features are examined in turn to reveal issues of public and private rights and responsibilities. Views of developers, lawyers and council staff are presented. The paper considers the strengths and weaknesses of the various models in place and identifies some critical elements that are important for good governance.

## KEYWORDS

**Bodies corporate, companies, incorporated societies, trusts, covenants, encumbrances**

## PRESENTER PROFILE

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## 1 INTRODUCTION

This paper reports on a research project that examined the establishment of various legal entities (bodies corporate, private companies, incorporated societies, trusts) and legal mechanisms (covenants and memoranda of encumbrance) that have been established to manage 'low impact' features (e.g. stormwater ponds, wastewater treatment systems, rain gardens, and swales) in privately owned multi-owned residential developments. The project set out to determine the key issues involved in the governance and management of these features and to review the effectiveness of the various entities that have been put in place to govern and maintain them. The goal of the project is to develop guidelines for councils, developers and owners with respect to what models are likely to be most effective for governing and managing these on-site 'low impact' features.

In section two that follows we begin by outlining the methodology and site selection process undertaken for the project (2.1). We discuss developers' preferences for particular legal entities (2.2) before describing the views of a number of lawyers we interviewed (2.3). Section three examines the various legal entities and mechanisms we came across in our project (3.0) and includes a table that outlines the main features of the entities and mechanisms. We then report on the private versus public issues regarding 'low impact' features and the role of territorial authorities (4.0). We conclude by identifying a number of critical elements that are important to the successful long-term operation and management of 'low impact' features in multi-owned residential developments (5.0).

## 2 DISCUSSION

### 2.1 METHODOLOGY AND SITE SELECTION

We identified a number of possible multi-owned development sites for our research project; information on these sites was gathered principally from council site files and from the internet. For instance the Companies Office website was accessed for company (www.companies.govt.nz) and incorporated society rules and constitutions (www.societies.govt.nz) and real estate websites (www.allrealestate.co.nz) were accessed for more general information about multi-owned developments. Site visits were undertaken to view the 'low impact' features first hand. We also identified a range of people to interview including developers, council staff, residents and lawyers. The interviews were recorded and subsequently transcribed and analysed.

The research participants we interviewed were assured confidentiality and for that reason we cannot name or identify the specific sites we visited and investigated. Connected to this was the small number of candidate sites available to investigate and the newness of 'low impact' features within multi-owned developments. This meant that in one sense we were only able to investigate what could be regarded as the teething problems in 'low impact' feature set ups rather than the mid to longer term issues that may well arise. Overall we visited seven sites with such features and conducted fourteen interviews, including residents, developers, council staff and lawyers. In section 2.3 below we outline the views of six lawyers; four of these interviews were conducted during a prior research project we undertook concerning governance issues and were not included in the count of the fourteen interviews mentioned above.

### 2.2 DEVELOPERS' PREFERENCES FOR PARTICULAR LEGAL ENTITIES

We were particularly interested in learning how developers and their advisors selected the particular legal and management structure for a particular development. For developers the decision to establish a particular type of legal entity (such as an incorporated society or limited company) often appeared to be based on a developer's past experiences with particular legal entities. In some instances developers veered away from specific legal entities (such as a body corporate under the Unit Titles Act) based on past negative experiences with such entities. When we asked a developer of a multi-owned development why an incorporated society was chosen as the legal entity to govern the 'low impact' features onsite, he responded:

*"We wanted to establish freehold titles basically - so everybody owns their own freehold title - if you had a body corporate then they don't have a freehold title... .. I had a lot of involvement with body corporates..."*

...you didn't want to go there?

*"No... .. with an incorporated society - it's really the people that are living here that are running it - we have a committee of residents [that] gets elected by the residents and they physically run it - we have a secretary that takes the minutes - she does the books and all of that sort of thing and that's basically what it is"*

As section 3.1 notes incorporated societies within multi-owned developments are often a legal requirement under the Securities Act 1978. However we also came across a number of examples where one or more limited companies had been established within a multi-owned development as a means of governing either 'low impact' features or a 'non-low impact' feature such as on-site Golf Club and/or restaurant. In some instances this was because the developer chose a legal entity he was already familiar with (such as a limited company) or because the developer believed a purchaser would be more familiar or comfortable with one type of entity. Developers are also guided by their lawyers as the following section reveals.

### 2.3 WHAT LAWYERS HAVE TO SAY ABOUT THE VARIOUS LEGAL ENTITIES IN MULTI-OWNED DEVELOPMENTS WITH 'LOW IMPACT' FEATURES

As a result of our interviews with lawyers we discovered a number of complexities regarding the legal aspects of 'low impact' features in multi-owned developments. The views of lawyers regarding which type of legal entity best suited multi-owned developments with 'low impact' features varied. Also as the project progressed we discovered that a number of multi-owned developments have more than one legal entity governing different aspects of the development (such as water treatment plants, wetlands, golf courses, swimming pools, club rooms). In this

regard it became increasingly evident that the legal issues concerned were not only complex but of critical importance in terms of the long-term success of 'low impact' features.

### **2.3.1 LAWYER ONE – BODIES CORPORATE UNDER THE UNIT TITLES ACT BEST**

The first lawyer we contacted was of the view that the use of unit titles and bodies corporate was the best means of governing on-site 'low impact' features in multi-owned developments. He believed that overseas jurisdictions that successfully used unit titles and bodies corporate legislation (including the states of Victoria and New South Wales in Australia) demonstrated that this type of legislation worked well, and that the recent review of the New Zealand Unit Titles Act 1972 (UTA) would improve the management and operation of bodies corporate.

This lawyer stated that property legislation (such as the UTA) was much better set up to deal with land ownership issues compared to incorporated societies legislation. He believed that the rules of an incorporated society could well be both inoperable and unenforceable given that a person could not be forced to join an incorporated society, regardless of whether they owned property (individually or jointly). He further stated that voluntary organizations such as incorporated societies did not have the statutory backing that property legislation had, with incorporated society legislation emphasizing the running of meetings rather than the protection of property.

Overall this lawyer believed that in terms of commonly owned property the UTA legislation provided far greater protection than other legislation and that it would be better to continue with such legislation rather than set up alternatives which would be divisive. Furthermore the provisions within the UTA were sufficient and needed to be further utilized.

As previously mentioned (see 2.3 above and also 3.1 below) an incorporated society is often a legal requirement under the Securities Act 1978. Though underlining this point, another lawyer we interviewed also agreed that there was sense of incongruity regarding the Securities Act requirement for incorporated societies when the Unit Titles Act and bodies corporate more properly dealt with concerns regarding shared land ownership.

### **2.3.2 LAWYER TWO – IT'S NOT ABOUT LEGISLATION BUT THE PEOPLE AND PROPERTY CONCERNED**

The second lawyer we spoke to stated that the different legal entities set up to manage, operate and maintain commonly owned property (including at-source stormwater management features) all shared similar advantages and disadvantages. He believed that the success of the operation depended not on the legislation but on:

- how well organized and strong-minded the owners were
- the physical characteristics of the property and its design, layout
- the quality of construction and maintenance of the 'low impact' features involved

In this lawyer's view, there was no specific legal entity or legislation that would fix any of these problems, suggesting that poor design and construction of features cannot be overcome by the good management of owners.

### **2.3.3 LAWYER THREE – INCORPORATED SOCIETIES AND TRUSTS PROVIDE THE BEST OF BOTH WORLDS**

The third lawyer favoured combining the principles of incorporated societies with those of trusts and believed that this model resulted in the 'best of both worlds'. He stated that bodies corporate operated on outdated concepts of participatory democracy and that many owners do not have the time to attend AGM's or stand for election for executive positions (this can also be said of incorporated societies). We discuss incorporated societies and Trusts in greater detail in sections 3.1.5 and 3.3.

### **2.3.4 LAWYER FOUR – CURRENT STATUTORY AND LEGAL FRAMEWORKS ARE 'BLUNT INSTRUMENTS' AND 'A TIME BOMB WAITING TO HAPPEN'**

The fourth lawyer spoken to stated there was a serious lack of statutory backing and proper legal framework for multi-owned developments and viewed the existing frameworks (including the bodies corporate under the UTA) as 'fairly blunt instruments'. The question of how to limit liability in such multi-owned developments, he stated, was a 'time bomb' waiting to happen.

It was intended that the multi-owned development he was currently involved in, would be administered by an incorporated society which would include a residents' association which would be responsible for the costs and operation of the commonly owned 'low impact' features in the development.

However the development also had individual fee simple lots, and in the instances where 'low impact' features existed on these lots, the cost and operation of the 'low impact' features would be the responsibility of the individual owner rather than the incorporated society/residents' association.

Other members (directors and a landscape engineer) involved in the set up of this multi-owned development were also interviewed. One of the directors mentioned the possibility of setting up a Trustee Management Company to oversee the management and operation of the development. It was also mentioned that it was likely that an external body corporate management company (current body corporate management companies include the likes of Crockers, Strata Management Ltd, Centurion Property Management Ltd, Body Corporate Administration Ltd, Bayleys Realty Group Ltd) could become involved in the management and operation of the 'low impact' features in the development.

### **2.3.5 LAWYER FIVE – GOOD GOVERNANCE MECHANISMS ARE INHIBITED BY THE PRESENT LEGISLATIVE ENVIRONMENT**

Lawyer five drew attention to multi-layered developments, and the tensions that arose such as when commercial and residential units existed along side each other. In such instances this lawyer reported that in many instances the governance frameworks that had been set up for the multi-owned developments were not well structured and that there was a lack of education and awareness amongst purchasers as to what was involved in such multi-owned developments. The lawyer mentioned there was rarely an executive summary, overview or flow diagram that stated how the various layers of the development were linked, and that he felt that such documents were needed.

*"I think the problem is that there has never been anybody to stand back and say 'well, we need to have a reasonably good document for this and we need to actually explain how it all fits together' and a lot of clients don't see the linkages and where there are documents that butt up to each other – there is no really good mechanism to make it work properly and then often there is no overarching responsibility..."*

The lawyer mentioned a recent multi-owned development he has been involved in where more than one legal entity will exist:

*"...we did one...where we've got a requirement of the council that the common facilities, which are bits of roads, bits of walkways, common areas around terraced housing, has to be done in a constitution...that's their requirement – in addition we've suddenly been told by the client that within one lot, which is going to be divided into 40 lots - one lot will be a...unit title...so we'll have a unit title sitting snugly underneath a constitution and that body corporate will have its own obligations and ... then they will in turn have an obligation to the incorporated society for all the nice landscaping and roading and stuff that they are responsible for..."*

Given that such legal complexities would be beyond many residents the lawyer's opinion was that an 'information memorandum' for buyers would be a good idea:

*"...I think one of the ways forward is for there to be an information memorandum that goes to every buyer within this group of terraced houses, within this ...body corporate to say 'this is what you get for your money and this is what you are going to be involved with and*

*this is the body that looks after it and these are the lines of communication...you've a body corporate because you have to under the Unit Titles Act [and] ...all of you collectively will share in some measure of responsibility for the common areas of which you pay a share and...you each have a vote... .. but unless those memoranda [are provided] it's not very easy for laypeople to sit down and work through all of the ... legal documents..."*

The idea of an information memorandum was based on various overseas statutes that the lawyer had looked at, including Queensland and Ontario:

*"...in Queensland [they have a] Disclosure Statement which is a disclosure to the client exactly what they are buying ... the Ontario legislation has it for the same sort of reasons – if you are buying – particularly a brand new unit or apartment building or whatever within these multi-level multi-owned developments...even if it's a second-hand property the vendor of the second-hand property has also got to provide an up-to-date disclosure statement with up-to-date statements of what the body corporate levies are and what rule changes have been done ...that's not a bad idea in my view"*

The lawyer mentioned that at this point in time the Section 36 certificate in the UTA provided some very basic information to the purchaser but that getting such information from a body corporate secretary was not always straightforward. Also mentioned was the fact that the Westpac Bank had recently put out new mortgage instructions in which one of the requirements is the provision of two years of body corporates minutes. Though the lawyer stated this was a step in the right direction, it was something of a tall order and in fact the bank had since recanted on the request.

With multi-owned developments usually necessitating the use of specific legal entities (i.e. incorporated societies under the Securities Act in the case of five or more owners of common property, and the establishment of a body corporate under the UTA in the case of unit titles (versus fee simple estates), the view of the lawyer we interviewed in this instance was that the establishment of suitable linkages between the various legal entities was of paramount importance in the current legislative environment. This entailed the establishment of suitable linkages between the various legal entities, so that the rules of each entity worked together rather than butting up against each other, and well developed dispute resolution mechanisms within each set of rules. In this respect the lawyer was of the opinion that the Queensland legislation was well worth examining. This lawyer also helpfully directed us to a number of useful papers which we discuss in section three.

### **2.3.6 LAWYER SIX – COULD 'LOW IMPACT' FEATURES IN MULTI-OWNED DEVELOPMENTS BE THE NEXT LEAKY BUILDING CRISIS?**

The sixth lawyer held the strong opinion that a significant number of multi-owned developments neither adequately addressed nor suitably resolved the legal relationships, rights or duties between the developer, owners and territorial authorities. Too often, this lawyer stated, the use and management of commonly owned assets or activities were not established with rules that were secured by effective legal instruments and procedures in perpetuity. This created risks to the physical and natural environment (particularly in the case of 'low impact' features), the community within the multi-site development, as well the potential risk of claims being made against the territorial authority as the responsible regulatory authority. This lawyer directed us to a key document titled 'Subdivisions – Let Us Not Have Another Weather-tight Homes Debacle – Managing Subdivision Risks for the Council and Community' (Brookfields, n.d) which we refer to in section four.

## **3 VARIOUS LEGAL ENTITIES, MECHANISMS AND ASSOCIATED LEGISLATION**

In this section we review four different legal entities (bodies corporate, incorporated societies, limited companies and trusts) created under various statutes that are being used to manage multi-owned residential developments, as well as highlighting some pertinent implications of the Securities Act. We also touch briefly on legal mechanisms including covenants and memoranda of encumbrance.

### 3.1 BODIES CORPORATE AND THE UNIT TITLES ACT 1972

The Unit Titles Act 1972 (UTA) is defined as:

*An Act to facilitate the subdivision of land into units that are to be owned by individual proprietors, and common property that is to be owned by all the unit proprietors as tenants in common, and to provide for the use and management of the units and common property. (Unit Titles Act 1972:2)*

Bodies corporate are created under the UTA to manage and administer common property for owners. While bodies corporate have been in operation for some 30 years it is not until recently, with the rapid growth in medium and higher density housing developments, that many critical issues concerning the operation of bodies corporate have come to the fore (Dixon *et al.*, 2001a:11).

In a study of the medium density development of Ambrico Place in New Lynn, commissioned by the Waitakere City Council (Dixon *et al.*, 2001b) it was found that the Unit Titles Act had not kept pace with the expansion of different housing types and the scale of new developments managed by bodies corporate. Five further issues were also highlighted. First, was the difficulty for owners to change body corporate rules. Second, communication problems between body corporate secretaries and owners were evident. Third, issues of communication for residents for whom English is a second language were noted. Fourth, it was found that off-site owners do not always advise tenants of the body corporate rules. A final issue to emerge was that bodies corporate with a small number of units are often unable to employ even a part-time manager to look after the development on a daily basis (Dixon *et al.*, 2001b:26).

If a multi-owned residential development with low impact features has been subdivided by means of unit titles (rather than fee simple titles; though these may also exist in the same development) then the UTA requires that a body corporate (as per the UTA) be created. If the location of the low impact features are on commonly owned property (perhaps rainwater tanks, swales or wetlands) then it is likely that the body corporate will be responsible for the management and operation of those features.

The first ever review of the UTA has been underway since 2004, with amendments to the Act due to be released in the next several months.

### 3.2 INCORPORATED SOCIETIES AND THE INCORPORATED SOCIETIES ACT 1908

Incorporated Societies are established under the Incorporated Societies Act 1908 (ISA). Paul (1996, 5) states that the ISA primarily protects the members interests. This has the effect of placing members' interests over that of the property, resulting in the argument that in itself the ISA does not deal with or provide any guidance in relation to how common property issues should be managed, operated or maintained (Dixon, van Roon & Dupuis, 2005). Another issue relates to 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 Incorporated Societies Act 1908) there is no provision for the accounts to be audited (Dixon *et al.*, 2005). While Dixon *et al.* state it is possible to write a rule for the incorporated society that provision be made for the annual accounts to be inspected by an independent auditor, they also mention that any rules of the society are very easy to change therefore creating a potential sense of uncertainty or instability with the society (2005). The up-side of this is that if a developer were to establish a set of rules in the society that gave the developer or other another party undue advantage over future owners, then it would not to difficult to have those rules amended (Dixon *et al.*, 2005). Another weakness of incorporated society relates to the strength of the dispute resolution mechanisms within the ISA. Dixon *et al.* report that:

"If an incorporate 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)" (2005).

### 3.3 THE SECURITIES ACT 1978

The Securities Commission website ([www.sec-com.govt.nz](http://www.sec-com.govt.nz)) states:

*"The Securities Act establishes the Securities Commission, setting out its functions and powers. These functions include reviewing and commenting on securities law and practices; reviewing and commenting on activities on securities markets and the rules of those markets; and co-operating with similar bodies overseas".*

The Securities Act 1978 (SA) defines securities as "any interest or right to participate in any capital, assets, earnings, royalties, or other property of any person" (section 2D Securities Act).

Wilson, a Christchurch lawyer, in her paper 'Compliance with Securities – Laws for Developers' (2006:3) states that:

*"The Act exists to regulate the 'offer of securities to the public'. Its key aim is to ensure that members of the public are provided with adequate information about securities being offered to them, in order that they may make informed decisions on whether to subscribe for such a security.*

*A common perception is that the Securities Act does not apply to land transactions. Where a development involves more than five lot owners who have rights in respect of common land the Act will almost certainly be relevant".*

In the context of multiple lot developments the owner's rights in the communal land constitute the 'security' and any advertisement of lots in a development where there will be communal land and the provision of an agreement for sale and purchase constitutes an "offer of a security" (Wilson, 2006:4). In such instances the Act requires a current registered prospectus be made available before any offer can be made to the public, as well as the provision of a current registered prospectus at the date of allotment of the security. The subscriber must also receive a copy of the investment statement before subscribing for the security (Wilson, 2006:5-6).

#### 3.3.1 THE RESIDENTIAL PROPERTY OWNERS EXEMPTION NOTICE 1999

An alternative to the above scenario is the Securities Act (Residential Property Developers) Exemption Notice 1999 which allows for a specific exemption to be applied for where communal land or facilities are held by an incorporated society. This means that a developer can sell residential sections which incorporate communal facilities without the necessity for a prospectus and investment statement (Wilson, 2006:8). In this case the communal facilities must be held by a society incorporated under the Incorporated Societies Act 1908 and the members of the society will be owners of the residential sections within the development. The communal facilities must be owned or leased by the society before settlement of the sale of any of the residential sections and a certificate of title must be issued in the name of society for the communal land in question (Wilson, 2006:9).

The developer must also supply the purchaser with a number of other documents before the sale and purchase agreement is signed, including the rules of the society, a copy of any agreements in respect of the management of the society's affairs, a specimen of any deed or agreement providing for the transfer of communal facilities from the developer to the society, a specimen of the sale and purchase agreement and a specimen of any lease agreement for communal facilities (Wilson, 2006:9).

#### 3.3.2 INSTANCES WHERE THE RESIDENTIAL EXEMPTION NOTICE DOES NOT APPLY

Technically a number of developers may not be able to take advantage of the Residential Exemption under the Securities Act (Wilson, 2006:10). This includes instances where part of the development may be zoned commercial, and with particular relevance to 'low impact' approaches, where water and other utility schemes are not owned communally and where such features are chattels rather than land.

### 3.3.3 ENFORCEMENT OF CONDITIONS AND BREACHING THE SECURITIES ACT

The Securities Commission has powers to receive evidence, require persons to provide information, summon witnesses, obtain information on behalf of similar bodies overseas, and receive undertakings ([www.sec-com.govt.nz](http://www.sec-com.govt.nz)). The Act provides for both civil and criminal liability where securities are offered or allotted in contravention of the Act, advertisements or prospectuses are misstated or where the Commission is obstructed in its work. Criminal prosecutions are carried out by the Registrar of Companies ([www.sec-com.govt.nz](http://www.sec-com.govt.nz)).

Under notice of the Residential Exemption each private lot owner is required to become and remain a member of the society, comply with rules and bylaws of the society and pay amounts properly levied by the society. Wilson suggests the simplest way to give notice of these requirements, particularly for future owners of land, is by means of a positive covenant registered against the title, or by means of a memorandum of encumbrance (2006:12). These forms of legal mechanisms are discussed in section 3.6.

The consequences of failing to comply with the Securities Act are serious. A Securities Commission news release dated 5 March 2007 states that:

"Failure to comply with security laws carries serious consequences. Issuers and their directors may be required to repay the subscription amount with interest, and may face civil or criminal penalties ... Residential property developers should seek advice from a lawyer who is experienced in securities law. Developers may be able to rely on class exemptions to reduce compliance costs. Alternatively, they may seek an individual exemption from the Commission. These are considered on a case by case basis". ([www.sec-com.govt.nz](http://www.sec-com.govt.nz))

### 3.4 LIMITED COMPANIES AND THE COMPANIES ACT 1993

Our research indicated that there are instances where developers choose to establish a limited company rather than an incorporated society; in such cases the Residential Exemption, as noted earlier, may not necessarily apply. However in one interview, a lawyer gave an example of a developer who successfully applied for a Residential Exemption notice, and formed both an incorporated society and limited company within the development. Because the territorial authority was not interested in taking on ownership or responsibility for the infrastructure within the development the developer formed a water company that owned and maintained the water ways and water facilities within the development. When asked why the developer chose a company as the legal entity to own and operate the water facilities, the lawyer responded:

*"...because basically it's got a limited liability status that also enables them to ...borrow against...and there's a few benefits for being a company...the incorporated society is not well accepted by lending institutions as a vehicle for lending against...because it's more of a community of interest amongst owners as opposed to a liability company which has a board of directors, a shareholding structure under the Companies Act... [it's] seen to be a little bit more...corporate."*

The lawyer also stated that it is not always straightforward for a company to be an owner of common facilities, especially in instances where every owner is a director and a shareholder. In such cases every time an owner sells not only does the property concerned have to be transferred so does the transfer of shares, resulting in rather a convoluted compliance procedure in terms of Companies Office records. With an incorporated society set up however, a change of ownership merely requires the register of the society to be updated internally, rather than notifying the Companies Office.

When asked whether the incorporated society or limited company would have priority if any problems arose between the two the lawyer was of the opinion that it depended on how it was set up, and that the way such legal entities were structured was crucial:

*"It's important...the developer buys into that from day one [that] the lawyer is involved in doing these, and also [that] the marketing ensures that everyone understands that it may be the incorporated society that is the overarching body...or it may well be that the limited*

*liability company for infrastructure issues like water or sewage or...owning the gymnasium or whatever else sits alongside that - not actually even under it [the incorporated society] necessarily - but it may well have...a management contract between the two.."*

*"The other thing ...is...a lot of these management contracts are very poorly drafted and right at the moment I've got one of my partners working with me to actually prepare what we would call a sort of Rolls Royce...management agreement to try and get around this problem..."*

*"...the same is the case for bodies corporate as well...under the Unit Titles Act there is no provision in the Act for management – other than a very limited statement about management in the rules – so many of these [body corporate] management companies ...have no statutory authority or any of that and the management agreements are poorly drafted and we've had problems ever since – it's been an issue"*

### **3.5 TRUSTS AND THE CHARITABLE TRUSTS ACT (1957), THE PUBLIC TRUST ACT (2001) AND THE TRUSTEE COMPANIES MANAGEMENT ACT (1967)**

As stated earlier, one of the lawyers we interviewed mentioned the use of Trusts as a legal mechanism to govern commonly owned property. The lawyer explained that by setting up a Trust a legal deed is formed which sets out an agreement between a Settlor (developer), Protector (independent auditor) and group of Trustees (owners/residents). The Settlor creates a Trust Fund whereby the Trustees agree to hold, upon trust, the money and assets in the Trust, for the purposes and terms set out in the Deed. The Deed lays out the purposes of the Trust, the appointment, duties, powers, liabilities and other roles of the Trustees, and the procedures for meetings, voting, quorum, delegation, and annual reports and accounts. The role of the Protector is to monitor the activities of the Trustees and ensure the purposes of the Trust are being carried out.

Another lawyer noted that while Trusts were not common he was aware of a development where the underlying land is fee simple and the owners have only a leasehold interest (in the form of a unit title). As a result a Trust has been used to set up a Protector Arrangement whereby the Trust and the Trustees will protect certain funds for the benefit of everyone in the development. The Protector's role is to ensure that the lease does not expire or collapse. Though the UTA also protects the unit title owners, the Protector Arrangement acts as a further safeguard with the appointment of a community recognized trustee (e.g. NZ Guardian Trust). The use of such a trustee provides longevity of the arrangement and ensures that the rental for the lease does not get funnelled elsewhere.

It was also mentioned that with Trusts becoming more common, they had become more acceptable to lending institutions. Another advantage related to the use of charitable trusts as non-profit making organizations, thereby lessening the tax burden for the trust involved. The converse of this is when developers choose to form limited liability companies to govern commonly owned property within multi-owned developments, so that a profit could be made, and returned to the shareholders (not as dividends but to benefit a collective pool). The shareholders could be unit title owners and/or the incorporated society, depending on how the management structure of the multi-owned development had been set up.

### **3.6 LEGAL MECHANISMS INCLUDING LAND COVENANTS AND MEMORANDA OF ENCUMBRANCE**

Covenants and memoranda of encumbrance are not legal 'entities' as such but are legal mechanisms that are placed on the certificate of title as a means of notifying owners about certain conditions relating to their obligations regarding their property.

#### **3.6.1 LAND COVENANTS**

Hinde, McMorland and Sim describe a covenant as:

*"a promise made under seal, that is, in a deed. As such it is enforceable only between certain parties...generally such parties are those within privity of contract" (2004:725).*

However, they also state that covenants are so crucial to certain transactions relating to land that under certain conditions the class of persons between whom the covenant is enforceable has been extended. As well there are statutory provisions for certain other types of covenant, particularly for conservation or subdivision consent purposes. Also noted is the fact that the Resource Management Act 1991 makes provision for various covenants in connection with resource consents and subdivisions, with each type of covenant having its own provision for notification or registration on the title of the affected land (Hinde, McMorland & Sim, 2004:725).

Further on they note that despite cases where it was desirable to place upon a neighbour a positive obligation to maintain or repair a particular facility, if such a covenant was entered into before 1 January 1987, any such covenant would only be enforceable against the original covenantor, and as a positive covenant it could not be enforced against any successor in title (2004:769).

### **3.6.2 POSITIVE LAND COVENANTS**

Section 126 of the Property Law Act defines a positive covenant as one "whereby the covenantor undertakes to do something in relation to the covenantor's land that would beneficially affect the value of the covenantee's land or the enjoyment of that land by the person occupying it" In the case of multi-owned developments a covenant can be included from each lot owner giving a corporate body authority (such as an incorporated society, limited company or body corporate under the UTA) to penalise an individual lot owner who breaches such a covenant.

### **3.6.3 RESTRICTIVE LAND COVENANTS**

Hinde, McMorland and Sim (2004:733) describe a restrictive covenant as:

*"a promise or agreement made by the owner of the servient land with the owner of the dominant land that the covenantor will not do some act in relation to the servient land which he or she could otherwise do. If the promise is negative in substance and benefits the dominant land, it will run with the servient land in equity, thus constituting an equitable interest in that land which binds the covenantor's successors in title who take with notice of it."*

The servient land refers to the parcel of land over which the covenant applies, whereas the dominant tenement refers to the parcel of land that benefits from the covenant that has been applied to the servient land.

### **3.6.4 COVENANTS IN GROSS**

A further type of land covenant is a 'covenant in gross'. Hinde, McMorland and Sim (2004:770) provide the example of a subdivider of rural land for housing where the territorial authority requires a private system for the disposal of waste water and effluent:

*"The subdivider may not retain land to be the dominant tenement, but may need to be responsible for an indefinite period for the operation of the system. An element of the scheme the subdivider might set up could include covenants in gross, with the subdivider as the covenantee, the burden of which would have to run with each of the lots serviced by the scheme."*

*Though enforcement of positive covenants created before 1 January 1987 and any covenants in gross cannot be achieved by direct means, there are various devices or indirect means which can be used ... the principal method used has been to adapt and register a memorandum of encumbrance."*

With regard to 'low impact' features it is likely that any positive covenants created prior to 1987 related to stormwater ponds, wetlands and the protection of areas with high biodiversity.

### **3.6.5 MEMORANDA OF ENCUMBRANCE**

Judge Hansen defines an encumbrance as “any memorial on the title, which interferes with any otherwise legal use of the land by the registered proprietor, by creating a charge or interest over the land for the benefit of another” (in Hinde, McMorland & Sim, 2003:345).

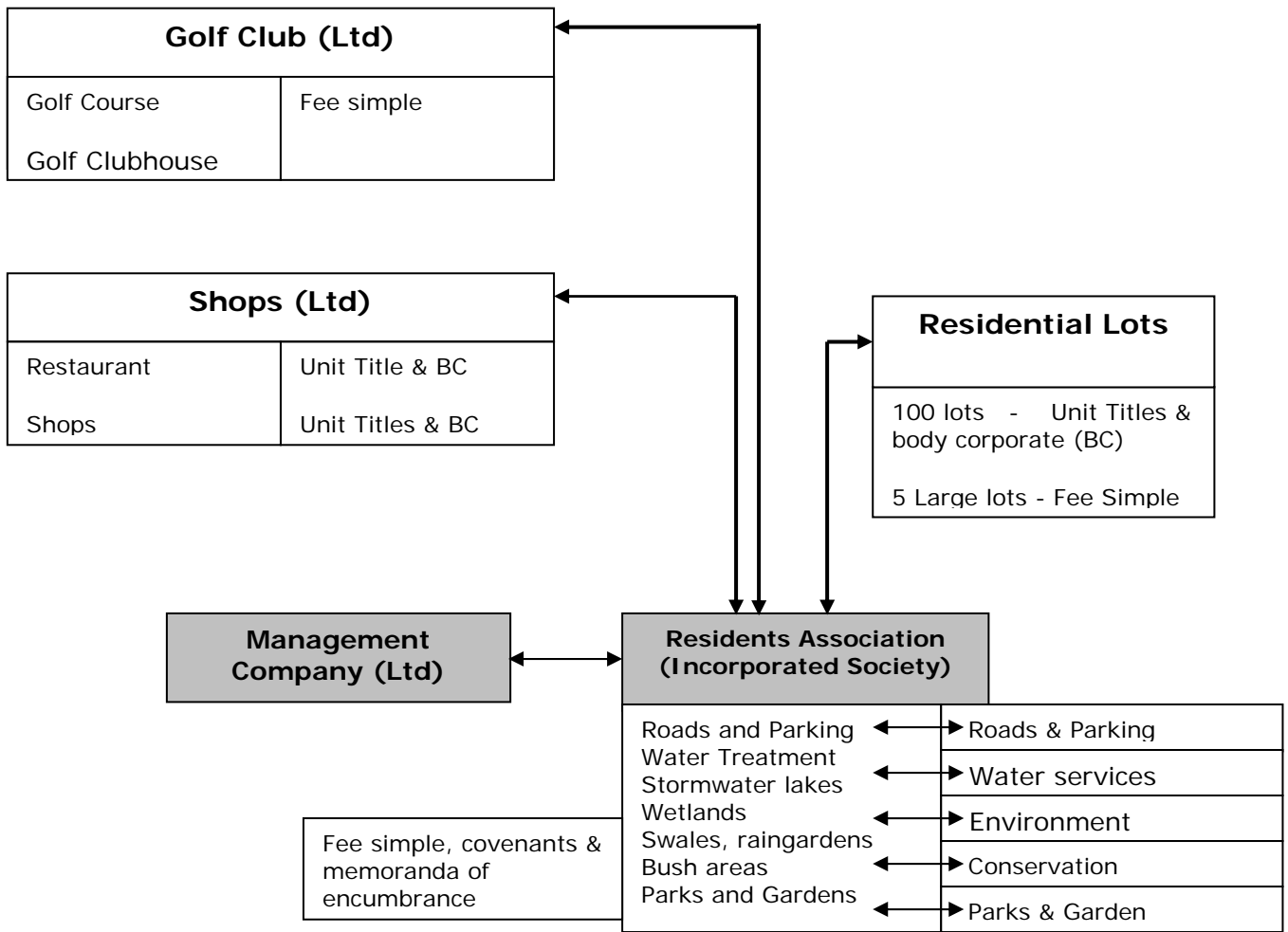
The Land Transfer Act 1952 states that a memorandum of encumbrance may be registered against the title of the servient land thus giving the encumbrancee an interest in that land. The encumbrance allows the covenantor to create a defeasible rentcharge in favour of the covenantee, with the rentcharge being enforceable only if certain covenants affecting the covenantor’s land are not observed or performed (Hinde, McMorland & Sim, 2004:770).

A memorandum of encumbrance is often used in instances where there is no dominant tenement to support a land covenant or when the remedies available to enforce the land covenants are not regarded as sufficient to deter the covenant from being breached. It should be noted however, that there has been significant discussion and legal commentary that the use of encumbrances to support covenants is not enforceable and for this reason it is not currently possible to be certain that an encumbrance will be enforceable against the encumbrancer (Wilson, 2006:14).

### **3.7 PLURAL LEGAL ENTITIES AND MECHANISMS WITHIN MULTI-OWNED DEVELOPMENTS**

As noted previously, there are instances where a number of legal entities and mechanisms are created within a multi-owned residential development, as a means of managing various activities in the development. The following diagram (Figure 1) provides an example of a multi-owned development that has commercial and residential land, activities and legal entities. As the diagram illustrates, the legal entities consist of a number of limited companies (governed by the Companies Act 1993) that own and manage commercial activities such as a golf club and shops. A limited company is also connected to a residents association (which is governed by the Incorporated Society Act); the limited company in the form of a management company provides services for the residents association including the governance of features including swales and rain-gardens. Other legal entities include each body corporate (governed by the Unit Titles Act 1972) that exists in relation to each unit title (including residential and commercial land and property). Covenants and memoranda of encumbrance have also been utilised as a means of ensuring that certain features are protected and/or maintained.

Figure 1: Plural legal entities within a multi-owned development



We gratefully acknowledge Shane Hartley for providing the framework for the above diagram.

Table One that follows outlines some common features of the various legal entities and mechanisms discussed in this paper, as well as their strengths and weaknesses. Also listed is the main legislation that is relevant to each legal entity and mechanism, as well as the type of financial reporting that is required by the legislation. This table should be viewed as an outline rather than a comprehensive list of each and every aspect of the legal entities and mechanisms listed. For instance land covenants include a broad range of covenants that we have not been able to cover in this paper including ‘open space’ covenants, covenants for conservation purposes, covenants to preserve the natural environment, heritage covenants, and covenants of sites having historical, spiritual, emotional or cultural significance (Hinde, McMorland & Sim, 2004;725). Likewise Trusts can be established under different legislation (e.g. Charitable Trusts Act 1957, Public Trust Act 2001, Trustee Management Act 1967) meaning that different rules will apply depending on what legislation was used in create the Trust in question.

Table 1: Features of various legal entities & mechanisms found in multi-owned developments

	<b>INCORPORATED SOCIETIES</b>	<b>LIMITED COMPANIES</b>	<b>BODIES CORPORATE</b>	<b>TRUSTS</b>	<b>LAND COVENANTS</b>	<b>MEMORANDA OF ENCUMBRANCE</b>
<b>RELEVANT LEGISLATION</b>	INCORPORATED SOCIETIES ACT 1908 (ISA)  SECURITIES COMMISSION ACT 1978 (SCA)  RESOURCE MANAGEMENT ACT 1991 (RMA)	COMPANIES ACT 1993 (CA 1993)  RESOURCE MANAGEMENT ACT 1991 (RMA)	UNIT TITLES ACT 1972 (UTA)  RESOURCE MANAGEMENT ACT 1991 (RMA)	CHARITABLE TRUSTS ACT 1957 (CTA)  PUBLIC TRUST ACT 2001 (PT)  TRUSTEE COMPANIES MANAGEMENT ACT 1967 (TCMA)	PROPERTY LAW ACT 1952 (PLA)  LAND TRANSFER ACT 1952 (LTA)  RESOURCE MANAGEMENT ACT 1991 (RMA)	LAND TRANSFER ACT 1952 (LTA)  RESOURCE MANAGEMENT ACT 1991 (RMA)
<b>FEATURES</b>	A REQUIREMENT UNDER THE RESIDENTIAL EXEMPTION OF SECURITIES ACT 1978	FAMILIAR TO DEVELOPERS	REQUIRED UNDER THE UTA WHEN UNIT TITLES ARE FORMED	NOT VERY COMMON AT THIS POINT IN TIME	NOTED ON CERTIFICATE OF TITLE	USED TO REGISTER COVENANTS ON CERTIFICATE OF TITLE
<b>FINANCIAL REPORTING</b>	YEARLY FINANCIAL STATEMENTS REQUIRED BY IRD	REGULAR REPORTING REQUIRED UNDER THE CA 1993	SOME REPORTING REQUIRED UNDER UTA	YEARLY FINANCIAL STATEMENTS REQUIRED BY IRD	NONE	NONE
<b>STRENGTHS</b>	PROFIT OR NON-PROFIT  SOCIETY REGISTRATION, RULES AND FINANCIAL STATEMENTS PUBLICLY AVAILABLE  PROVIDES SOME PROTECTION FROM CREDITORS  CAN OFFER TAX SAVINGS	PROFIT OR NON-PROFIT  LIMITED LIABILITY  TAX SAVINGS  READILY ACCEPTED BY LENDING INSTITUTIONS  SOME RECORDS PUBLICLY AVAILABLE	UNIT TITLES ACT UNDER REVIEW  UTA LEGISLATION WRITTEN SPECIFICALLY FOR MULTI-OWNED DEVELOPMENTS  COMMON  LEGALLY WELL RECOGNISED	PROFIT OR NON-PROFIT  PROVIDES SOME PROTECTION FROM CREDITORS  CAN OFFER TAX SAVINGS	SIMPLE  COMMON  CAN ACT AS A BACK-UP TO OTHER MECHANISMS	SIMPLE  COMMON  CAN ACT AS A BACK-UP TO OTHER MECHANISMS  MAY PROVIDE GREATER DETERRENCE FROM BEING BREACHED THAN JUST A COVENANT
<b>WEAKNESSES</b>	NO AUDITING OF STATEMENTS REQUIRED UNDER THE ISA  RULES CAN BE TOO EASY TO CHANGE  OTHER ENTITIES (E.G. CO'S) OFTEN PREFERRED BY DEVELOPERS & COUNCILS	GREATER REPORTING COMPLIANCES FOR DIRECTORS  RESIDENTIAL EXEMPTION UNCLEAR AS TO WHETHER ASSETS CAN BE HELD INDIRECTLY IN A COMPANY	RECORDS NOT PUBLICLY AVAILABLE  RULES & BC MANAGEMENT COMPANIES CAN BE OVERLY RIGID	NOT MANY CURRENT EXAMPLES TO GO BY & THEREFORE YET TO BE TESTED	MAY NOT PROVIDE SUFFICIENT DETERRENT AGAINST BREACH OF COVENANT  LIMITED TOOL COMPARED TO SOCIETY, COMPANY OR BC	DEBATABLE WHETHER THEY CAN BE USED ENFORCED  LIMITED TOOL IN COMPARISON TO SOCIETY, COMPANY OR BC

#### 4 PUBLIC/PRIVATE ISSUES AND THE CRITICAL ROLE OF TERRITORIAL AUTHORITIES

Councils have substantial experience in addressing the increasing range of technologies and strategies that avoid adverse effects on water bodies from stormwater runoff (e.g. sedimentation). However councils have much less experience with the operation and maintenance of 'low impact' technologies and strategies, particularly in relation to the private governance issues concerning the on-going management of 'low impact' features.

A senior planner in a provincial jurisdiction, when asked about who comes up the legal and management structure of 'low impact' features in residential multi-owned sites, responded:

*"What generally happens - we tend not to go in the first instance and tell them what to do - we want to give them some flexibility in regards to how they want to approach a problem or an issue - so although I wasn't dealing with the consent itself - I would imagine we would have gone back to the engineers and the engineers would have given us comments - we would have gone back to them and said - look, we've got some pretty significant concerns and issues with the ponding, the flooding, all those sorts of things, what your wastewater is going to be doing - address it pretty much - how you see fit and if it's not adequate we'll tell you and we'll come back and start going from there - but we give them [in] the first instance the opportunity to come up with a solution.*

*[Interviewer] "And have you got any opinions whether you think something like an incorporated society is better than a company or...?"*

*"So long as it does what it needs to do from our point of view and it's maintained - it's fully functional and - I don't have a problem - I don't know the ins and outs of the difference between the two - but so long as they do what they are supposed to - from our point that's fine"*

Our research suggests that as long as the management of adverse effects on the environment is addressed, councils at this point in time have little concern as to *what* type of legal entity or mechanism exercises that control. The shift towards 'soft' engineering and the use of devices and features on-site challenges traditional approaches to infrastructure management and places more responsibilities on owners and the entities created to manage 'low-impact' features. It raises a new set of issues such as the need to ensure that: consent conditions are sufficiently comprehensive, the entity created is well suited for the development and the site, owners and other stakeholders are educated about long term management and maintenance, the rights of individual owners are protected in relation to those of the entity with respect to changing rules, consent conditions are adequately monitored, liability for costs is clear if systems fail, and that there is sufficient provision for resolution of disputes where there is more than one entity on site (Dixon, van Roon & Dupuis, 2005).

Clearly, the issues surrounding governance issues and legal entities as they pertain to 'low impact' features are becoming apparent to councils, and also the Environment Court. A council planner, reporting on an application for a multi-owned development, wrote the following:

*The applicants engineer proposes that a company be set up, with shares held by each of the property owners in the subdivision, to undertake regular inspection of the filters and septic tanks to see if they need cleaning. Legal advice is that the company would have no status in relation to any consent. It is therefore recommended that consent notices be put on the titles to the lots requiring the property owners to carry out, or have carried out yearly inspection and maintenance of the sewage treatment system...The applicant could still set up a company to carry out maintenance work on behalf of the property owners but this arrangement would be outside of any consent.*

This application was declined, and subsequently appealed to the Environment Court who issued a consent that included, contrary to the legal advice mentioned above, the requirement that a company be set up:

*Prior to application for the s.224(c) certificate, the consent holder's solicitor shall give an undertaking that:*

- A. *A registered company will be established to organise the regular inspection and cleaning of septic tanks and effluent filters for each residential lot within the subdivision.*

However there does not appear to be any uniformity in terms of what type of legal entity is required. The conditions of consent for a multi-owned development in a different TLA reads:

*An incorporated association of lot owners, or such other legal entity approved by Council, is to be established; ...*

While a condition for another site in the same TLA reads:

*That a Memorandum of Encumbrance shall be created which registers against all residential lot titles and specifies that the owner(s) of each residential lot is required to be a shareholder of the Utility Company which will own the stormwater and effluent disposal areas and which will own, develop, operate and maintain the effluent disposal system and stormwater management system...*

This condition was later amended to read:

*A Memorandum of Encumbrance shall be created which registers against all unit and strata titles the requirement that each owner(s) shall be a member of the "[name of Incorporated Society]" constituted so as to meet subdivision conditions...*

A council stormwater engineer referred to the complex and convoluted nature of consent issues which meant that it was not surprising that councils sometimes lost their way with the consent process, either by too easily accepting conditions for consent or not adequately following up that conditions were being adhered to.

The above points support the view put forward by Brookfields (no date) who stated that while multi-owned developments often provide a better environment in a number of respects (e.g. socially, environmentally, economically) the common ownership of infrastructure has nevertheless increased the legal complexities and magnified the possibility of risk (Brookfields:1). Brookfields observes that there can be no settled set of rules, documents or structure for multi-owned developments, given that each development reflected the goals of the developer and was greatly determined by the geography and topography of each unique development site. Despite this it is noted that the failure to properly address legal issues of ownership relations and the performance and operation of works (including maintenance and upgrade) lead to the risk of default in the provision, operation and maintenance over time (Brookfields:1).

Particular mention is made of the significant role that local councils played when granting consents for multi-owned developments. It was especially important that when granting consents:

*"...the Council can adopt procedures and forms and require securities that will best ensure the due allocation of costs and risks in both the short and long term in respect of works for the protection of the environment and the performance of those works" (Brookfields:1).*

Also noted is that:

- Very few councils are regulating such multi-owned developments with adequate attention to minimizing the contingent future risks (some who claim to do so are found on examination to be less than optimal in performance);
- That some councils are experiencing costly burdens in rectifying substandard performance;
- That where issues are being addressed it is more likely to be as a result of the proposals of the developer, rather than the requirement of the Council, and are accordingly designed to achieve different objectives than those that should be the concern of the Council; and

- That this is a national issue arising in all, or almost all, cities and districts at one level or another (Brookfields: 2).

Another point made in relation to access-ways, but which is also applicable to other commonly owned property, is that:

*“The biggest problem is the issue of who has the liability to address and solve the potential problems in advance, for the protection of the owners in perpetuity? Is it the developer, the surveyor and consultant, or the lawyer? Alternatively it may be each vendor and purchaser every time properties are sold and bought”* (Brookfields: 7).

This warning of liability was also extended to territorial authorities that grant subdivision consents (Brookfields: 8) with the further statement that “the Council’s role is merely that of the regulator with a responsibility to ensure the sustainability of the environment, neither more nor less” (Brookfields: 13).

## 5 CONCLUSIONS AND DRAFT GUIDELINES

Unpacking the private governance of common-property features reveals a complex web of accountabilities and relationships in relation to law, private property rights and regulation. The quality of decision-making by various parties as the entity is created and rules developed, the physical design of low impact features and the consent conditions imposed by councils are all critical elements in shaping the long term future of these sites. In addition, the ability of owners to manage and maintain their commonly-owned features is crucial, whether this is achieved by engaging experienced contractors or by the owners themselves. As noted earlier, many of these properties are at an early stage in their development. It is thus premature to assess how well the private governance arrangements, created in an ad hoc fashion, are going to work and which model best suits particular designs and sites. Nonetheless, our research strengthens our earlier view (Dixon, van Roon & Dupuis, 2005) that the issues traversed in this paper require much closer scrutiny by policy makers, councils and other stakeholders to avoid major problems in the future.

The forms of private governance being created are largely untested while practices are moving rapidly ahead in the absence of any systematic oversight. There is a disjunction and tension between the private governance arrangements created by developers and their advisors to manage multi-owned sites and the functional role of councils and their capacity in setting conditions for effective long term environmental management. Councils are of course confined to dealing with their mandated responsibilities. However, it is important that council staff are knowledgeable about the strengths and weaknesses of the various forms of legal entities so that consent conditions can be crafted carefully. Similarly, there is a need for education of all the various parties involved- planners, stormwater engineers, other council staff, lawyers, developers, real estate agents and importantly owners and residents.

We are developing draft guidelines for the various parties involved in order to assist current practices in this field. In the previous sections of this paper we referred to a number of suggestions that were made by the research participants interviewed and documents we were directed to. While the confidentiality agreement with our research participants means that we cannot acknowledge their names, we are able to identify the relevant publications. Points that were raised in both the interviews and the publications relate to issues that significantly affected successful outcomes for residents, developers and councils in relation to commonly-owned land and ‘low impact’ features. The following publications were helpful:

- ‘From Clay Pit to Community: A Study of Medium Density Housing in Ambrico Place, New Lynn’, Report for the Waitakere City Council (Massey University and The University of Auckland), 2001.
- ‘Getting On’: An Agenda for Living Close Together, Dupuis, A and Dixon, J. in Living Together: Towards Inclusive Communities by Thompson-Fawcett, M. and Freeman, C (eds), Otago University Press, 2006.

- 'Subdivisions – getting it right', New Zealand Law Society seminar presented by Tim Jones of Glaister Ennor, Auckland and Pru Steven of Goodman Steven Tavendale and Reid of Christchurch, 2006.
- 'Subdivisions – Let Us Not Have Another Weather-tight Homes Debacle – Managing Subdivision Risks for the Council and Community', John Sheppard of Brookfields, Auckland, no date.
- 'Compliance with Securities – Laws for Developers', New Zealand Law Society Property Law Conference paper presented by Anne Wilson of Anderson Lloyd Caudwell, Christchurch, 2006.

To assist our process, we have prepared a diagram that outlines the typical path taken with regard to the creation and establishment of 'low impact' features (Figure 2). Beneath this diagram we have detailed what we believe would be a more successful and effective path in terms of establishing 'low impact' features in multi-owned residential developments (Figure 3). We then propose some guidelines for the various parties involved in the steps described (Step 1 to 4). These guidelines will be developed further in the final stages of our research and peer-reviewed with knowledgeable professionals in the field.

Figure Two below outlines the general path that is currently taken when creating governance mechanisms and Figure 3 below that outlines our recommendation in terms of a more effective path to determining successful LIUDD outcomes.

Figure 2: Current Path Taken When Creating Governance Mechanisms for Low Impact features

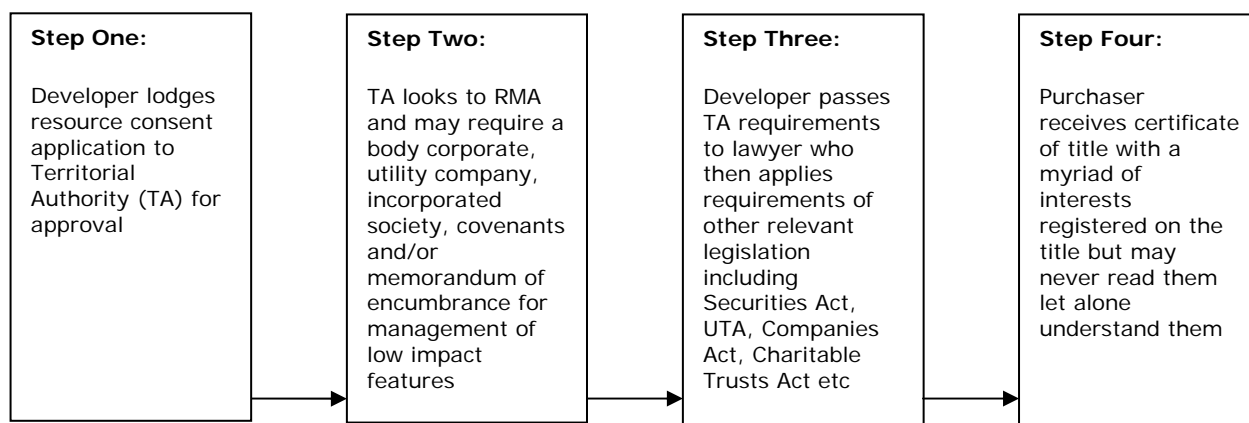
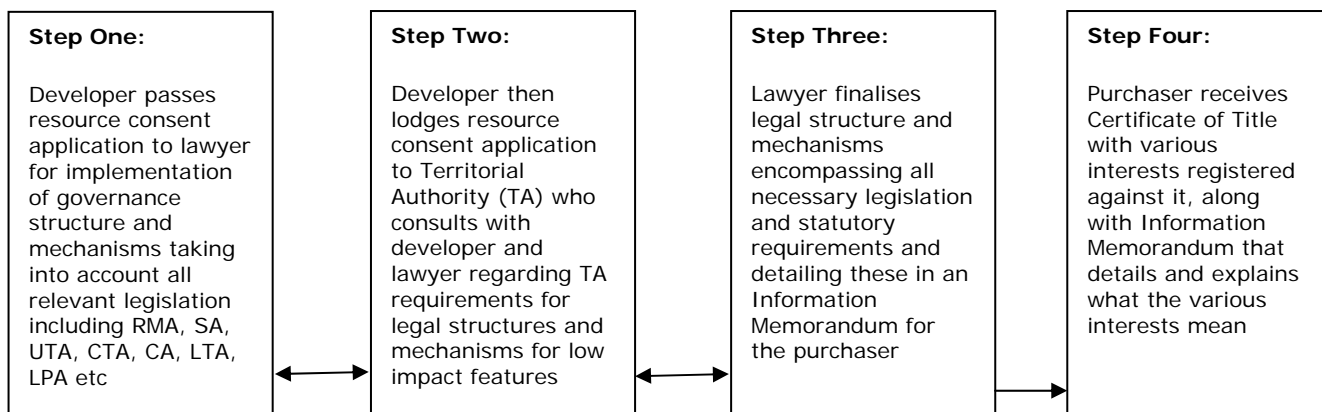


Figure 3: Recommended Path When Creating Governance Mechanisms for Low Impact Features



## 5.1 STEP ONE: DECISION ON WHICH TYPE OF ENTITY AND DRAFT RULES

- Developers and their lawyers need to discuss the development plans at an early stage in order to determine the most appropriate form of governance for the site. They need to have confidence that the entity will contain sufficient rules that will reflect the

requirements of various legislation (such as the Securities Act, Resource Management Act and so on) and also enable sound long term management once the developers complete their involvement.

- Where there is more than one entity to be created for the site, attention needs to be given to establishing linkages between the various legal entities so it is clear what should happen in the event of a dispute or systems failure. The rules in each entity need to be consistent with other rules.
- In the drafting of the rules for the proposed entity adequate provision needs to be made for owners to change rules later if necessary, for flexibility regarding the engagement of property managers to look after commonly-owned features, and for suitable dispute resolution mechanisms. A specific problem in the creation of bodies corporate, for example, is that property managers have been locked in by developers for long periods which owners have found difficult to renegotiate. Further, there has been a disjunction between the administration of the affairs of the body corporate and the need for hands-on property management.
- Similarly, consideration needs to be given as to whether or not water and other utility schemes are owned communally and whether 'low impact' features are chattels rather than land and the implication of this in terms of the Securities Act and the Residential Exemption Notice.
- Developers and their lawyers need to consider how the entity rules will provide for the ongoing performance and operation of 'low impact' features including maintenance and upgrades. Some developers are now setting up management companies to operate for a number of years following the completion of the development to ensure that low impact features are properly maintained. In this case, care needs to be taken to avoid conflict of interest situations occurring between developers, property managers and owners. This issue has arisen in respect of bodies corporate where property managers and developers are financially linked or where a property manager may own and/or occupy a unit in the development, with full voting rights.

## **5.2 STEP TWO: PROCESSING OF COUNCIL REQUIREMENTS**

- Councils review and, if necessary modify their policies in relevant plans and codes of practice in respect of governance and management of these sites to ensure that consents secure the use and management of common property or activity in perpetuity in the interests of the Council and the community.
- Councils ensure that staff are well informed about the governance frameworks proposed. Few planners, for example, are knowledgeable about the issues involved in creating the various legal entities described in this paper. Staff drafting consent conditions need to be aware of the strengths and weaknesses of the various entities proposed. Similarly, if consent conditions require monitoring, they need to be adequately resourced by councils.
- Councils seek further information from developers where necessary as to the legal instruments they propose to employ in multi-owned residential developments and how they intend to provide for the long term management and maintenance of the site in draft rules.

## **5.3 STEP THREE: FURTHER DEVELOPMENT OF PROPOSED ENTITY AND RULES**

- The shaping of the final design of the entity, its rules and the inclusion of consent conditions is critical at this stage. There needs to be consultation between the developers, lawyers and council staff where necessary.
- The way the entity is structured in terms of its decision-making processes, the responsibilities of owners, financial reporting, setting of levies, procedures for changing rules and dispute resolution is important in shaping governance arrangements that will be required to last for decades. Developers and their lawyers carry significant responsibility at this point.

- Similarly, it is important any contracting arrangements put in place, such as commitments to engage a property management company to manage the entity on behalf of owners or to engage contractors to maintain the low impact features on site are provided for in such a way that gives the new owners some flexibility if they wish to change or modify these arrangements.
- In the event that the governance arrangements for legal entities are not well designed in terms of the rules, and consent conditions are not sufficiently comprehensive, councils will likely bear the brunt of both property owners' and the wider public's dissatisfaction in the long term.

#### **5.4 STEP FOUR: PURCHASE AND BUY-IN BY NEW OWNERS**

- As stated in Figure Two (step four) the purchaser's certificate of title may have a myriad of interests registered against it. As well as financial mortgages registered against the property and electricity and telephone easements, interests relating to 'low impact' features may include the registration of:
  - A memorandum of encumbrance noting the owner as a shareholder in a utility company
  - A restrictive covenant noting the owner may not drain any wetlands on the property
  - A positive covenant noting the owner's responsibility for maintaining on-site rain gardens
  - A memorandum of encumbrance noting covenants in gross relating to the upkeep of swales in the development
- Potential purchasers need to be properly informed about their role and obligations with regard to the interests noted on their certificate title. This in turn requires that lawyers and real estate agents are similarly well informed. The lack of knowledge on the part of owners, and other interested parties, raises a critical question of whose role it is to inform buyers about the advantages and disadvantages of belonging to a legal entity, whether it be a body corporate, incorporated society, limited company or trust.
- The provision of an information memorandum with an executive summary, overview and flow diagram for purchasers that states how various layers of the development are linked could be used as a means of informing purchasers about their roles and obligations.
- The information memorandum would also outline the lines of communication between various legal entities, the operation of owners' committees, their collective responsibilities, voting rights and financial arrangements, including the setting and collection of levies and the need for a properly funded, long term maintenance plan. The information memorandum would also provide potential purchasers and current owners with disclosure statements that provide up-to-date information regarding levies, and rule changes.

#### **ACKNOWLEDGEMENTS**

Due to the confidentiality conditions of our research project, we unfortunately cannot name the research participants who kindly gave us their time and thoughts during the course of this project. However many of the participants will be able to identify their words or views in this paper, and we gratefully acknowledge their generosity in sharing these with us. We would also like to thank Tim Jones of Glaister Ennor, John Sheppard of Brookfields and Shane Hartley of Terra Nova Planning Ltd for their time and assistance in directing us to a number of helpful documents.

#### **NOMENCLATURE**

Quotes from the recorded interviews of our research participants have been included in this paper. In these instances the spoken words of the interviewees have been indented from the left hand margin, written in italics and enclosed in speech marks. In some instances the sentence of the research participant has been shortened in an effort to make the sentence clearer; in these cases we have inserted three period symbols (i.e. ...) to indicate where one or more words in the sentence have been removed. In instances where one or more sentences have been omitted from the quote we have inserted six period symbols with a space in the middle (i.e. ... ..). At other times we have added one or more words to make it clearer for the reader; whenever this has been the case we have enclosed our added words in square brackets [like this]. In all instances

we have made the utmost effort to ensure that the quote we have used has been accurate in terms of wording, context and meaning.

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