

Strata and Community Title in Australia for the 21st Century Conference.

Challenges ahead for the development industry in respect of the
management problems in large, complex and mixed use schemes:
as viewed by a community manager from Queensland

Presented by:
Tim Sheehan

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1 INTRODUCTION

1.1 *Scope*

I have been requested to prepare a paper dealing with the challenges ahead for the development industry in respect of management problems in large, complex and mixed use schemes.

This paper is restricted to the following types of management problems evident in the Queensland jurisdiction:

- Within the large, complex and mixed use schemes it is essential to undertake “community” development and management activities. However, “community” development activities are currently outside of the scope of most bodies corporate because of the lack of statutory power from the enabling legislation.
- The very nature of the large, complex and mixed use schemes demands a unique decision making mechanism and administration system. The current system is a problem.

I am a community manager working in the Queensland jurisdiction, with a background in advising developers during the design, titling, construction and establishment phases of projects which are large, complex and contain a mixture of uses.

While the problems for residents in the management of large, complex and mix use schemes may overlap substantially with the challenges for the development industry, this paper focuses on those challenges for developers.

1.2 *What are problems?*

I do not believe it is necessarily definitive of a problem where one group of stakeholders within a scheme has a different point of view to another group of stakeholders.

Body corporate communities consist of people living and working closely together. Where people come together differences of opinions will occasionally arise in respect of how each of these people should behave. Further, the goals and objectives of these people may differ. The existence of these differences should only be indicative (and not definitive) of management problems in respect of these types of schemes. Problems exist where there is not an appropriate mechanism for issues to be resolved, or alternatively, a problem should be deemed to exist only where the nature of these schemes necessarily pits one group of stakeholders against another group of stakeholders.

1.3 *Do large, complex and mixed use schemes have more or less problems than other types of schemes?*

I have not conducted the appropriate statistical research of the data base of organisations like the Queensland Commissioner for Body Corporate and Community Management to definitively answer this question.

I do suggest though that there is an alignment of factors which should see a decrease in the number of problems. These factors include:-

- (a) Australians are becoming more “Manhattanised”. Residents and stakeholders are becoming more aware of the demands and idiosyncrasies of living closely with, and on top of your neighbours. This is distinguished from the traditional Australian environment of a quarter acre block subdivision where one’s neighbours were kept at a “safe distance”.
- (b) The people who put these schemes together (developers and their consultants) are becoming more aware of the pitfalls and more aware of how to avoid these pitfalls through clever design.
- (c) Legislative frameworks for these schemes are improving, allowing previous problems to either be avoided or resolved. Legislation also assists with education.

I also suggest that the other proposition relevant to the topic of the management problems in large, complex and mix use schemes is that these problems are not different from the problems which may occur in small, non-complex and single use schemes. However, by their vary nature the large, complex and mixed use schemes may have:

- (a) Longer development timeframes, allowing more problems to gestate.
- (b) A larger number of stakeholders involved, having the potential for more problems to arise.
- (c) Being complex, comprehension of the legal and physical structures may be more difficult for stakeholders. With a lack of understanding more problems may arise.
- (d) Diversity within the scheme, which provides an environment for more types of problems to appear.

2 COMMUNITY DEVELOPMENT INITIATIVES WITHIN A BODY CORPORATE AND LACK OF POWER

I submit that one area of management problems in large, complex and mixed use schemes arises from an inappropriate or rigid statutory framework for the provision of “community” initiatives like:

- (a) Social facilitation (e.g. festivals)
- (b) Architectural compliance
- (c) Services (e.g. transport) and sustainability

2.1 *Social Facilitation*

Anecdotal evidence gained by canvassing the opinions of developers of very large communities in the United States has indicated that it is an absolutely essential function of successful developments for there to be a service stimulating social development.

I do not suggest the United States model contains all of the answers for Australian developers going forward. However, as an environment it provides two things which the Australian system does not. Firstly, there are many, many large community title schemes. Within these large community titles scheme there is a diversity of uses. Also, these community title schemes have been going for a long period of time. It is common to find examples of large schemes (many thousands of lots) which have been completed for 20 or more years. By examining this history we can predict the future of Australian strata and community title schemes.

The lesson learnt from the developers of these schemes is that to maximise the chances for successful and sustainable communities it is essential to encourage the occupants to interact with each other. Interaction should commence as soon as possible. It occurs through the establishment of groups (examples include dancing lessons, bands, playgroups, sporting clubs, dining clubs, hobby groups) and the holding of activities (like festivals, Christmas carols, fun runs).

It is understood that these groups could develop over time without seeding. However, for a developer, it is a major advantage for these groups to evolve early in the development process. Early evolution promotes sales, increases property values, and generally contributes to an intangible, but real, positive buzz within the development. In order to establish the groups early they must be seeded and a governance structure for this seeding and funding must be provided. While a body corporate would be an ideal vehicle to seed these groups, this is just not possible within the Australian context. Generally, with bodies corporate powers are limited to repair and maintenance of common property and managing the conduct and behaviour within lots. By way of example, spending money to have a Christmas carols function is outside of these heads of power. By restricting the heads of power society is missing a major opportunity to use bodies corporate as the "village" of the 21st Century.

Currently, many bodies corporate are using funds to undertake these social community functions anyway. These decisions to spend money in this way would be ultra-vires if ever challenged. Unfortunately, history indicates it is only a matter of time before "Scrooge" would want to close down the Christmas carols function.

2.2 *Architectural Compliance*

Control of the built form within the community is an issue dear to the heart of most developers when creating a large, complex and mixed use scheme. Controlling the built form is part of delivering the vision for the product. I suggest that the existence within community titles schemes of a mechanism which is able to control built form has been a major driver for Queensland developers in particular to adopt community title schemes for large scale flat land developments (i.e. the body corporate suburb like Coomera Waters).

For non-body corporate developments, the control of housing construction has been a thorn in the side for developers for many years. Privity of contract issues mean that without a community titles scheme developer control is generally lost when the first land buyer sells to a subsequent owner. In jurisdictions outside of Queensland other mechanisms like covenants may be available. However, the covenant mechanism is not available within Queensland. Further, covenants still rely on a party to go to the expense to enforce the obligations. The advantage of community title is that the body corporate serves as policeman for the developer and the other owners.

Control of the built form is not an issue in a high-rise development as a developer is also building all of the structures within the community. However, the advent of large standard format plan communities, where the lots are sold as vacant land with individual owners to build the houses, retail spaces, factories or offices within the community means that the body corporate needs to provide a mechanism which allows for an appropriate control through an architectural code. Architectural codes are common within these communities. However, the current system does have unnecessary difficulties in its administration.

Problem areas with architectural codes include the following:

- (a) If the developer is intending to undertake a development over an extended time frame (say 10 years) then it is likely architectural styles will change during that time frame. Under the current system a developer is obliged to establish all guidelines upfront. However, these guidelines will over a period of time need to be altered to reflect changes to styles, building materials, and environmental demands. As it is the developer who has the initial vision for the project and also a substantial vested interest with unsold portions of land, it is appropriate that the developer has a very strong, if not predetermining, say in how any codes should be changed, and it is not unreasonable for a developer to reserve to itself all rights of these changes. Striking the balance between developer control and owner input is often difficult.
- (b) A second problem arises with establishing the details of the code. It is often argued that in order for an architectural code to be definitely binding then its full details must be provided for in the community management statement. However, setting out a fifty or one hundred page architectural code which may include colour drawings and photos is not the appropriate for a community management statement. These documents are required to be in black and white and must meet titles office registration requirements. Consequently the code should exist outside of the CMS, but be adopted through the CMS. This is the mechanism which is generally used. However, such a mechanism may not be enforceable.

2.3 *Services and Sustainable Initiatives*

Architectural codes, being covenants that run with the land with a built in policeman, are a significant driver in the use of community management statements for flatland subdivisions. An equally important factor is the opportunity to incorporate sustainable initiatives in development.

The community titles scheme enables this advance because it provides both governance and an administrator: two factors often essential in any system. Sometimes these functions are performed by a local authority, but often the local authority is reluctant to take on the role. It is submitted that without local authority support for such initiatives then the only available mechanism to establish these things is the community management statement and the community title scheme.

Examples of such initiatives include:

- § Community specific transport (a bus service to ferry workers from a commercial community titles scheme to the close by train station).
- § Rainwater harvesting systems that link a number of properties and traverse public spaces like parks and roads.
- § Grey water recycling systems.
- § Communal power generation systems.
- § Common utility distribution networks (water, power, gas).

These initiatives are becoming more common, and often are environmentally essential. They are accepted by developers as worthy of capital expenditure, providing a system exists to continue with them once the developer leaves the development.

Currently the statutory frame work makes the management and establishment of the systems more difficult than it needs be. For instance, with any of the physical distribution networks referred to previously (i.e. wires or pipes) a common challenge is having the system move from one lot through a public road to another lot. Titling to allow these services to cross public roads needs to be simplified.

An additional problem is that sometimes funding for these services cannot be collected through body corporate contributions. The body corporate is restricted to collecting funds for the management and maintenance of the common property. Collecting for services delivered only to occupants within lots is on an opt-in basis – i.e. they must be user pay. Where owners elect to opt out of the service then the economic model for these services can break down. Providing proper disclosure is made then the body corporate should be empowered to collect fees from all owners, even where outside of the management and maintenance of the common property.

3 THE DECISION MAKING MECHANISM FOR LARGE, COMPLEX AND MIXED USE SCHEMES

The decision making mechanism for community titles schemes in the Queensland jurisdiction is problematical, to the point that it is unworkable.

This problem exists for all community titles schemes, but it is magnified when the decision making model is applied in large, complex and mixed use schemes. The magnification comes about because in large and complex schemes there are more decisions required to

make the daily operation of the schemes possible. The problem is simply this: In these schemes not all decisions can be made by the committee, nor at general meeting, yet this is what the Queensland legislation requires.

3.1 *Why is the current mechanism unsuitable?*

Queensland community titles schemes have a mechanism that requires decisions from either:

- Full committee, or
- General meeting.

No individual can make decisions for the body corporate. The powers of the executive members of the committee are limited to only performing certain executive functions. For instance, the chairman's power is limited to chairing meetings. The chairman has no presidential style power. These restrictions prevent the executive making decisions about the operation of the scheme on a daily basis.

Management by general meeting is management by consensus (or lack thereof). For large schemes the group of owners may in fact be several thousand people and their decision could be required for something as simple as where to place playground equipment or what colour should the entry statement be. The decision may be by ordinary resolution, special resolution, or even worse, resolution without dissent. This situation does not make sense and has the potential to be unworkable for owners, committees, developers and the community managers of these communities.

I believe that the Queensland government should be applauded for its initiatives to ensure that the owners and residents of the communities are encouraged to be involved in the management of their own communities. However, this has now been taken to an unreasonable level. All decisions must be made by these groups of people who are on the committee, or by the people at general meeting. No delegation of any kind is possible, except for the extraordinary situation of a Division 10 Agreement, and this only applies where there is a complete lack of interest from owners.

For our large, complex and mixed use schemes it is essential that a new model is adopted. These owners and their committees must be allowed to appoint individuals to go out and make necessary decisions on their behalf, for all the daily operational matters that are intrinsic to the successful operation of these communities.

Examples of the difficulty of the system:

- The lift in a high-rise building requires routine maintenance. The lift maintenance mechanic wants to know what would be the most convenient time to close off access to the lift. He approaches the body corporate manager for direction. The body corporate manager speaks with the caretaker and the chairperson. However, the body corporate manager does not have any delegated power from the body corporate to make the decision to close down the lift for any period of time. Consequently essential maintenance must be delayed until the next general

meeting because only the owners at general meeting have the power to restrict owners access rights to common property.

- The body corporate has resolved at an annual general meeting to renew its gardens. A detailed quote was provided and submitted to all owners at the annual general meeting. At the time the work is to be undertaken some of the materials specified in the original proposal are not available and a decision needs to be made as to a suitable alternative. However, as the original materials have been accepted in the specification included in the general meeting notice, no-one is empowered to make the decision which contradicts the general meeting. It would require another annual general meeting with the motion submitted again specifying the new material.
- A visitor is illegally parked on common property across the bin storage area. The rubbish truck has arrived to empty the bins. A decision is required on the spot to enforce the by-laws so that the essential function of rubbish collection is performed. There is no easy, common sense way to have the bylaws enforced and to have the illegally parked vehicle removed. No-one is empowered to make those types of decisions on the spot. It requires a committee meeting resolution.

3.2 *Alternative Solutions*

Community titles schemes require the establishment of "bodies corporate". I use the term "bodies corporate" in the context of common law (i.e. companies and clubs) and not in the context of property development. The decision making model for common law bodies corporate has evolved over hundreds of years. It is now a commonly understood concept, and it provides a mechanism for these companies to make daily operational decisions. The principles can be distilled down to the following simple ideas:

- (a) Each year the shareholders vote for a board of directors.
- (b) The board of directors then sets the policies which contain the plans and goals for the company.
- (c) The board appoints executives, who are then charged with implementing the policies and plans.
- (d) The board of directors reviews the work of the executive officers, sometimes through subcommittees. The board also reviews the policies regularly.
- (e) At the subsequent annual general meeting the board reports to the owners about the performance of the company, and the shareholders make decisions as to their satisfaction by voting on or off their board representatives.

Another example of an appropriate decision making mechanism is the Australian political system. In our political system the people are empowered to vote to appoint their elected representatives and also to approve changes to the constitution. It is a constitution which is the document that provides for the running of our country. These politicians in turn appoint bureaucrats who are charged with putting into operation the policies passed by the

parliament. This system works. A similar mechanism must be adopted for our bodies corporate, to make large and complex schemes workable.

I suggest an appropriate decision making mechanism for our community titles scheme would operate as follows:

- (a) The owners in our bodies corporate should be responsible for electing the committee. They should also be responsible for approving changes to the community management statement. This statement is effectively the constitution of the community titles scheme.
- (b) These elected committee persons should then be in charge of budgeting and setting policy.
- (c) The committee would also be charged with appointing suitable delegates to implement the policies that the committee sets. These people can either be owners, or the body corporate manager or resident managers. They would have the power to make decision on behalf of the body corporate
- (d) The performance of these executive persons would be reviewed by the committee.
- (e) The committee's performance in turn would be reviewed by the owners

Under this model it would be advantageous to create the position of "chief executive officer". This person would be the focal point for all community titles scheme activity. Most clubs and companies function through a chief executive officer, and I see no reasons why a similar position would not be effective for large or complex community titles schemes.