

‘Public’ Assets and the Master Planned Estate

Robin Goodman and Kathy Douglas
School of Global Studies, Social Science and Planning, RMIT University.

Abstract:

Traditionally in Australia, developers have been responsible for providing either serviced residential lots, or house and land packages. Increasingly however developers are now offering housing estates that cater to those interested in particular lifestyle options. Aimed predominately at the second or third home buyer with greater disposable income, a new style of master planned estate which includes additions such as recreational and community facilities or environmental features, promoted to appeal to particular market segments. However with these additional features come new ownership arrangements which may mean compulsory membership to bodies corporate responsible for ongoing maintenance. Of concern in relation to this new approach to residential development is the shift of responsibility for some community assets from public to private hands.

This paper explores the implications of this shift through investigation into some recent master planned estates in Victoria. We highlight prominent examples where assets of state or national significance are being transferred to body corporate ownership, and discuss the changing role of local government in relation to these developments. We examine some of the conflicts arising from the role of the body corporate in one particular Melbourne estate and consider issues relating to information available to potential buyers. We consider recent legislation to deal with bodies corporate which are attempts to provide a clearer framework for dispute resolution in such cases. Finally we conclude that greater caution should be exercised by those in a position to approve these arrangements as the array of potential pitfalls and conflicts is considerable.

Introduction

Traditionally in Australia developers have been responsible for providing either serviced residential lots, or house and land packages. Increasingly however developers are seeking to offer more than simply housing and are now marketing residential estates that cater to those interested in particular lifestyle options. This represents a shift from house building to more comprehensive place making (Coiacetto, 2005). Aimed particularly at the second or third home buyer with greater disposable income, a new style of master planned estate (MPE) is becoming more common. These estates are part of the trend that has seen a growth in developments catering for the more affluent on the urban fringe (Randolph, 2004; Dodson and Berry, 2004). Such estates might include recreational and community facilities such as golf courses or equestrian facilities, country clubs, water features such as wetlands and landscaped open spaces. Increasingly environmental features such as retained native vegetation, water sensitive urban design, or energy efficient buildings are promoted to appeal to particular market segments. However with these additional features come new ownership arrangements which may mean compulsory membership to bodies corporate responsible for ongoing maintenance of the features of these ‘lifestyle’ estates.

Bodies corporate have been used for a long time in Australia in developments such as multi-unit flats or apartments where there is shared property, like driveways or stairwells, in common. Usually, purchase of a property where a body corporate exists involves compulsory membership of the body corporate, for which an annual fee is required. This trend in shared property in MPEs appears to be an expansion of this role involving more complex and valuable assets, and leading, the authors believe, to an increase in potential conflicts in the future. Research for this paper has uncovered at least one Melbourne MPE where a range of disputes have arisen between residents and the developer, residents and the body corporate manager, and amongst residents themselves. Some of these disputes suggest there is a lack of clarity about the roles of individual purchasers, bodies corporate and developers, and this raises questions about the desirability of some aspects of this form of development. New laws in relation to bodies corporate in Victoria, introduced through the *Owners Corporation Act 2006*, may go some way to ameliorating problems surfacing in planned estates. However, we believe this trend in ownership arrangements requires further consideration and public debate. The issues raised by this expansion of role for bodies corporate include: the changing roles and responsibilities of councils in overseeing urban development; the implications of moving facilities normally in the province of the public domain (and owned and maintained by councils) to the private domain in the form

of body corporate ownership or through ownership via a corporate entity; and the abilities of such bodies to manage what are in some cases sensitive environmental or heritage resources.

This paper presents findings from initial research into the use of bodies corporate in MPEs in Victoria. As such it is to some extent a scoping exercise. Our findings ought not to be considered conclusive at this stage – our aim is to raise issues for discussion and further investigation. The research was conducted largely through interviews with planning officers in a number of local governments in Melbourne, predominantly in the growth areas as that is where the majority, although not all, of the MPEs are being built. These interviews provide us with both a sense of the breadth of issues involved, and some specific examples which highlight particular issues. In addition to this we draw upon a more focussed investigation of the experience of one MPE in metropolitan Melbourne, in order to identify in more detail some of the potential problems that can arise. The paper considers issues relating to information available to potential buyers of house and land packages, and questions the extent to which the full ramifications of ongoing body corporate involvement are clear to consumers prior to purchase. It discusses the changing role of local government in relation to these developments, and analyses the legal frameworks for holding of body corporate assets. Finally we consider recent legislation to deal with bodies corporate and the ramifications for master planned estates and draw conclusions as to its adequacy in addressing some of the issues identified.

The expanding role for bodies corporate

The use of bodies corporate has been increasing in Melbourne over the past decade. Much of this increase is due to the growth of multi-unit developments in the boom of medium to high density developments. Such arrangements usually are a necessity where there is property such as common entrances, stairwells, or lifts, which must be held in common. A much smaller proportion has been in the area of common property on residential housing subdivision of detached housing. Here the property owned in common might be a road, open space, environmental reserves, community or recreational facilities and even heritage buildings or other assets.

There is currently no publicly accessible data base which can provide definitive numbers on this trend. Land Victoria, the branch of the Victorian Department of Sustainability and Environment (DSE) which is responsible for land titles, is currently undertaking a project to capture existing title information and link it into a better online data base (DSE, 2006). Hopefully this will ensure that more information is publicly available and trends in this form of development will be better able to be tracked in the future. In the meantime the best available statistical information comes from the *Final Report of the Body Corporate Review* (Consumer Affairs Victoria, 2006). This report estimates that there are approximately 65,000 bodies corporate in Victoria (covering 480,000 lots) and that this is growing by about 2,000 each year. It seems logical to attribute this growth to the boom in apartments and multi-unit developments that has been well documented over the last decade (Buxton and Tieman 2004). The vast majority of all bodies corporate are very small. 71% of all bodies corporate have less than 5 lots within them. Only a tiny minority of all bodies corporate, approximately 4%, have more than 20 lots, but because of their size they never-the-less represent nearly half (46%) of the total number of lots (Consumer Affairs Victoria 2006, p.12). The bodies corporate we are investigating in this paper would fall into this category.

Discussions with a range of local government planning and asset managers suggest there are a variety of arrangements now being approved of in relation to residential estates. The following list attempts to present all the major types of arrangements but does not try to quantify how many of each presently exist in Victoria, as this is currently not possible given the lack of publicly available information.

Roads, driveways and pathways.

The placement of roads within a residential estate into a body corporate may originally occur because the developer wishes to build to a different standard to that of the council, perhaps to have a particular style of roadway other than the council would normally supply. For this reason the developer may nominate to build the roadways themselves, and then transfer them to the body corporate as lots in the estate are completed and sold. Likewise extensive walking or cycling paths may be a promoted feature of the estate which councils would not normally supply or maintain in the style a developer might want.

Community and recreational facilities.

There are a range of such facilities which might be placed in body corporate ownership. Instances we are aware of include swimming pools, gymnasiums, community centres and barbeque and picnic areas. These

are generally assets which are not commercially run (as are most of the golf courses associated with MPEs) but are part of the marketed lifestyle appeal of the estate.

Open space.

This appears to be one of the most common usages of bodies corporate in the MPEs aimed towards the higher end of the market. Open space components of an MPE are often featured heavily in marketing aimed at showing a lifestyle beyond the individual household. Developers may wish to develop landscaped areas of open space to a higher standard than the council are prepared to undertake. Under such circumstances the developer may prefer to control the open space themselves and later transfer ownership to the body corporate. For their part councils may be reluctant, or indeed refuse, to take ownership of such assets, as they are wary of additional ongoing financial liabilities.

Environmental reserves.

The protection or enhancement of environmental assets such as remnant vegetation, grasslands, forests or wetlands, is often part of the original conditions under which the subdivision was allowed. Previous research has shown that the environmental trade-off has been a common aspect of negotiating the rezoning of previously non-urban land, particularly in the controversial cases of land that was part of Melbourne's green wedges (Buxton and Goodman, 2002). The maintenance and/or restoration of these areas has been in some cases a deciding factor in their approval, attractive to local governments reluctant or unable to finance such endeavours. In some cases the asset has then been transferred to public ownership as part of the developer contribution, but in others it has become the property of the body corporate.

A current example which illustrates some of these issues is Eynesbury to Melbourne's west. This development on the western basalt plains encompasses three areas considered to be of significant environmental value. A management plan has been endorsed as part of the agreement between the council and the owner¹, originally the developer. As the housing lots are sold ownership will change to the body corporate the management liability will pass to its members. The sensitive environmental areas include native grasslands, a rocky gorge and a Grey Box forest which is of such significance it is listed on the Register of the National Estate. Potential threats to these areas posed by the residential development were identified in the report of the independent panel investigating the rezoning. They included:

- increased public access to the significant site by the visiting and resident populace
- secondary implications of residential development (e.g. domestic animals particularly cats and dogs)
- potential management issues relating to the above pressures (e.g. potential excessive build-up of native fauna species) (Melton C20 Panel, 2000, p.96)

The development is still in its construction phase although house and land packages have commenced selling (Eynesbury Township, 2007).

There are a number of issues which could potentially arise from the decision to place the environmental areas under body corporate ownership. Firstly, although it is believed that owners and the body corporate will be bound to carry out the agreed management plan, the *Planning and Environment Act 1987* does allow for such agreements to be altered by appeal to the Victorian Civil and Administrative Tribunal (VCAT) under section 184 which states that:

(1) *An owner of land may apply to the Tribunal for an amendment to a proposed agreement if-*

- (a) *under a planning scheme or a permit the use or development of land for specified purposes is conditional upon an agreement being entered into under this Division; and*
- (b) *the owner objects to any provision of the agreement.*

Secondly, as the panel report stated specifically, one of the potential threats to the sensitive areas would be access by the resident population. As these residents are now to be the owners of these areas, they may well feel that they have some rights to access them, and even to utilise them for passive recreation, for example dog walking. As the panel report quoted previously makes clear, this could damage this sensitive environment.

¹ Known in Victoria as Section 173 agreements from the section in the *Planning and Environment Act 1987* which authorises them

Heritage assets.

These can be regarded in a similar manner to the environmental assets, in that they are resources which may not be of particular benefit to individual residents, (as for example a swimming pool may be), but which are part of the original plan for the MPE negotiated between council and developer. Just as with environmental assets, heritage assets may be expensive to maintain, and councils may therefore be happy to agree to transfer to private ownership in the form of the body corporate. A prominent example of such an asset exists within a development on the site of the historic Pentridge Prison in Coburg, a northern suburb of Melbourne. The site was originally owned by the Victorian State Government but was sold for private development after the prison was closed. The site contains a number of historic buildings and other features and part of the agreement with the developers is that a public museum and display be established. One of the most prominent historic relics is the surrounding blue stone prison wall, and it is intended that this will be placed in the hands of the body corporate.

Just as with the environmental areas discussed above, this arrangement raises a number of issues. There is the issue of the ability of a body corporate to be able to afford the potential ongoing maintenance costs that such an historic construction might require. Whilst much of the wall might at the present time be stable and in good condition, it is inevitable that at some time in the future it will require rehabilitation or preservation works which might well be very expensive. This may well be why the local council did not choose to accept responsibility for the wall. However, it is questionable whether privatisation of such an historic relic the best way to ensure its preservation. Better maintenance and protection of the wall may in fact have been assured if the state government had retained ownership of these unique assets.

Changing roles for councils and residents

The assignment of assets to body corporate structures within residential estates must be approved by local government as part of the overall development plan for the subdivision. Changes to councils' roles and responsibilities as a result of these new arrangements are therefore occurring with their approval. It is clear that the attraction for councils of body corporate ownership is that it avoids the financial commitment of responsibility for ongoing maintenance. In discussions with council planning officers it would appear that there are a variety of attitudes towards the use of bodies corporate, with some planners expressing reservations about the ability of bodies corporate to properly manage the range of assets now within their control, and others expressing philosophical opposition to the privatisation of public areas such as open space. Clearly many councils would regard the cost shift onto the developer, and subsequently the body corporate, as expedient. However with this shift from the council there is also a relinquishing of control over the standard of maintenance in the future.

Agreements between the council, as the planning authority, and the developer, as part of the planning approval process for the estate, has been used in some instances to bind bodies corporate to standards of maintenance or specific ongoing maintenance plans. As these agreements are very recent (the instances we are aware of involve estates still in the development phase) we have yet to see how possible it will be in practice to hold bodies corporate to such agreements into the future. There is particular reason to be concerned about the maintenance of assets with very specific or particular requirements, such as sensitive and large environmental areas or heritage assets identified. These may prove to be very expensive to maintain, and the body corporate is limited in funds to the annual fee that members are prepared to pay. Issues with regard to their management might well require knowledge and expertise well beyond that of the members of the body corporate. While councils too, need at times to draw on outside expertise beyond their own staff, they have far greater experience in, for example, the management of open space, or native vegetation areas, than most members of the public who make up a body corporate. It is not always possible to foresee what issues will arise in the future, and to write an agreement in such a way as to bind a future body corporate to an acceptable level of care and maintenance to cover all possible problems. It seems fraught with potential for future conflict. It is certainly arguable that these most sensitive of assets ought to be placed in public hands to ensure at least a greater degree of public accountability and scrutiny with regard to their treatment.

A further implication for councils is that having accepted private ownership of open space areas within a development, they may find that residents (members of the body corporate) may then request a reduction in their rates on the basis that council is no longer supplying them with the normal level of goods and services. We are aware of at least one instance in Victoria where individual residents receive rate reductions for the portion of their rates that would go toward parks and public land management. This arrangement was negotiated on the basis that the open space areas within their estate are privately owned by their body corporate. The implications of this shift need to be carefully considered. It is not only a privatisation of what

would normally be public space, but it is a reduction in the contribution that the developer and the development are making to the rest of the community. The social and financial implications of the more exclusive and up market MPEs have been discussed in a growing body of literature on exclusionary or gated communities (Blakely and Snyder, 1997; Low, 2003; Atkinson et al, 2004; Rofe, 2006). It would appear that this kind of financial trade off could exacerbate the sense of exclusivity and separation from other residents of the municipality. From a council's point of view, the opting out of some portion of rates might call into question the overall value to the municipality of these MPEs

For residents of these estates, who are therefore members of the body corporate and part owners of these assets, there are also a range of liability issues which can arise causing concern. These can be either financial liabilities beyond those originally foreseen, or in some cases legal liabilities. One case which demonstrates this involves a swimming pool. A pool owned by a body corporate is not considered public and is therefore not required to have a life guard. While the estate remained small with only a few residents who knew each other this was unproblematic. But as the estate grew some residents become concerned that there were people using the pool that might not be body corporate members or their guests. This raised questions for them regarding the legal consequences for them if an accident were to occur. Discussions ensued as to who was to be responsible for ensuring security and how this might best be approached. Ultimately the solution lay in the body corporate spending more money on security and fencing than they had previously anticipated. Then however, members of the body corporate who never used the pool began to question its worth, and suggest that it be closed or handed over to the council (presuming incorrectly that they had some obligation to accept it).

In other instances there are unforeseen costs arising from the site's previous use which might require either a one-off treatment or rehabilitation works, or ongoing maintenance which a body corporate may be unaware of or not in a position to financially deal with. Finally, in issues dealing with problems in public open space areas residents of an MPE may find it difficult to know how to respond or who to deal with, as the usual channel of calling in the council is not open to them. Council officers in some instances have no role in assisting residents to solve problems involving body corporate assets. This does not prevent residents feeling that councils ought to be able to step in, creating resentment that they are somehow being ignored or given substandard treatment because of where they live.

Informed purchasing

Many of these problems might not occur to such a degree if people buying a property in an estate with a body corporate truly understood its implications. This however seems problematic, when these ownership arrangements are relatively new and it is possible that many of the potential issues are as yet unknown. When buying into a MPE consumers are generally relying on brochures, plans and site inspections of the land or land and home package. Representations made in brochures relating to facilities in the estate, such as a country club or a golf course, can be relied upon if they are representations of fact and not simply a 'mere puff'. For example, a representation that there will be a swimming pool in a country club setting would be binding upon a developer, but a statement that the country club and pool will deliver a 'relaxed lifestyle' is the kind of statement that is a mere puff. That is the promise of a relaxed lifestyle is an effort to inspire a vision that is not binding if not delivered. However, some assertions of fact will not be binding if there is a disclaimer in the brochure or plan. The developer might include a picture of a park with a cycling track in promotional material, but not provide the cycling track when the park is completed. If the developer has included a disclaimer, such as a statement to the effect that the park including the track is an artist's representation only, then it may be that the buyer has no recourse if the cycling track is not included in the final landscaping.

One of the key issues for consumers of MPEs is the availability of legal protection for the lack of promised facilities. There is both state and federal legislation dealing with consumer's rights in relation to advertised benefits that are not delivered. At a state level in Victoria the *Fair Trading Act 1999* can provide consumers with recourse for misleading or deceptive conduct (see s.9). At a federal level the *Trade Practices Act 1974* provides this protection. Provisions relating to misleading and deceptive conduct in this Act (see s.52) are the most likely vehicle for redress for lack of promised facilities as this legislation deals with corporations and most developers are corporate entities.

However, the prospect of suing a developer can be daunting. The average home buyer in an MPE is unlikely to have the resources to mount an action in the federal court. Costs are a major concern in relation to the decision to litigate. Many middle-income earners are not able to launch litigation due to the fear of

escalating costs. This is despite having a claim that would be assessed as “meritorious” (Cashman, 2007). The Victorian Law Reform Commission (2007) is presently investigating the area of costs as part of its review of civil justice. One of the concerns in relation to applications under the Trade Practices Act are the costs of a suit in the Federal Court, as opposed to a less expensive tribunal setting for the litigation, and the likelihood that a developer would access considerable resources to defend any action.

An alternative is the Australian Competition and Consumer Commission (ACCC) who may take action on behalf of consumers. However, the ACCC has finite resources and will only take action in certain circumstances:

In enforcing consumer protection laws, the ACCC focuses on industry-wide conduct and conduct that affects many consumers, to achieve outcomes that make the most effective use of its resources. The ACCC cannot take action in all circumstances of misleading conduct.

The ACCC is more likely to take action against a business for misleading advertising if it has been carried out through a medium that reaches a wide audience, such as over the internet, on national television, or through a nation-wide print advertising campaign (ACCC 2007).

If MPE home owners wish to take action against developers they will need to fund the action or convince the ACCC that they are worthy recipients of support. Other options include the securing of Legal Aid funding or possibly pro bono representation. Neither of these two options are easy to acquire; legal aid has strict merit tests and pro bono schemes are limited in the number of matters that can be undertaken. However, pro bono schemes do assist where there is a public interest issue and arguably concerns of a MPE community regarding lack of promised facilities may fit the criteria for eligibility. These criteria include “eligible matters are matters of public interest, which: require a legal remedy or other legal assistance; and affect a significant number of people; or raise matters of broad public concern; or impact on disadvantaged or marginalised groups” (Public Interest Law Clearing House, 2007).

It may be that MPE community members may gain assistance due to the number of people affected by the misleading representations and arguably due to the fact that these estates raise issues of broad public concern. However, MPE members are unlikely to be seen as fitting the category of disadvantaged or marginalised group and although this is not necessarily a requirement to gain assistance it may be that due to competing resources the perceived relative wealth of MPE members may mean that other individuals or groups are given preference.

Overall, the likelihood of MPE owners being able to pursue a developer are therefore limited and in effect a developer can take this fact into account in deciding whether to deliver upon promised facilities in an estate. For instance it may be that an “adventure” playground is promised in promotional material, but the final delivered playground lacks most of the attributes of an “adventure” playground. Thus it may be that developers may choose to cut costs in relation to specifications rather than fail to provide facilities in their entirety. In the event that facilities are substandard disgruntled owners may take out their frustration against council’s planning officers who approved the plans. It may therefore be in councils’ interests to ensure that promised facilities materialise.

Potential conflicts and future problems

The tension regarding the nature of disputes in MPEs relates to some extent to the motivation of the developers in planning and developing an estate. Clearly there is debate around motivations. Costley (2006, p.157) poses the question “are developers of master planned communities (MPCs) responding to the increasingly diverse and sophisticated requirements of consumers; political and /or social drivers; or purely to economic imperatives?”. This may not be a dichotomy. Developers may well be motivated to provide increasingly sophisticated and socially beneficial communities, but also be driven by the need to produce significant profits from their endeavours.

Disputes in MPEs arguably relate to some degree to this tension, but also stem simply from the tensions of community living. Disputes in bodies corporate are not unknown (Consumer Affairs Victoria, 2006, pp.19-21) and the particular context of MPEs does not necessarily create the potential for conflict where none existed previously. However, the kinds and degrees of conflict in the context of MPEs may differ to some extent from the issues that have generally arisen in more traditional body corporate structures. The use of bodies

corporate in MPEs will both share traditional issues of conflict and concern in communities and create new conflicts and concerns.

Through the use of participant observation we obtained an understanding of the types of disputes that may arise in body corporate circumstances where the joint assets are held for a large community in an MPE - as opposed to a collection of apartments or units, the more traditional examples of body corporate communities. In our research for this paper we observed disputes in a body corporate in an MPE in Melbourne. The body corporate assets of this estate consisted largely of a country club with gym, pool and tennis courts.

An issue that has been raised repeatedly in this community is the adequacy of the assets, built by the developer, given the size of the estate. Although, initial plans for the estate included a set number of both detached houses and medium density townhouses and apartments, this number grew as the estate was progressively sold and the original master planned community was altered. The assets originally envisaged for the estate and held in body corporate hands were in all probability never adequate for the number of residents. This is perhaps an example of the tension between a developer's profit motive and the need to provide community facilities in body corporate structures. In addition, these inadequate assets were not increased by the developer in line with the increase in housing that occurred as the estate plan was altered. This has raised concerns in the community where complaints are common regarding over crowding in the pool and gym. Some members of the community have publicly announced their view that they no longer wish to be part of the body corporate arrangement due to the inadequacy of the facilities. Some other residents have indicated that they were never interested in the body corporate assets, but wished merely to buy into the estate.

This case raises a number of concerns regarding the advisability of the privatisation of recreational facilities such as swimming pools, gymnasiums and tennis courts. For instance, council owned swimming pools are maintained and insured by council and planning is undertaken to improve or even extend facilities as required. Privately owned assets operated by bodies corporate in MPEs such as swimming pools may not be adequately maintained or supervised due to high costs of such maintenance and the fear of increasing body corporate fees for the community. Additionally, planning regarding upgrades, flowing from increases in population or perceived needs, will be unlikely as bodies corporate or similar entities generally do not possess the resources required for such large undertakings.

Additionally, there have been concerns in the community regarding management of the body corporate. The Victorian Department of Consumer Affairs, in its recent report upon bodies corporate, identified a concern that is mirrored in this particular community, although not necessarily by all of the residents:

Property developers, separate to the completion of a building and sale of individual property lots, determine the lot entitlements (voting right for the subdivision) and lot liabilities (financial contributions for the subdivision) that may maintain their control over the management of the common property to the detriment of the lot owners. This could also include entering into long-term service contracts with subsidiary or related companies that are not necessarily cost competitive and efficient from the lot owners' point of view (Consumer Affairs, 2006, p.21).

In line with the Consumer Affairs report findings this particular community has had resident complaints regarding differentiated body corporate fees. That is there has been some expressed disquiet in the community regarding a large multi-apartment development in the estate, which had increased in the number of apartments substantially from the original master plan. The residents of the apartments pay a reduced body corporate fee. Along with the reduced fee there is theoretically reduced access to the country club and facilities. Residents are not entitled to have access after a certain time of the day. However, there is no method in place to police such reduced access and residents of the estate have queried the differentiated fee, both how it came about and the desirability of such an arrangement. The view has been expressed that without a security guard monitoring the access to the country club, or an expensive swipe card system that would disallow access after a certain time of day, the reduced access proviso of membership is ineffectual. Additionally some residents of the estate have also queried the cost effectiveness of the body corporate management company placed by the developer to administer the body corporate arrangements. All of these concerns detract from the harmonious sense of community originally promoted by the developers and presumably sought by residents.

As well as structural concerns there have been interpersonal issues arising in the body corporate committee where one member has complained of defamatory conduct by other members of the committee and legal

action has been threatened. Given these types of concerns, some residents are calling for a review of whether the estate should have a body corporate structure. However, once established the body corporate is very hard to alter. In the relevant legislation any major change, must be agreed upon by at least 75% of members, with non-voters considered to be voting for the status quo. To get this kind of agreement would be extremely difficult, especially considering that the developer will still retain a stake in the body corporate until all lots are sold.

Clearly, the collective private ownership of assets can raise ongoing conflict. The reality of the ongoing conflict experienced in this one example is at odds with the happy community lifestyle so often promoted in marketing material for MPEs. The nature of MPEs necessarily involves closer contact with neighbours. Generally, this attribute of the designed lifestyle estates, is a prominent element in promotional material. However, experience in apartment complexes points to the difficulties of disputes arising in the long term between fellow lot owners in corporate entities (Consumer Affairs Victoria, 2006). We query therefore whether this kind of arrangement is the best choice for MPEs. Apartment residents necessarily share common infrastructure. This requirement is not the case in MPEs and the placing of facilities in the private hands of residents, rather than with councils, arguably invites disputes.

New legislation

In Victoria the growth in apartments and other developments that utilise body corporate arrangements, such as MPEs, has prompted a review of the regulation of the management and the powers and functions of bodies corporate. New legislation in Victoria, the *Owners Corporations Act 2006*, was passed last year and is likely to become operational in late 2007. As part of this new legislative regime there is now a name change from “body corporate” to “owner corporation.” There are also new methods of dealing with disputes. For example if a resident of an apartment complex or master planned estate has an issue with another lot owner or the manager of the owner corporation where they believe there has been a breach of the of the Act regulations or rules, then they may make a complaint. This right is given also to managers (see s 152). After making a complaint the legislation requires that parties participate in an internal dispute resolution scheme. If this process is unsuccessful then a party may apply to the Director of Consumer Affairs to have the dispute mediated or conciliated by a Consumer Affairs employee (see s 161). If that process is unsuccessful, then a party may apply to the Victorian Civil and Administrative Appeals Tribunal (VCAT), who ultimately have the power to make a determination (see s. 162). The opportunity to go to VCAT is only available where parties have exhausted the other two avenues for dispute resolution (s. 153).

The need for such a complex scheme of dispute resolution springs from the nature of holding joint assets. Disputes can arise in MPEs over a vast range of issues including constraints on the design aspects of housing such as paint colours, gardens and fences, or wider community issues such as problems with traffic management, tree retention or community activities. The new legislation attempts to provide opportunities for conflict resolution, through known processes that can be followed. Many of these disputes would traditionally be matters to be raised with and determined by the local council, which has the experience and infrastructure to deal with them. Displacing conflict relating to assets to the province of the body corporate clouds the issue of accountability for these assets. Consumer law is an empowering concept within the law and deals with the increasing sophistication of our legal system to understand and deal with complaints relating to the consumption of goods (O’Shea & Rickett 2006). By focussing upon body corporate issues consumers of MPEs can be distracted from the real issues, the provision of facilities, both the number and the specifications, as promised in promotional material. Consumers purchasing a house within an MPE can too easily view the lack of facilities as an issue for the body corporate or ultimately council when the real source of their dissatisfaction was inadequate provision originally by the developer.

Conclusions

Our research suggests that the use of bodies corporate within MPEs is becoming more widespread and expanding to include a range of assets which would normally be in public hands. This growth in new ownership arrangements is being overseen by local and state government planners who ultimately must approve the use of bodies corporate within any new subdivision. This article has raised a number of concerns with regard to this trend. Firstly that a range of assets, such as sensitive environmental or heritage resources require a greater level of care and protection than can be guaranteed when placed in the hands of a body corporate. Secondly, that the increased use of bodies corporate is a form of privatisation of public assets which might further exacerbate the exclusive and isolated nature of MPEs from the rest of the community. Thirdly that these new arrangements alter the relationship which residents have with (a) their

local council and (b) with each other, causing conflict and confusion in many cases, at odds with the happy community lifestyle they are intended to facilitate.

It does not seem sufficient to simply invoke the 'let the buyer beware' adage, as arguably no-one can be properly informed of the implications of this expansion of the body corporate role in these ways, as we are entering into new and somewhat uncharted territory. There does however, seem sufficient reasons to suggest that caution should be exercised, as once established, these ownership arrangements are extremely difficult to alter. The result may not only be the loss of assets of state or national significance to public ownership and control but a diminution of the sense of community coherence that these MPEs seek to promote.

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