

Parking, Parties and Pets: Disputes – the Dark Side of Community Living

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ABSTRACT

In the last decade community living, in master planned communities or strata titled complexes, has increased. As land becomes scarcer, the popularity of these schemes is predicted to grow. Offsetting this popularity is the peculiarities of community living, in particular the often unthought-of difficulties arising from living in very close proximity to your neighbour. Such difficulties affect both amenity of life and property value. This paper seeks to inform practitioners of the issues arising from community living. It does this by identifying the more common forms of disputes and considering recent tribunal and court decisions. The paper concludes by identifying the dispute warning signs to assist to practitioners with the valuation process.

Key words body corporate, community title scheme, master planned communities, dispute, adjudication, QCAT

INTRODUCTION

Community living can appear very enticing. Some complexes, for example, provide all the benefits of living in a resort, such as a pool, gym and barbecues, with no responsibility. In the last decade this type of residential accommodation has become more prevalent with an increasing number of complexes being developed. (Easthope, Randolph & Judd, 2012) As housing affordability continues to be a problem for the average Australian; (MacKillop, 2012) as increased numbers relocate to urban areas (Forsyth, 2012) and as land becomes scarcer these types of complexes are set to become more popular. However, while benefits attached to land and its use will increase its value; associated negatives will have the opposite effect. (*Spencer v Cth* (1907)) In the context of community title schemes the amenities available in a community scheme for use by occupants may increase the value of your investment. Any benefit of such living must be weighed against matters, i.e. disputes, which will decrease that value. Worse still, disharmony within a community, wherever located, may lessen its attractiveness to potential buyers (Lo & Wang, 2012) leaving current owners who need to relocate trapped in their ‘investment’, unable to recover their capital let alone make a gain.

This paper seeks to assist in the valuation process by identifying, from a legal perspective, the more common examples of the less palatable side of community living. Disputes can arise in a variety of contexts – including between a lot owner and the body corporate; between the body corporate and the manager; between owners; or between an owner and its tenant. (Easthope, Randolph & Judd, 2012) Issues can arise in respect of financial arrangements, management, service contractors or, probably most common of all – bad behaviour by your neighbour. Some types of disputes are more common than others but any dispute may impact negatively upon community life and indirectly upon the value of lots within a community scheme.

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In a community scheme, the relevant Australia State/Territory law prescribes the mechanisms for governance of the scheme. Generally, the relevant scheme by-laws and law also prescribe the method for regulating disputes. As each State/Territory has different laws, it is not possible in a paper of this size to review each law. The jurisdiction therefore considered is Queensland, with decisions of both the Queensland Commercial and Administrative Tribunal ('QCAT') and the Body Corporate Adjudicator examined where relevant. As will be considered, where some dispute resolution processes are internal to the scheme, and others are confidential, identification of the existence of a dispute may not be easy.

Consideration of all types of disputes is beyond the scope of this paper. This paper therefore will reflect on what are perhaps the more obvious forms of disputes only. These all arise in respect of occupant (whether owner or tenant) behaviour and can be simplistically categorised as being either one of either unauthorised use of the common property (parking) or noise (parties); or unauthorised animals (pets). The paper commences with an overview of relevant literature; this includes identifying the relevant model by-laws to give context to the disputes discussed. The literature review identifies a lack of academic consideration of community-specific disputes, which is at odds with the wealth of case law. The paper then identifies the legislated dispute resolution process before examining some recent tribunal and court decisions. The paper concludes by assisting practitioners to identify disputes by providing guidance on where to look for warning signs.

Community living, whether in strata-style complexes or planned suburbs, (Johnson, 2012) has been part of the Australian landscape for many decades. In comparison, master planned or gated communities are a newer form of accommodation within many areas of Asia. (Lo & Wang, 2012) However, the increased popularity of this style of living throughout Asia for both foreign and local residents (Shen & Wu, 2012) means the issues raised by this paper are relevant for property practitioners throughout the Pacific Rim region.

METHODOLOGY

Existing literature, legislation and cases were reviewed for the purposes of identify the types of disputes that occur within a strata titled scheme, and the most common types of disputes. The Literature Review provides an overview of current research relevant to strata titled schemes and master planned communities in order to provide a context for the subsequent discussion of disputes. Consistent with legal research, the Literature Review includes relevant research, as well as legislation, court and tribunal decisions and statistics. As such the Literature Review forms part of the research methodology.

Limitations

Despite the volume of available research regarding master planned and strata titled communities and community living, there is limited academic consideration of its darker side – disputes within the community – or the impact these issues have on the valuation of the lots within the relevant community. Where literature does comment upon issues within a community's operations; for example Lo & Wang's (2012) notation of the language difficulties in operating a management committee for a gated community in Beijing, these matters were not subject to a dispute resolution process, as the party affected simply withdrew from the committee. Empirical data therefore is limited.

A related restriction arises where, in complying with legislated dispute resolution procedures, a dispute is resolved early (i.e. internally within the community) without the need for external referral. (Easthope, Randolph & Judd (2012)) When this occurs, the details and existence of the dispute are not publically reported. In these circumstances, the only means of being aware of the existence of a dispute is to undertake a full records search of the community records, importantly focussing on correspondence files and emails. While this material would be available for inspection by a prospective purchaser and/or their

financier (for a fee) as part of the normal conveyancing process, it was neither physically nor financially viable to review this material for the purpose of this paper. Consideration of actual disputes is therefore restricted to those for which there is a reported tribunal or court decision.

Community living is attractive at any stage of life. (William & Pocock, 2010) However, while retirement villages ('RV') are a type of community living, throughout Australia these are subject to specific legislative regimes that are State/Territory based *and* separate from strata title laws. Also, while in many respects issues arising in a RV are similar to those arising in strata title complexes, most are unique to RV living or tenure. (Craddock & Blake, 2012) A consideration of RV disputes, therefore, is beyond the scope of this paper.

Finally, this paper neither discusses nor proposes a valuation methodology. It provides instead a legal analysis of specific disputes. Its purpose is to bring these issues to the attention of property managers and the valuation profession. What place and weight the existence or non-existence of disputes, or the type of dispute, has in the valuation process requires separate consideration.

LITERATURE REVIEW

The growth in the number of strata complexes and master planned communities, and those living in these complexes; (ABS, 2012) has been matched in recent years by an increase in research regarding their establishment and operations. Australian researchers have reviewed strata scheme management models in the context of determining the optimal model for effective community governance of a master planned community and its influence on the development of 'community'. (Bajaracharya & Khan, 2010) This is complemented by recent international research in relation to the influence of local and foreign residents on the character, appearance and survival of the strata scheme (Lo & Wang, 2012); and the attractiveness of the scheme to investors and residents. (Shen & Wu, 2012)

Wardner (2012) noted that 'sense of place' can influence the decision making process of businesses who choose to re/locate to master planned communities. This is not unique to commercial operations. The change in the residential construction sale processes of the late 1960s (i.e. via the creation of the suburban display villages as described in Johnson, 2012) set in motion the realisation of the importance of this in the domestic context. The impacts of *unplanned* economic and population growth *or* change can negatively affect any sized community. This has led to cities such as Ipswich, Queensland to seek to actively plan and work to maintain their unique 'sense of community'. (Jansen, Cuthill & Hafner, 2012) For both domestic and commercial users, the *status quo* of any community in the context of the interactions between users/occupiers and any current/past disputes will impact upon its sense of place and sense of community. This in turn will impact upon its amenity and value. In close communities such as strata titled complexes, it is suggested this impact will become more noticeable as the number of mixed-use strata developments grows.

Alternatives to the traditional Australian residential accommodation model, of suburban sprawl and the quarter-acre block (Flew, 2012) are needed for a variety of economic and social reasons. (Buys *et al*, 2007) New developments therefore are being planned to try to address these issues. (Maller, 2011) The number and diversity of strata titled ('community') schemes, be they apartment blocks, master planned or gated communities, (Flew, 2012) multi-titled golf complexes (Whiteoak & Guilding, 2009) or 'claytons' retirement villages (Craddock & Blake, 2012), thus is predicted to increase. While many master planned or gated communities, particularly very large ones, are not established as a strata titled scheme, it is becoming more common for them to be established as such or have a component, residential and/or commercial, that is part of a strata titled scheme. (Warken, Guilding & Cassidy, 2008)

What this means in practice is that, in addition to the need to comply with the law generally, there is now another set of rules – body corporate by-laws – to be followed; and another 'regulator' – the body

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corporate/strata committee – to whom occupiers are answerable. The unfettered capacity of an owner to control the use of their strata lot or who visits or stays with them is, therefore, considerably reduced in comparison with more traditional forms of property ownership. (Blandy, Dixon & Dupuis, 2006) Many people clearly do not understand this different way of living and as such resident expectations of their control and/or answerability to others can exacerbate many disputes. As Easthope, Randolph and Judd (2012) identify, some people simply do not know how to, or how to modify their behaviour so they can, live in close proximity with others.

In Queensland the *Body Corporate and Community Management Act 1997* ('BCCMA') regulates the establishment and operations of body corporate/strata title schemes. It also prescribes regulations, referred to as 'modules' that apply to matters of management and operation of the relevant schemes. The modules must be read subject to the provisions of the BCCMA, which can complicate matters for the lay-person. Which module applies depends upon the type of scheme and the scheme's community management statement. (BCCMA, Section 21(2)) For example, a specific module was introduced in 2011 solely to regulate duplexes. (*Body Corporate and Community Management (Specified Two-Lot Schemes Module) Regulation 2011*) If the community management statement does not nominate a module the Standard Module applies. (BCCMA, Section 21(4); Standard Module, Section 3)

The BCCMA prescribes the matters to be addressed by by-laws as relevant to the operation of the particular scheme. (BCCMA, Section 169) The exact provisions of the by-laws are not compulsory but whatever is adopted must not contradict the BCCMA or any other law. (BCCMA, Section 180) By-laws may be varied at or after establishment of the scheme subject to proper processes being followed. (BCCMA, Section 62) When no by-laws are specified for the scheme the model by-laws provided in the BCCMA will apply. (BCCMA, Section 168(2) and Schedule 4)

The relevant by-laws for this paper are –

1 Noise

The occupier of a lot must not create noise likely to interfere with the peaceful enjoyment of a person lawfully on another lot or the common property.

2 Vehicles

(1) The occupier of a lot must not –

- (a) park a vehicle, or allow a vehicle to stand, in a regulated parking area; or*
- (b) without the approval of the body corporate, park a vehicle, or allow a vehicle to stand, on any other part of the common property; or*
- (c) permit an invitee to park a vehicle, or allow a vehicle to stand, on the common property, other than in a regulated parking area.*

11 Keeping of animals

(1) The occupier of a lot must not, without the body corporate's written approval –

- (a) Bring or keep an animal on the lot or the common property; or*
- (b) Permit an invitee to bring or keep an animal on the lot or the common property.*

As stated, the model by-laws are not compulsory and what is adopted for a particular strata title scheme is at the discretion of the 'original owner' (BCCMA, Section 13(1)) who is usually the developer of the complex. Issues arise both in respect of breaches, as well as the validity of, by-laws. Section 169 BCCMA provides *inter alia* that by-laws may regulate the use and enjoyment of individual lots or of the common property. Section 180(7) BCCMA, however, requires that by-laws must not be oppressive or unreasonable. The ability of the original owner and subsequent body corporate to change, or adopt new, by-laws other than the model by-laws inevitably lead to disputes and judicial consideration as part of the dispute resolution process as to what content would breach these provisions. The starting point in any dispute therefore is to determine whether the by-law is valid before considering whether the conduct complained of contravenes the by-law.

OVERVIEW OF BCCMA DISPUTE RESOLUTION PROCESS

The parties to a dispute within a community scheme cannot choose how a dispute is to be resolved as the process prescribed by the BCCMA is mandatory. (BCCMA, Section 229) The BCCMA aims to provide a mechanism for disputes to be prevented and, if not able to be prevented, to be more easily determined by enabling parties to be informed as to how to avoid disputes; and proscribing a process by which disputes must be resolved. (BCCMA, Section 228) It must be noted that not all disputes in a community scheme follow the process described in the paper as Chapter 6 only applies to ‘disputes’ as defined by Section 227. (BCCMA, Sections 228 and 276; Lang Business [2008])

Where the breach is of a by-law the body corporate, owner or occupier must follow the contravention notice provisions. (BCCMA, Chapter 3, Part 5, Division 4) A notice is served on the offender requiring them either to remedy the breach (BCCMA, Section 182(4)) and/or, if a breach has occurred that is likely to be repeated, to not reoffend. (BCCMA, Section 183(4)) If the breach continues, or occurs again, then the body corporate may commence court proceedings *or* apply for dispute resolution through the process prescribed in Chapter 6, BCCMA. (BCCMA, Section 182(4)(e)) If the dispute is not ‘complex’ (BCCMA, Section 229) then the dispute resolution process usually commences with the requirement for the parties to attempt internal dispute resolution either by means of self resolution or using processes provided by the scheme body corporate. (BCCMA, Section 229(3); Schedule 6) If this fails, provided a genuine attempt was made at resolution, (BCCMA, Section 241(1)(c)) the next stage is to bring an application for either conciliation or adjudication. (BCCMA, Sections 239A and 239B)

Conciliation is a confidential process (BCCMA, Sections 252L and 259(6)) where an independent but qualified party assists the disputants to resolve their dispute. (BCCMA, Sections 242A and 252L) Conciliated disputes are not reported. If conciliation fails then the dispute may proceed to either departmental or specialist adjudication (BCCMA, Section 266) for an adjudicator’s order. (BCCMA, Section 276(1)) A requirement of both these processes is that the parties must have made a prior reasonable attempt to resolve their dispute.

Additionally, in certain circumstances, mediation may be used to assist parties to reach an agreement. (BCCMA, Sections 254 and 257) Mediation also is confidential process and any disputes resolved by mediation are not reported nor is any matter discussed referable in subsequent proceedings or appeal. (BCCMA, Section 254(4)) Appeals are permitted from adjudicator’s order to QCAT on points of law only. (BCCMA, Section 229(3)) Where the dispute is a ‘complex dispute’ (BCCMA, Schedule 6; Section 229) the dispute is resolved either by specialist adjudication or QCAT. (BCCMA, Section 229(2)(a)) Appeals from an order of a specialist adjudicator are to the appeal tribunal under the QCAT Act. (BCCMA, Section 229(2)(b); QCATA, Schedule 3, Section 165)

DISPUTES

The number and type of potential disputes within a community scheme are unlimited. That is to say, only the variety of owners and occupiers; and the types and mixes of uses within a scheme limits the types and number of disputes. As stated, the paper will now consider those that are among the most common and, arguably, the most contentious.

Parking

Local government planning regulations prescribed the number of occupier and guest parking spaces that must be made available within a strata title complex. This number is dependent upon factors such as the number of lots within the complex and the permitted uses of those lots under the planning application. Parking spaces in large complexes are usually numbered with specified spaces allocated to lots either as part of the title for the lot, or by means of exclusive use bylaws. Parking spaces also are commonly allocated for visitors to the complex. Unauthorised parking has been identified as being a particular

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concern to owners, strata committees and managing agents. (Easthope, Randolph & Judd, 2012) Recent decisions reflect the disruption (*Everton Green* [2011]) and/or angst (*Coventry No 12* [2012]) that unauthorised parking on either common property or driveways can cause. This is particularly so when, as arose in the case of *Coventry No 12* [2012], the behaviour is repetitious and occurs over an extended period of time (here over 18 months) and also involves allegedly abusive behaviour by invitees. However, other than following the procedures laid down in Part 6, BCCMA the remedies available to the body corporate committee are limited. Towing an offending vehicle, however desirable, is not a power to be found within the BCCMA (*Admiralty Towers*, [2001]) and may lead to yet another dispute – this time against the body corporate.

Parties

After parking, noise was identified as being the second concern of disputants. (Easthope, Randolph & Judd, 2012) Section 167 BCCMA prohibits occupiers of lots from creating a nuisance. While this may extend to a variety of behaviours, more commonly the relevant nuisance is in respect of unwanted noise. By-laws also may specifically regulate noise separate from any nuisance. (*Nathans Villa* [2011]) Many body corporates, therefore, have by-laws which, similarly to the model by-law, (BCCMA, Schedule 4) provide that an owner or occupier of a lot must not create or permit noise to emanate from the lot that is likely to interfere with the peaceful enjoyment of another lot or the common property. Such a by-law applies to noise emanating from a lot arising from inappropriate occupier and invitee behaviour. This also applies to behaviour on common property immediately adjacent to a lot in which they had recently been invitees. (*Mctaggarts Place* [2007]) Such a bylaw also applies to noise arising from normal business operations (i.e. in respect of air ducting and exhaust fans) (*St Tropez* [2008]).

What is not addressed by the by-laws, and which may be more difficult to manage, is noise arising from ordinary use that is not a breach. Noise from adjoining lots or the common property, although *not* breaching any by-law, also can adversely impact on the amenity and/or use of your property. This issue can be caused or exacerbated by poor building design (Easthope, Randolph & Judd, 2012) which often places living areas in one unit on walls adjoining bedrooms in the neighbouring unit, or car parks/garages outside bedroom windows. There is no easy solution for such a problem.

Pets

While not ranking as highly as noise and parking, (Easthope, Randolph & Judd, (2012) included pet disputes within their discussion of general breaches of by-laws), the cases and the author's professional experience indicates that disputes regarding pets can perhaps be the most emotive of all body corporate issues. In particular, when down-sizing to a unit, it can be very difficult for a client to understand why they cannot take or replace the family pet/s they have owned for many years. As noted, when a dispute arises consideration as to whether the by-law itself is one that is permitted by the BCCMA is necessary. Most recently in *Body Corporate for River City Apartments* [2012] the Tribunal determined that a by-law that banned *any* pets was invalid pursuant to Section 169 as it did not regulate use but was an absolute prohibition. Similarly, a by-law that seeks to impose a weight restriction on permitted pets while not breaching Section 169 may fall foul of Section 180(7) as being oppressive or unreasonable. (*212 on Margaret* [2012])

As a final point, it must be noted that the by-laws cannot exclude, or be applied to exclude, a “*guide, hearing or assistance dog*” from a lot or the common property. (BCCMA, Section 181) Professional experience shows, however, that for hearing or assistance dogs (as opposed to the more obvious seeing-eye guide dogs with their distinctive harness) difficulties can arise, and friction can be caused, until the nature of the dog is identified to all lots owners/occupiers and the committee. On this point at least good communication should (hopefully) prevent a dispute arising.

HOW TO RECOGNISE THE SIGNS OF A DISPUTE

In Queensland QCAT and court decisions are accessible on the Queensland Courts website – <http://www.courts.qld.gov.au/>. Additionally, for many civil disputes it is now possible to undertake a search through the online eCourts system to identify whether a complaint has been lodged with the court as well as accessing court judgements. A good starting point for determining whether or not a dispute exists in a community scheme is to undertake online searches. This will not, however, disclose all disputes that are being dealt with externally to the scheme as this depends on what stage in the dispute resolution process the dispute has reached and where any related court action was commenced.

BCCMA adjudicator's decisions, although not available online, are accessible by completing and submitting a search request and paying the relevant fee. (BCCMA, Section 299) However, the available information is limited to orders made within the previous six years. Further, the adjudicator only has jurisdiction to hear disputes between specific parties. (S. 227, BCCM) These include the Body Corporate, committee members, and *current* owners and occupiers. (*Swell Apartments*, [2010]) As disputes between former owners and other parties are not referable to the adjudicator, this means that relying solely on undertaking searches of adjudicator or QCAT or court decisions as a means of determining operational concerns within a community scheme is unreliable.

Finally, matters resolved by self-resolution, mediation and conciliation are not reported. Therefore, in order to obtain a true perspective of any potential disputes or issues which may affect the amenity of a complex and the value of a lot it is necessary to undertake a full inspection of the body corporate records, in particular the correspondences files and any email records. This is both a time consuming and not inexpensive process. Mere attendance at the premises for physical inspection of the property, however, will not, for the purpose of determining the existence or extent of any dispute, suffice.

CONCLUSION

Urbanisation, however defined (Forsyth, 2012) is increasing. As planners and developers move away from single use developments, in favour of resort or mixed use developments, how the disparate occupiers and users of these complexes will fit together are factors that need to be considered in the planning and construction processes. A failure to do so can aggravate the frequency and type of disputes. (Easthope, Randolph & Judd, 2012) During and post-construction, an effective and collaborative body corporate/strata committee can be essential to ensuring the ongoing success and viability of any community. (Whiteoak & Guilding, 2009) A lack of an effect committee can have an indirect negative impact on amenity and value.

Separate from management issues, residents' expectations of the amenity and use of their home differ from the expectations of business operators. For example, the level of noise emanating from a lot that is deemed reasonable will depend on the lot's permitted use. Where the lot's permitted use is, for example, use as a restaurant a reasonable level of noise will be different to that where the permitted use is residential. (*The Rocks Resort*, [2011]) While perhaps not impacting upon the value of the restaurant lot, this may have a flow-on effect to neighbouring lots. Issues of unauthorised parking and/or pets are equally disruptive of community life and amenity, and thus value.

As community living increasingly becomes the norm for many Australians these issues are likely to become more prevalent. For property developers, the issue becomes one of how to manage these issues to maximise their return and is thus a relatively short-term concern. For the valuation profession, however, community living disputes will have long term impact and it is the issue of how to identify, and then measure, these impacts that requires attention.

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