When Private Becomes Public: the provision of publicly accessible infrastructure in master-planned estates

ABSTRACT

Research undertaken by the authors in New South Wales (NSW), Australia suggests that master-planned estates (MPEs) that contain some publicly accessible infrastructure – such as roads, parks, walkways, lakes and bush land – outnumber those that are gated.

There is a need to further develop discussions that move beyond considerations of the social consequences of provision of private infrastructure in gated MPEs (social polarization in particular) and to recognize the consequences of the provision of publicly accessible but privately financed infrastructure within non-gated master-planned estates. We apply McKenzie’s (2003) work on the ‘fuzzy’ boundaries between the public and private realms to five case study MPEs in NSW that include publicly accessible infrastructure and outline some of the social, economic and legal implications for developers, local councils, estate residents and the general public of these fuzzy boundaries.

The paper concludes with some suggestions of how the challenges facing MPEs that include publicly accessible infrastructure may be mitigated, while at the same time maintaining the benefits that accrue to residents of the estate and surrounding areas, developers and local councils through the provision of such infrastructure.
Introduction

Master-planned estates (MPEs) have increased in numbers and popularity in Australia over the last two decades. MPEs are residential estates built by one developer to a coherent design. They include residential dwellings and shared common areas and some also include commercial elements, such as shops. The residential dwellings can be constituted entirely by detached houses, or may include a mix of detached, semi-detached and apartment dwellings. MPEs can be developed on either greenfield or brownfield sites and can range significantly in size from a few dozen dwellings with some shared roads, to a few hundred dwellings with extensive shared environmental infrastructure such as lake systems or bush land.

The increasing popularity of MPEs has been due to a combination of factors, including the push for urban consolidation in the metropolitan plans of state governments (VIC DSE 2002; WAPC 2004; NSW DoP 2005; QLD OUM 2005; Planning SA 2006) - which has increased the attraction to developers and councils of developments with smaller lot sizes - and the increased demand by purchasers for luxury amenities (such as pools, gyms, marinas and golf courses), an attractive residential environment (with coherent and well maintained design attributes), and a sense of ‘community’ (Rosenblatt et al. 2008; Walters & Rosenblatt 2008). Similar developments also exist in other countries, especially the USA’s homeowners associations.

The introduction of Community Title legislation in NSW in 1989 provided a legislative framework for the provision of such estates, and today, while not all MPEs in NSW are under Community Title, a large proportion are. Although Community Title is a relatively new mechanism for subdivision, it has proven to be a popular form of title in NSW, where the number of community schemes registered has been increasing steadily since the 1990s. As the legislation is relatively new, a number of issues have arisen regarding its practical application, many of which have been discussed in the NSW Department of Lands’ (2006a) Consultation Paper, Review of NSW Community Schemes Legislation. However, the matter of the provision of publicly accessible infrastructure within Community Title schemes and the issues that surround such provision were not raised in this governmental Consultation Paper.

MPEs are also a relatively recent phenomenon in Australia with an emerging body of literature addressing some of the implications of these new urban forms (Gleeson 2005; Gwyther 2005; Costley 2006; Eves 2007; McGuirk and Dowling 2007; Kenna 2007; Christensen & Wallace 2006; Goodman & Douglas forthcoming), and with academics calling for further theoretically-focused empirical research (McGuirk and Dowling 2007; Kenna 2007). There have been two parallel shifts in the Australian literature on MPEs over the past few years. The first is an increasing recognition of the complexity of available options for the provision of shared infrastructure (parks, roads, pools, bush lands, etcetera) within MPEs. Goodman and Douglas (forthcoming) provide an excellent example of work in this area, as does Bajracharya:

> Alongside rising community expectations regarding quality of services, there is an increasing trend for developers to be involved in either the direct provision of infrastructure, or its funding, with local councils and the state government playing a facilitating role in provision of services alongside their more traditional role of direct provision.

(Bajracharya et al. 2007, p.188)
There has also been a shift in the literature which recognizes that not all MPEs are gated, and which has begun to challenge assumptions that people who choose to live in MPEs are necessarily seeking to withdraw from public spaces:

The trend towards planned Community Title developments, where communal facilities are privately owned and regulated, is one market response to an apparently burgeoning demand among Australia’s urban middle classes. However, the extent of middle-class withdrawal from urban public spaces and disaffiliation from public neighbourhoods has not been clearly scoped … (McGuirk 2008, p.262)

This paper is positioned within this changing research landscape. This is important as the majority of Community Title MPEs (at least in NSW) are not gated and many contain publicly accessible infrastructure, such as roads, parks and bush land. Furthermore, many councils in NSW are reluctant to approve gated developments that exclude some of their constituents, preferring estates that are open to the public. Our aim is not to criticise research that has focused on gated estates. Indeed, we recognise that the issues raised by these theorists on gated MPEs in Australia, particularly regarding socio-spatial polarization, can in some cases be read across to other types of MPEs, whether they are gated or not. Indeed, work by Coiacetto has demonstrated ‘that some developers in Australia deliberately targeted specific residential market segments, or groups thereof’ (2007a, p.341, see also 2007b), thereby ‘shap[ing] social space’ (2007a, p.343) (see also Kenna 2007). Our contention is rather that the growth in MPEs should not be simply seen as a question of people retreating from the public to the private realm, but more fundamentally represents a blurring of the public/private divide. We support McGuirk and Dowling’s (2007, p.32) contention that:

- despite an overwhelming association in the international literature … master-planned development does not necessarily mean a diminution, through privatization, of the public capacity to foresee and shape the direction of MPE development. Instead, the Sydney example indicates that a variety of governance mechanisms are used to shape their delivery in ways that blur the notion of public/private, state/market dichotomy.

Indeed, MPEs provide an excellent exemplar of the outcomes of the new governance structure of the modern Australian city, as conceptualised by McGuirk (2008, p.257), with a focus on place competitiveness, quality of life and ecological modernisation. There is a need then to recognise two important points. The first is that the provision of publicly accessible infrastructure within master-planned estates can have a number of benefits. There are benefits for the residents and the general public who have access to these facilities. There are benefits for developers who are able to maintain a coherent and marketable image for their development. And there are benefits for councils, who are spared the task (if not the cost – offset by reductions in developers’ Section 94 contributionsii) of providing this infrastructure. Indeed, in an environment where government spending on public infrastructure is minimal MPEs may even provide a mechanism for, in the words of McGuirk (2008, p.266), effectively harnessing ‘the resources of the private sector … to address existing urban problems’. Indeed, Minnery and Bajracharya (1999, p.33) argue that:
Master planned communities are classic illustrations of the interactions among public and private sector intentions and policy implementation. The planning, development and implementation of master planned communities raises issues not just for land use planning but also for wider public policy.

The second point is that complications and confusion surrounding the boundaries between public and private space within MPEs can lead to confusion on the part of all stakeholders. It can also lead to numerous practical challenges in terms of managing and maintaining infrastructure within such developments.

In this paper, we draw on our findings from research carried out by the authorsiii and commissioned by the Urban Development Institute of Australia NSWiv (City Futures Research Centre 2008). Our research brief was to focus on issues arising as a result of the provision of publicly accessible infrastructure in Community Title schemes in NSW. The research consisted of a comparative analysis of the issues surrounding the provision of publicly accessible infrastructure in five case study Community Title schemes and focused on:

- the overlap of responsibilities for provision and maintenance between public authorities and private owners
- the costs of owning, operating, maintaining and providing public infrastructure in comparison with other forms of ownership (including the issue of liabilities for accidents)
- the capacity of owners to pay maintenance costs, especially as infrastructure and facilities age
- owners’ willingness to ‘pay twice’ for public facilities (once through Community Title obligations and once through council rates)
- management arrangements for publicly accessible space. (City Futures Research Centre 2008, p.1).

The research included sixteen semi-structured interviews with stakeholders (site managers, managing agents, council staff and developers) as well as a review of the deposited plans and council documents pertaining to each of the five case-study MPEs. In framing our discussion of the research findings, we utilise the work of US theorist McKenzie (2003). McKenzie draws on the work of Benn and Gaus (1983) to explain that the terms ‘public’ and ‘private’ have three different meanings in regards to property: agency, access and interest and that the boundaries between each of these three dimensions are unclear or ‘fuzzy’ (McKenzie 2003, p.210, drawing upon fuzzy set theorists such as Kosko 1993).

In the next section of the paper we outline the NSW Community Title system and introduce our case study areas. We then briefly outline the benefits of providing publicly accessible infrastructure in MPEs before examining the practical implications of the provision of publicly accessible infrastructure in MPEs under Community Title for the effective maintenance and management of such developments, drawing upon McKenzie’s (2003) explanation of the different meanings of public and private as they relate to property in order to frame our analysis. Finally, we provide some preliminary suggestions on how some of these challenges could be effectively addressed.
### The provision of publicly accessible infrastructure in Community Title schemes

A large proportion of MPEs in NSW are under Community Title and the five case study MPEs we discuss in this paper are all Community Title estates.

Community Title enables shared property to be created within conventional Torrens Title subdivisions (NSW Department of Lands 2006b). This makes it possible for individuals to own a dwelling and the land on which the dwelling sits, just as with Torrens title subdivision. However, concurrent joint ownership of the development’s communal property is also held by property owners within a community scheme. The extent of community property can range from a small park shared by a group of houses to extensive road systems and sporting, commercial and agricultural facilities (NSW Department of Lands 2006b). Community Title provides an alternative to Torrens and Strata title subdivision, allowing both for more flexibility in the subdivision of land than Strata title and for more control over the integrity of an entire development than Torrens title. Other types of title can also sit within a Community Title scheme, such as neighbourhood, precinct and strata plans.

The Community Title legislation was introduced in NSW as a result of a number of pressures, including the shortcomings of strata title legislation in dealing with horizontal subdivisions, the desire of developers to control the design and construction in large-scale developments for marketing reasons, and the potential to ease the financial pressures placed on local councils to provide public infrastructure. Community Title has also been used in NSW to encourage developer provision of public space in new residential developments.

As of November 2008 there were 507 current Community Title plans registered in NSW. Approximately half (260) of these Community Title developments are located in Greater Metropolitan Sydney and half (247) in other areas of NSW (NSW Department of Lands 2008). Within these schemes, there are over 12,000 community lots in addition to thousands more neighbourhood, precinct and strata lots within these community schemes (NSW Department of Lands 2008).

**Figure 1** Community Title plans registered in NSW by year and running cumulative total

Community Title is likely to increase in importance in the future (NSW Department of Lands 2006b, see also Figure 1) as the push for urban consolidation in Australia’s major cities calls for higher density residential development, and development on
smaller parcels of land. As a result, residential amenities, such as open space, and facilities, such as swimming pools, are being provided and managed communally rather than individually (NSW Department of Lands & NSW Office of Fair Trading 2006).

Infrastructure that is accessible to the wider population of an area (and not just the residents of the scheme) – henceforth ‘publicly accessible infrastructure’ - can be provided in Community Title schemes in different ways. Most Community Title schemes contain some common property not intended for the sole use of one owner. Some or all of this common area will become ‘Lot 1’ – that is, community association-owned property, where the community association is made up of all of the lot owners in a scheme (i.e. property-owners within the estate). In the first instance, before any lots are sold, the Community Association (CA) is the developer of the estate.

However, as the developer sells lots, the owners of those lots become members of the CA and so the ownership of Lot 1 passes into the hands of the lot owners in the development. Access to this property can be private (i.e. by residents only) or public. This will be decided in conjunction with the local council and recorded in the deposited plans held by the Department of Lands. The property will be maintained by the CA, who will be responsible for insuring that property. In other cases, the developer can hand over the ownership of some land within a scheme to the local council, or another government body, such as the National Parks and Wildlife Service. This property can be wholly-maintained by the owners of the land (council or another agency), or maintained by both the CA and the owners of the land (council or another agency). Even more complicated arrangements can also be in place, like in Sydney’s Breakfast Point development on the Parramatta River, where foreshore areas owned by Council are leased back to the CA.

Our research in five Community Title MPEs in NSW identified a number of benefits as well as a number of constraints in providing publicly accessible infrastructure. The following sections will address these benefits and constraints with reference to these five case studies, focusing particularly on the impact of ‘fuzzy’ boundaries (see for example, McKenzie 2003 drawing on Kosko 1993) for the provision, management and maintenance of these estates.

The case studies

The research undertook a detailed examination of the issues surrounding the provision of publicly accessible infrastructure within five Community Title schemes in NSW. Study areas were chosen of different ages, in different locations and with different arrangements in place for the provision and management of publicly accessible areas. Two are on brownfield sites in the middle ring suburbs of Sydney (schemes A’ & B), two in greenfield sites on the city fringe (schemes C & D) and one is in rural NSW (scheme E). Schemes A & B are established communities. The other three (schemes C, D & E) were reaching completion at the time of fieldwork (February-August 2007).

All of these developments contain publicly accessible infrastructure, but with different mechanisms for provision and management for the varying extent and type of publicly accessible infrastructure provided (outlined in Table 1). The case study research involved sixteen interviews with stakeholders, including CA Executive Committee...
members (who represent lot owners in the scheme), site managers, community/strata managing agents, council staff and developers as well as a review of deposited plans and council documents.

Table 1 Overview of Case Study Locations

<table>
<thead>
<tr>
<th>Scheme A</th>
<th>Scheme B</th>
<th>Scheme C</th>
<th>Scheme D</th>
<th>Scheme E</th>
</tr>
</thead>
<tbody>
<tr>
<td>Area</td>
<td>Sydney middle suburb</td>
<td>Sydney middle suburb</td>
<td>Sydney outer suburb</td>
<td>Sydney outer suburb</td>
</tr>
<tr>
<td>Size of Development</td>
<td>6 Ha</td>
<td>15 Ha</td>
<td>19 Ha</td>
<td>74 Ha</td>
</tr>
<tr>
<td>Publicly accessible infrastructure owned by CA</td>
<td>None</td>
<td>Two parks, all roads, pedestrian easements, storm water system</td>
<td>Drainage corridors, water features</td>
<td>A series of lakes and surrounding paths, pedestrian bridges, landscaping</td>
</tr>
<tr>
<td>Responsibility for maintenance of CA-owned publicly accessible infrastructure</td>
<td>Not applicable</td>
<td>CA</td>
<td>CA</td>
<td>CA</td>
</tr>
<tr>
<td>Publicly accessible infrastructure owned by local council or state agency</td>
<td>Two parks, roads</td>
<td>None</td>
<td>All roads and parks will pass into the ownership of Council</td>
<td>Roads, footpaths, landscaping, storm water system</td>
</tr>
<tr>
<td>Responsibility for maintenance of state or council-owned infrastructure</td>
<td>Joint maintenance agreement between Council and CA</td>
<td>Not applicable</td>
<td>Council. Possibility of joint maintenance agreement not yet raised at time of research.</td>
<td>Primarily Council, with all landscaping maintained by CA and most cleaning undertaken by CA</td>
</tr>
</tbody>
</table>

Our interviews with stakeholders in these schemes highlighted a number of benefits and challenges of providing publicly accessible infrastructure. We begin now with an overview of the benefits, before discussing the challenges in more depth.

**Why provide publicly accessible infrastructure in a MPE?**

There are many good reasons for developers, residents, local councils and other agencies to support the provision of publicly accessible infrastructure in Community Title MPEs. Developers can provide a higher standard of infrastructure to that normally provided by councils and thus enhance the level of amenity for residents. At the same time, local councils are not burdened with providing physical infrastructure. However, in many cases, the cost savings to councils are offset by section 94 credits provided to
developers. Furthermore, developers can provide infrastructure that fits with a particular marketing orientation but which goes beyond ‘normal’ council provision. Where publicly accessible infrastructure is maintained entirely, or in part by the CA, residents can maintain this infrastructure to a desired standard (above that usually provided by local councils). Furthermore, joint management arrangements, where residents and council jointly maintain these areas, enable residents to benefit from the same level of service provided by council to other residents in the local government area (LGA), with the option to provide additional maintenance.

**Challenges in providing publicly accessible infrastructure in MPEs**

While there are a number of benefits that can accrue from the provision of publicly accessible infrastructure within a Community Title MPE, our research also unearthed a number of potential problems. Before outlining these, we assert that the challenges relating to the provision of publicly accessible infrastructure within each of our case study areas have been largely influenced (if not caused) by the ‘fuzziness’ of boundaries between the public and private realm within these developments. Our description of these challenges is therefore complimented by reference to the work of a number of both Australian and international theorists who have discussed the issue of boundaries in the context of MPEs.

This discussion will draw on the work of McKenzie (2003) and his explanation of the three different meanings of public and private as they relate to property – agency (who is the owner and are they a state or private actor?), access (to what extent is access restricted?) and interest (who does it legitimately concern?), with the boundaries between each of these three dimensions being conceptualised as ‘fuzzy’. Indeed, McKenzie (2003, p.214) contends that ‘nothing about common-interest housing’ can be called fully private or fully public’. Furthermore, McKenzie explains that common-interest developments (including MPEs), and the actors involved in them (developers, CA members, owners) can take on attributes of the state, the market and civil society, often simultaneously:

> At the intersection of all three circles, where the boundaries of state, market, and civil society are at the fuzziest and hardest to police, we find the CID [common interest development] community association … As a nonprofit corporation that depends on volunteers to serve as directors and officers and that aims to create a sense of community, the community association functions like a civil society institution. To the extent that the association is carrying out what would otherwise be local government functions, it is akin to an extension of the state. And an association’s duty to concern itself with property values is a market-based incentive. (McKenzie 2003, pp.218-19)

We contend that when these issues are compounded in those cases where an MPE includes publicly accessible infrastructure as issues of the ‘public’ and ‘private’ dimensions of agency, access and interest become increasingly blurred.
Agency

We found some confusion on the part of residents regarding the agency dimension of the public/private divide. Specifically, there appeared to be a lack of understanding of the mechanisms behind community property by some owners. As Bajracharya et al. (2007, pp.198-99) explain:

The nature of the development process means that during the initial period of building and construction activities the private companies that built master planned communities are responsible for creation and maintenance of infrastructure and community services. However, once the development is completed, management of local infrastructure and services [sometimes] becomes the responsibility of local councils or communities. [Our brackets]

Indeed, community property is shared property, owned collectively by all owners of lots in a scheme through their compulsory membership in a CA. This means that each owner is required to pay levies for the management and maintenance of this common property. However, in some cases, it appears that this has not been explained sufficiently to purchasers:

We find the customers are generally … fairly non-understanding of community laws, it’s too new, they don’t know, it has to be explained to them again and again … they say I bought my house, why do I pay levies? What are the levies for? A lot of them obviously didn’t investigate it very strongly when they were at the purchasing side of things. (Managing Agent, Scheme C)

The situation is even more confusing in Scheme B, where all publicly accessible infrastructure within the scheme is owned by the CA (i.e. it is private land), but is marked as publicly accessible land in the deposited plans. In this case, it appeared that some owners were unaware of the extent of their responsibility (as joint owners of the common property in the scheme) to pay levies for maintaining the infrastructure in the publicly accessible areas of the common property when they moved into the estate:

People buy in this environment thinking that it’s part of the world at large, you know, there’s no real estate agent that says hey, by the way, do you realise that you’re going to be paying for more services than you’re going to get … so people come in and while we sign this contract, the contract book is about that thick [holds finger and thumb apart] and regular people don’t read things that thick and understand it all, you know. (EC member, Scheme B)

Access

In his influential book, The Environment and Social Behavior, American academic Irwin Altman (1975, p.211) explains that people are engaged in a dialectic relationship between the need for privacy and the need for social interaction and that it is important that private and public areas are clearly delineated to avoid ‘conflict, stress and other costs’ associated with ‘inappropriately designed environments’. This can be achieved through design mechanisms, but non-design issues can also confound the boundaries between public and private, such as maintenance arrangements. For example, within
Scheme B, the publicly accessible infrastructure is maintained solely at a cost to the CA, with no cost to Council. This has led to concerns by some residents that they are ‘paying twice’ for these areas, once through community levies and once through council rates.

It’s just not equitable that people less than 100 meters from me are being rated at the same basis, and yet their services are more highly supported. (EC member, Scheme B)

Further confusion has arisen among residents in Scheme B about which areas within the scheme exactly are publicly accessible, confounded by the apparent usage of obviously private areas (the pool and tennis court) by non-residents and the inability of the on-site security to expel these non-residents unless they can prove that the person is not a resident’s guest:

[The security guards] have the power to request [non-residents] to leave, they can use reasonable force to eject them … The catch 22 is that they have to be virtually assured that that person is not entitled to be there and that’s extremely difficult to establish. (EC Member, Scheme B)

These blurring of boundaries between publicly accessible and private common property both through uncertainty about which areas are designated as public and the use of private areas by members of the general public have led to discontent among residents living in the scheme. Some residents have thus proposed that Scheme B be gated, thereby reducing any confusion over either the agency or access dimensions of the public/private dichotomy.

However, Council is unlikely to approve the gating of this community. Indeed, many councils in NSW are opposed to gated developments and it is unlikely that problems arising from the provision of publicly accessible infrastructure in Community Title schemes will increase the number of gated communities in NSW.

The case of Scheme B, where all the publicly accessible infrastructure within the scheme are owned by the CA are actually quite rare in NSW. More common are arrangements whereby some, or all, of the developer-owned publicly accessible areas are passed onto the local council once they have been landscaped or otherwise prepared. For example, all of the common property in Scheme A is owned by the local Council.

However, while the ownership (agency) of this property belongs to council, and access is public, the CA has in place a joint management arrangement with Council to manage the publicly accessible areas. Council provides services with commensurate costs in the LGA, while the CA provides additional services. For example, under this maintenance arrangement, Council mows the lawns of the two shared parks in the scheme, while the CA is responsible for the upkeep of the flower beds. Such joint management arrangements enable residents to take advantage of comparable service levels provided by council to other residents in the LGA, while retaining the option to provide additional, enhanced, maintenance within their community scheme. In this sense, they should alleviate any concerns on the part of residents that they are ‘paying twice’ for services (such as has occurred in Scheme B).
However, such arrangements can also lead to confusion about costs, avenues for complaints, and ownership and access rights. In McKenzie’s terms, where agency is unclear, in this case because both the CA and the council have accepted responsibility for management - confusion can arise over access. Indeed, if they are to be successful, joint maintenance arrangements require a transparent cooperation among all interested parties, including correspondence and meetings, and this can be costly and time-consuming.

**Interest**

Webster (2002) has argued that the ‘urban realm’ is ‘an interlocking and overlapping set of club realms’. He explains that ‘most public goods are consumed by particular publics and are better conceived of as club realms’ (2002, p.3). Webster (2002, p.22) has discussed gated communities as ‘a particular manifestation of the club realm that gives legal protection to the economic right over shared neighbourhood attributes’.

This also describes non-gated MPEs, except that the boundaries between the members of the ‘club’ and the rest of the public are much more ‘fuzzy’. This fuzziness can lead to owners’ uncertainty about the extent of their interest in a scheme. As noted above in the case of Scheme A, the questions of agency and access with regards to publicly accessible infrastructure influence the dimension of interest or legitimate concern with the management of that publicly accessible infrastructure. Indeed, there can be disagreements among owners about the desired standard of maintenance for a development and the costs they are willing to shoulder. As we have seen through the example of Scheme B, people’s perceptions of their own interest in such infrastructure – informed by sense of ownership (agency) and control over access – will influence their decisions regarding how much they are willing to pay to maintain it.

… approaching council and seeing what we can do about the rates and this imbalance and inequality in what we’ve got to pay versus the fact that we don’t have the ability to close off our estate. We have the responsibility or the accountability without having the control, so we don’t like that. (A previous member of the EC, Scheme B)

This is a serious issue because where levies are insufficient to provide the necessary maintenance, the publicly accessible infrastructure can fall into disrepair, leading to concerns with small- to large-scale safety and property hazards. This is of particular concern in those schemes that contain large-scale infrastructure such as bush land (as is the case in Scheme E) or lake systems (as is the case in Scheme D), as inadequate maintenance and management could lead to serious problems such as fires, floods or water quality issues that would affect not only those people with an interest in the scheme (owners, residents, facilities managers), but also the surrounding areas and populations. The potential threats to an area’s ecosystem, property and residents’ lives and wellbeing should not be underestimated. The comments from a Council Officer about Scheme D provide an example of the wider impacts of a lake system within a MPE for example:

… how to address particularly flooding and water quality issues associated with that land because water goes through that land and into [an adjoining development], which is a very large future urban and
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parkland area where water quality and flooding is an even greater issue to the broader community and government and Council.

There are also public liability concerns. The costs of any public liability claim fall with the owners of the land. This means that if somebody injures themselves on publicly accessible, yet community-owned land (such as that in Scheme B), the Community Association is responsible for those costs. In those cases where publicly accessible property is actually owned by the local council (or another state agency) and the CA is involved with that property only in the sense of providing additional maintenance, public liability claims would be first directed at the landowner (e.g. the local council). However, where the CA is responsible for the maintenance of that infrastructure and the accident or injury is found to be as a result of inadequate maintenance, the landowner (e.g. the local council) could cross-claim the CA.

If a CA is found liable for mishaps (as the owners of the land, or through inadequate maintenance) and their insurance was insufficient to cover these costs, all owners would have to pay to cover the claim (proportional to their unit entitlement). This is a serious situation and the reason why insurances are mandatory on the agenda of the AGMs of NSW CAs.

Hence, it is important that the aforementioned confusion over agency and access does not lead to owners neglecting their interest (legitimate concern) in the development with regards to their practical and legal responsibilities to persons, property and the environment.

Discussion

We have outlined some of the social, economic and legal challenges for developers, local councils, estate residents and the general public of the provision of publicly accessible infrastructure in MPEs. We now provide a few preliminary suggestions on how some of these challenges could be addressed.

First, it is important to explain these issues to purchasers at the point of sale: which areas are publicly accessible (access) and who owns them (agency); the extent and nature of any land to be dedicated to the local council or other government body (agency); and obligations to pay levies for the upkeep of property and insurance costs (based on their interest in the property). Consideration can also be given to delineating publicly accessible and private land and infrastructure through design mechanisms. Whether an area is officially designated as publicly accessible or not, its use by the general public is more likely to be influenced by whether that area appears to be public or private. For example, work in the UK by Newman (1995) has shown that changing a neighbourhood’s design to make its boundaries clear can influence behaviour and the nature of that neighbourhood:

The residents owned and controlled them, and even if everyone was free to drive and walk into these streets (they had no guard booths), one knew that one was intruding into a private world, and that one’s actions were under constant observation. (Newman 1995, p.150)
Indeed, design and social cues are arguably as important as legal access rights. For example, while Scheme B includes publicly accessible infrastructure, the estate itself is designed such as to deter more people from using these areas. The buildings face inwards, encircling the publicly accessible parks and there are only two small entrances into the estate. The managing agent for Scheme B noted:

> From my understanding, it’s generally residents that use the facilities even though they’re public. I don’t know the public’s perception, whether they realise they’re entitled to use them.

In contrast, Scheme D has been designed to integrate with its surrounding suburbs, backing into local roads and sports fields and linking up walking and cycle paths within the vicinity.

> [Council is] investing millions of dollars in footpaths right throughout the city and we’ve got a really active push to try to get people out of motor vehicles and onto pushbikes and walking, so we’ve got an accelerated program over the next two years ... the demand for pedestrian and cycleway movements throughout the city has really grown, so this [Scheme D] just becomes a logical part of that ... The people who will go out and about on their push bikes will find destinations and this [Scheme D] will be a really interesting destination.

(Council officer)

Some precautions can be recommended for the management and maintenance of publicly accessible infrastructure in Community Title MPEs. The first is to ensure that those with an interest in this infrastructure bear the cost of its maintenance. This means that councils should be encouraged to provide the same level of maintenance within a scheme as they do elsewhere in the LGA, or come to a joint maintenance agreement with the scheme’s CA to provide services commensurate with what they would spend in the LGA (as has been the case in Scheme A). Where a strong working relationship can be fostered between the developer and the council from the early stages of the development, this will enable better planning and maintenance. The aim is to ensure that all those actors with agency (ownership) and access take an interest in providing, and/or paying for the maintenance of the publicly accessible infrastructure.

Management of the publicly accessible property is essentially the responsibility of landowners (those with agency), be they the CA (as in the case of Scheme B) or the Council (as in the case of Scheme A).

However, where a body other than the owner is providing maintenance of those areas (as is the case in joint management arrangements) because of a legitimate interest in their efficacy, management plans may be required to outline stakeholder responsibility for maintenance. It is especially recommended that management plans be put in place at the development stage, such as that which has been put in place in Scheme D to ensure that the lakes system is properly maintained.

A partnership with a specialist agency is also advisable where major infrastructure is being provided, such as that which was set up with the National Parks and Wildlife Service for Scheme E. Finally, it is important to clarify the legal interest of the different parties (those with agency, those involved in maintenance due to an interest in the
infrastructure, and those with access) with regards to public liability, and make it clear to owners that costs resulting from public liability claims can befall them either as owners in a scheme, or through their involvement with the maintenance of a scheme.

Conclusion

In recognising the increasing complexity of available options for the provision of shared infrastructure in MPEs and moving our focus away from gated estates, we are able to broaden our approach to the study of MPEs and address an increasingly apparent challenge - difficulties arising from the provision of publicly accessible infrastructure within MPEs.

Indeed, while publicly accessible infrastructure provision within community-titled MPEs has its benefits, many of the challenges encountered by the residents and other stakeholders appear to have arisen precisely because these estates were not gated and the public/private boundaries were blurred when it came to agency, access and interest in their publicly accessible areas. This argument is not a call for more gated estates, instead we argue that it is only when these ‘fuzzy boundaries’ are directly acknowledged and mechanisms are in place to minimise their potentially negative consequences that the full benefit of publicly accessible infrastructure provision in MPEs will be felt.

Much more work needs to be done in this area to come to terms with the social, economic and legal implications for developers, local councils, estate residents and the general public of the provision of publicly accessible infrastructure within MPEs. While this paper has introduced a number of issues relating to agency, access and interest, it is based on research in only five MPEs within NSW and our findings are not necessarily transferable to other contexts. It is essential that more research is carried out in different areas.

In particular, it would be interesting to explore in more detail the ways in which the issues faced by MPEs outside large cities differ to those within those cities. Furthermore, the different states and territories in Australia have different legislation governing the creation and management of MPEs and the implications of these differences for the management and maintenance of publicly accessible infrastructure will need to be explored fully.

Finally, researchers in other countries may wish to draw upon the NSW case in their own analyses of the issues facing use of publicly accessible infrastructure in master planned estates. In all cases, we would urge researchers to recognise the importance of all stakeholders (but especially owners) being aware of the boundaries between public and private infrastructure when it comes to the ownership (agency) and access of that infrastructure, as well as their interest (legal and otherwise) in such publicly accessible infrastructure.
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Notes
i 59.5 million people were estimated to live in association-governed communities in the USA in 2008. This includes homeowners associations, condominiums, cooperatives and other planned communities (CAI 2008).
ii ‘Section 94’ refers to Section 94 of the Environmental Planning and Assessment Act 1979 (NSW). It enables consent authorities (such as Councils) to impose levies on new development for public amenities and services required as a consequence of the development (for example because of an increasing population moving into the area). Developers of MPEs can either pay their Section 94 contributions as a cash payment, or they can negotiate with Council to provide some or all of their contribution in-kind the form of land and/or the construction of public amenities and services (e.g. public parks, roads, libraries). (See NSW Department of Planning 2008 for more information.)
iii In conjunction with Professor Jane Marceau (City Futures, UNSW).
iv The views expressed by the authors and the respondents do not necessarily reflect the views of UDIA NSW.
v The schemes’ names have been removed to preserve the anonymity of the interviewees.
vi Including gated communities, townhouse and condominium projects and other planned communities (McKenzie 2003, p.203).
vii Advice on these issues was gratefully received on a pro bono basis from Andreones Lawyers and Holding Redlich Lawyers.
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