Managing individual home-ownership within multi-owned property

Britain has long had problems accommodating individual home-ownership within multi-residential property. This comparative socio-legal study examined and evaluated the day-to-day operation of different property ownership regimes in parts of the USA and Australia. The results of this evaluation were presented directly to those actively involved in reforming property laws in Britain. The key findings were:

- **In both Australia and the United States, commonhold ensures an individual freehold interest in the flat as well as a defined collective interest in the common parts of the building. Statutes, regulations and governing documents determine the decision-making framework and approaches to management and maintenance arrangements. The critical considerations are: the need to come collectively to decisions, act upon these decisions, and ensure all owners contribute equally to all associated costs, even those owners who opposed the decision in the first place.**

- **While governance regimes in both Australia and the United States are broadly similar, the actual legal devices employed to address specific decision-making matters differ, offering different models for possible UK practice.**

- **Because in England and Wales, affirmative promises (such as an agreement to pay service charges) can only be enforced against subsequent purchasers in a landlord-tenant setting, an 'owner' in multi-ownership buildings owns a lease not a freehold. Therefore, reform was focused on creating a new form of ownership. In Scotland, individual ownership within multi-ownership buildings has long been possible but the range of possible management systems can mean that owners' needs are not met. Reform in Scotland has not focused on creating a new form of ownership, but rather on facilitating the revision of outmoded title conditions.**

- **The researchers conclude that:**
  - **In England and Wales commonhold will establish a new home-ownership system, which mirrors very closely those operating in Australia and the US, giving the owners more control over their flats. In Scotland, the reform process is focusing on title conditions. This is not sufficient as it still allows for infinite variety in management systems;**
  - **For commonhold to work, support structures will be needed, in particular good information and advice and a responsive and inexpensive system for resolving disputes;**
  - **The imminent introduction of commonhold within England and Wales could facilitate more concentrated urban developments. New forms of suburban developments could also arise, whereby owners can collectively manage a range of additional 'common facilities'. This new form of ownership could have major implications for solely commercial and mixed residential/commercial developments.**

Background

Who owns what and who is responsible for what within multi-owned private property needs to be clearly understood if individual enjoyment and security within this type of property are to be assured. Current arrangements in both England and Wales and in Scotland fail to ensure this happens.

The prime objective of the study was to improve general understanding of how arrangements in Australia and America function, with a view to promoting their wider adoption in Britain. However, the timing was such that this study made a direct contribution to the reform process within England and Wales initiated by the introduction of the Commonhold and Leasehold Bill in summer 2001. The study brought a number of significant lessons from the Australian and American experience to the attention of practitioners and policy-makers engaged in the reform process in Britain.

Practice in the US and Australia

Common interest ownership systems

Common interest ownership is a form of multi-ownership private housing prevalent in Australia and the United States. The study examined both the law and practices of ownership arrangements in the US in states that have adopted the Uniform Common Interest Ownership Act and in California, and in Australia in the states of Queensland and New South Wales.

Homeowners in multi-ownership housing developments, in both Australia and the US, generally have a freehold interest in their individual property, plus an ownership interest in the common parts or a compulsory interest in the community association that legally owns and controls these common parts.

Common interest communities can be residential, commercial or industrial. There are four basic legally defined common interest arrangements:

- **Condominium** ('strata titles' in Australia). Homeowners have a freehold interest in their residential unit coupled with a tenant-in-common interest in the common areas. Homeowners may also own an interest such as a balcony or parking space that is common area but generally used by only one owner. This interest is called a limited common area or part.
- **Housing co-operative** ('company titles scheme' in Australia). Here a corporation owns the entire structure. Each owner has a lease for a unit within the building, coupled with an interest in the corporation. This is similar to the situation in England and Wales where a group of leaseholders has collectively enfranchised. Although historically important in certain large American cities, co-ops are rarely created today because mortgage arrangements in some states can leave all owners liable if one defaults on their payment.
- **Planned community** ('community titles' in New South Wales). Homeowners have a freehold interest in their unit or lot coupled with an interest in the community or owners' association that owns the common areas. They can also own an interest in an area defined as a limited common area.
- **Master planned communities.** Two or more of the above arrangements can co-exist. In communities with more than one block, or with commercial as well as residential units, the owners in each block vote on matters only affecting their block. Their representatives vote on matters affecting the entire community.

Homeowners' associations

A board composed of elected owner-directors governs such communities. The association has been characterised as a mini-government because it enforces rules, like laws, can levy monthly assessments, like taxes, and maintains facilities in which the owners have a legal interest. It has been characterised as a business because it must ensure the well-being of the collective assets through prudent financial and risk management. Finally, the association is a collection of neighbours and is expected to play a role in fostering and developing a sense of community.

The decision-making process

Regardless of the form of ownership, all owners share a direct interest in the governance of the building and associated grounds. Collective control is exercised through their direct participation in the community association. Most jurisdictions provide for a 'one unit – one vote' arrangement for all association elections purposes. Others base voting rights on floor area or on the value of the unit. The rights, rules and responsibilities of this body are set out in the property's governing documents in statute or in regulation.

Owners buying into such communities have to accept negative and affirmative covenants. These can also be enforced against any subsequent purchasers. Examples of affirmative covenants include the obligation to pay assessments to maintain the common building. Negative covenants are normally restrictions on the use of the flats. In both Australia and the US, it is the associations' board of directors which determines the level of annual assessments, subject to the approval of owners and, in some specific cases, statutes.

Statutes, regulations and governing documents usually provide for the amendment of governing documents. This is essential given that developers cannot fully anticipate all the changes that might occur over the lifetime of the property. Some jurisdictions permit a simple majority to amend particular provisions, such as use restrictions. Most generally require a super-majority to amend provisions that alter an individual's property interest.

Enforcing such covenants requires an effective and fair, yet inexpensive dispute resolution mechanism. Internal dispute resolution mechanisms relate to how the association notifies owners of violations, if necessary fines them, and - in protracted disputes - places a charge or lien on their freehold interest. Typically this happens when an individual owner fails to pay a debt owed to the association, such as their monthly assessments. In extreme cases where this is not paid, a court can sell the property at a foreclose sale. External dispute resolution mechanisms can include mediation, informal arbitration and litigation requirements.

Most states require full disclosure when properties within such communities are sold. Prospective owners not only receive a copy of the governing documents but can also see the community association's reserve study. This identifies the major building components, estimates their life expectancy and then compares this with the level of available reserves.

Unlike the situation in Britain, specific statutes and regulations ensure a standardised and agreed procedure for organising the governance of these communities. Owners are more likely to know in advance of purchase what they are buying into and to understand the sanctions should they fail to play their part. They are also made aware of the on-going costs associated with living in this type of development, and do not budget solely on the basis of mortgage repayments.

The reform process in Britain

The leasehold reforms in the Commonhold and Leasehold Reform Bill will result in leaseholders gaining greater control over their homes, should they wish to do so, by being given the Right to Manage their building and an easier means of buying out the freehold. While these reforms will go some way to addressing the long-standing ownership and management failures of the leasehold system, the parallel introduction of commonhold provides a clear admission that leasehold reforms alone are inadequate. Although commonhold ownership will not eliminate all problems that can and will arise within multi-owned properties, it will create a legal ownership arrangement better able to address most of them.

Commonhold, when enacted, will establish a new home-ownership system, which mirrors very closely the governance systems operating in both Australia and the United States. Individual ownership and collective governance ensures the proper on-going governance of the building in the interests of all owners. However, structures will be needed to support this change: good information and advice, to inform the public about this new form of ownership, will be required; setting in place a responsive and inexpensive system for resolving disputes will also be important.

While England and Wales have opted to create a new form of property ownership, in Scotland incremental reform remains the preferred approach. This is not surprising given that in Scotland individual ownership of multi-owned properties has always been possible. Both 'positive' and 'negative' obligations transfer to subsequent owners through the property's title. This means the maintenance of common elements can be made the joint responsibility of all owners. While the theory is sound, actual operating practices ensure the existence of a wide range of management systems, many of which – due to either age or poor legal drafting – fail to meet owners' needs. As a result, the debate to date has largely focused on legal concerns around title provisions and the common law, not ownership. However, the need for a more comprehensive reform agenda is a core consideration of the recently created Scottish Executive Housing Improvement Task Force.

Conclusion

The researchers conclude that the imminent introduction of commonhold within England and Wales will give owners increased control over their flats and eliminate the hardship existing under the current system where they only 'own' a lease which is a diminishing asset.

This new form of ownership could facilitate more concentrated urban developments. New forms of suburban developments could also arise, whereby owners can collectively manage a range of additional 'common facilities'. This new form of ownership also has major implications for commercial and mixed residential commercial developments.

While Scotland permits multi-ownership housing, the existing system does not meet the needs of many owners. There is no consistency between blocks and owners often do not understand their rights. The current reform agenda will not greatly alter this situation.

If, as has been suggested, high density housing is to play an integral part in the continued growth of mass individual home-ownership a new legally defined ownership arrangement whereby the individual ownership of property is combined with clear collective responsibilities for its on-going governance will prove a necessity.

About the study

The study examined the failings and limitations of current ownership and governance arrangements in England and Wales and in Scotland, some of which had been considered prior to the beginning of the study. This exercise was conducted with key policy-makers. It was assumed when the study began, that it would identify the problems and offer solutions based on United States and Australian law and practice.

However, within a few months of the study starting, the Government announced its intention to introduce commonhold law in England and Wales. Thus, the production of the comparative element had to be brought forward. The timing was fortunate, because the key policy-makers were able to take advantage of the comparative study when creating the Commonhold Bill, reintroduced in the summer of 2001. In Scotland, the study proceeded as originally planned and the direction of reforms is still under consideration by the Scottish Executive's Housing Improvement Task Force.

How to get further information

Further information about the study can be obtained from Dr Douglas Robertson, Director, Housing Policy and Practice Unit, University of Stirling, Stirling FK9 4LA, Tel: 01786 487719, Fax: 01786 466323, email: d.s.robertson@stir.ac.uk, or Professor Katharine Rosenberry, Professor of Law, Californian Western School of Law, San Diego, 225 Cedar St, San Diego, CA 92131, Tel: 619-525-1433, Fax: 619-696-9999, email: krosenberry@cwsl.edu.

The full report, **Home ownership with responsibility: Practical governance remedies for Britain's flat owners** by Douglas Robertson and Katharine Rosenberry, is published for the Foundation by YPS (ISBN 1 899987 76 2, price £12.95).

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