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Australia's property industry

Creating for Generations

30 July 2021

Community Land Regulation 2021
Policy & Strategy, Better Regulation Division
NSW Department of Customer Service
4 Parramatta Square, 12 Darcy Street
PARRAMATTA NSW 2150
Submitted via email: communityscheme@customerservice.nsw.gov.au

Proposed changes to Community Titles Regulations

The Property Council welcomes the opportunity to provide feedback to NSW Customer Service on the proposed changes to Community Titles Regulations.

As Australia's peak representative of the property and construction industry, the Property Council's members include investors, owners, managers and developers of property across all asset classes.

We note that the Community Titles Reform package comprises:

- The draft Community Land Management Regulation 2021;
- The draft Community Land Development Regulation 2021;
- The Regulatory Impact Statement to the draft Community Land Management Regulation 2021; and
- The Regulatory Impact Statement to the draft Community Land Management Regulation 2021.

Our commentary and recommendations in relation to these important reforms is attached for your review and consideration.

Should you wish to discuss these issues further, please contact Annie Manson, NSW Policy Manager via email amanson@propertycouncil.com.au or phone on 0422 131 741.

Yours sincerely

Lauren Conceicao
A/NSW Executive Director
Property Council of Australia

Property Council of Australia – Residential Committee
29 July 2021

Invitation for submission to NSW Government regarding proposed changes to Community Titles Regulation

Proposed Community Land Development Regulation 2021	
Questions regarding proposed amendments to regulations	**Response**
1. Are there any other matters that should be mandatory to address in a development contract lodged with a community, precinct or neighbourhood plan?	No other matters suggested to be included in a development contract.
2. Is it appropriate to allow up to 20 years for conclusion of a development contract in larger, more complex community schemes?	Yes, given the size and complexity of such community schemes a 20 year timeframe for conclusion of a development contract is appropriate, subject to the comments below. **Determination by Registrar General-** It is necessary to consider whether, pursuant to clause 23 of the Community Land Development Regulations the Registrar General is the most appropriate determinator of applications for an extension to the timeframe for the conclusion of a development contract. It is considered that as this is more of a planning issue and the Registrar General may not have the relevant skills or expertise to consider the issues relevant to the development and to make the determination. ***Recommendation-*** We consider that the planning consent authority is more appropriate to perform this role and this matter should be considered as part of a development application seeking consent for the development contract. If such applications are considered by the Registrar General, the need to obtain additional planning approvals throughout the course of a development may have unintended impacts, for example, on the ability to complete the development within 10 years. Approval by the Registrar General may create a disconnect in

	circumstances where the contract for which development consent is sought must be 10 years and a s 4.55 modification to the consent must be obtained if the Registrar-General approves a longer period. This might impact aspects of the development such as proposed staging.
3. Is the information required to be submitted to the Registrar General in support of an extended conclusion date sufficient?	Our comments in relation to this proposal reflect the comments at item 2, relating to the relevant expertise of the Registrar General in the determination of such applications. It is noted that at clause 23(2)(a) of the Community Land Development Regulations it is required that developers include in an application to the Registrar General the number of lots proposed to be created before the conclusion of the development contract. Developers may not know the number of lots at that time, which may be subject to future consents where development applications are anticipated to be staged. ***Recommendation:*** We reiterate the recommendation provided at item 2. In addition we recommend that the application to extend the date for the conclusion of the development contract not include details of the number of lots to be created. This will be the subject of future development applications and approvals.
4. Is the proposed process for requiring amendments to a management statement to be lodged for registration in consolidated form appropriate?	Yes, the proposed process is appropriate.
5. Is the process for determining the valuation day appropriate?	Yes, the process for determining the valuation day is appropriate, subject to the following comment. **Cross-reference-** We note that there may be an incorrect reference in clause 31 where it references “the Act, Schedule , clause 4(c)”.

	Recommendation- It appears the reference to this clause should instead provide "the Act, Schedule 1, clause 1(4)(c)".
6. Do you have any other feedback on the proposed Regulation not covered by the specific questions above?	1. ***Concept Plans*** – There is little detail of what is to be included in a concept plan attached to a development contract and it could be construed that the concept plan needs to address matters beyond those matters prescribed by clause 20 of the Community Land Development Regulations. This would be unduly restrictive for developers who wish to create multi staged developments which will each be the subject of future development consents. The concept plan should only address those matters disclosed in a development contract which are limited to matters relating to association property. ***Recommendation –*** The regulations clarify that the concept plan attached to a development contract need only address the disclosure items noted in the development contract. 2. ***Requirement for land to be "contiguous"*** – Whilst this is not related to the Community Land Development Regulations, this is an issue in respect of the Community Land Development Act 2021 which we consider should be reviewed. Section 4(3) of the Community Land Development Act 2021 provides that 'land is contiguous even if it is divided by, or separated from other land by a natural feature, railway, public road, public reserve or drainage reserve'. This definition is relevant to a number of sections in the Community Land Development Act 2021 , including sections 16, 25 and 26 which relate to the adding of land to a scheme parcel (whether as association property or as a development lot) and which require the land added to be contiguous to the scheme parcel. The provisions allowing for addition of land to a scheme parcel are intended to provide flexibility, however the requirement for land to be contiguous can have the effect of preventing, for example, land contained in one scheme parcel from being added to another scheme parcel. For example, if a community development lot is to be added to a precinct parcel as a precinct development lot, but the

relevant community development lot is separated from the precinct parcel by community association property, this will not satisfy the requirement for the lot being added to be contiguous.

Recommendation - We suggest that land should be able to be moved between:

(a) the community parcel and a subsidiary scheme parcel;
(b) one subsidiary scheme parcel and another subsidiary scheme parcel; and
(c) a subsidiary scheme parcel and the community parcel,

without the land needing to be contiguous.

3. **Execution of a dealing, plan or other instrument** - Clause 21(2)(b) of the Community Land Development Regulations requires that the relevant developer must provide the Registrar General with a statutory declaration that:

> *'(b) sets out the circumstances in which the dealing, plan or other instrument was approved by the association*.'

If the matter is a development concern under section 55 then section 56 sets out that the developer can sign any dealing, plan or other instrument on behalf of the association to give effect to a decision about the development concern.

Recommendation – For clarity clause 21(2)(b) of the Community Land Development Regulations should be amended to say:

> *'(b) sets out that the dealing, plan or other instrument constitutes a development concern under the development contract and was executed by the relevant developer pursuant to section 56(4) of the Act.'*

4. **Developer exercising functions -** Section 57(5)(b) states that a developer may exercise any of the following functions for the purpose only of allowing development permitted by a development contract to be carried out:

> *(a) functions of an association bound by the development contract; and*

'(b) functions of any other person having functions under the scheme concerned as may be prescribed by the regulations'

Recommendation – The proposed Community Land Development Regulations currently do not prescribe any other person. Consider whether the Regulations should prescribe that the developer can exercise the 'functions of any other person bound by the development contract' noting that the development contract is also binding on each person who is a mortgagee, chargee or covenant chargee.

5. **Community Scheme Parking** – The Community Land Development Act 2021 and the Community Land Development Regulations (and the Community Land Management Regulations) are silent on community scheme parking. Under s650A(1) of the *Local Government Act* an agreement for a community scheme parking area, and any other agreement conferring functions on a council in relation to a community scheme parking area, must be approved by special resolution of the association and must comply with any requirements for such schemes prescribed by regulations under the Community Land Management Act.

Section 233(2)(g) of the Community Land Management Act states that the regulations can make provision for 'requirements for agreements between associations and councils relating to association parking areas under s650A of the *Local Government Act 1993'*. The reference is to 'association parking areas' which is not a defined term and is ambiguous as it may not include 'street parking', that is parking on roads which are association property and on access ways.

Recommendation - Drafting could be included in the Community Land Development Regulations (and/or the Community Land Management Regulations) to clarify that the use of the of the term 'association parking areas' also refers to or includes 'street parking' or parking on association property generally. In addition, a developer should have the ability to enter

	into an agreement with council regarding parking on association property without the need to obtain a special resolution of the association, particularly if the intention to do so is disclosed in a development contract.

Proposed Community Land Management Regulation 2021	
Questions regarding proposed amendments to regulations	**Response**
1. Is the proposed commencement date of 1 December 2021 suitable? If not, what alternative date should be adopted and why?	We have no concerns with the proposed commencement date of 1 December 2021. If there is any general consensus that the proposed commencement date be pushed out beyond 1 December 2021, then we recommend that the new proposed commencement date be after 31 January 2022 to account for Christmas/New Year shut downs and to allow the community lands sector sufficient time to prepare for the changes in the new year.
2. Are there any more items that should be mandatory on the agenda of the first AGM of the association?	No other items suggested to be added to the agenda for the first AGM.
3. Are there any more documents or records that the original owner should be obliged to provide the association at the first AGM, or 3 years after the registration of the scheme?	We make the following suggestions regarding the documents or records obliged to be provided at the first annual general meeting: 1. **Clause 7(1)(a)**- It is usual practice to submit a QS certified costing of insurance to facilitate provision of the insurance policy.

Recommendation- We recommend that this requirement be flexible such that the original owner is required to provide either a valuation or a costing of those buildings as certified by a QS.

2. **Clause 7(1)(b) –** We note that clause 7(1)(b) requires the provision of maintenance and service manuals.

Recommendation- We recommend this clause be limited to maintenance and service manuals for association property only.

3. **Clause 7(1)(c)-** This clause does not contemplate that some of these documents may not be finalised or in place at the first annual general meeting if it is a long-dated scheme.

Recommendation: We recommend this be conducted on a staged basis.

4. Clause 7(1)(d)- We note that this clause requires the provision of copies of building contracts for the scheme parcel including variations.

Recommendation: We recommend the removal of this requirement on the basis that

(a) these are commercial in confidence documents between private parties; and
(b) provision of all variations is likely to involve significantly overwhelming amount of documents particularly so if the scheme includes a strata scheme.

This clause should be limited, at minimum as follows:

(a) narrowed to only contracts relating to association property;
(b) to allow the redaction of commercially sensitive information; and

	(c) to include a definition of "building contracts" which is limited to contracts for construction of community facilities. Contracts such as civil works contracts should not be included in this definition. 5. **Clause 7(1)(e)**- We note that clause 7(1)(e) requires that the provision of the most recent BASIX certificate for each building on the scheme parcel. ***Recommendation***- We recommend that this requirement should be limited to require BASIX certificates only for any association property (if such BASIX certificates are required). Our view is that BASIX is usually not applicable for non-residential buildings so this is unlikely to be required.
4. Is the list of property assets provided in clause 25(2) appropriate for a maintenance schedule? Should any other items be included?	No additional items suggested to be added to the list of property assets to be included in a maintenance schedule.
5. Do you have any other feedback on the proposed Regulation not covered by the specific questions above?	1. **Proxies and powers of attorney –** Section 24 of the Community Land Management Act replicates the position under the strata legislation imposing a prohibition on an original owner or person connected with the original owner casting a vote by means of proxy of power of attorney if the proxy or power of attorney was given pursuant to the term of the sale contract for the lot. The Community Land Management Act and the Community Land Management Regulations are not clear on whether section 24 of the Community Land Management Act will have retrospective application. Clarity on this point is required given a number of developers have existing proxies and powers of attorney granted by purchasers pursuant to their respective sale contracts prior to the changes to the Community Land Management Act becoming effective and retrospective application of this section will inhibit the ability of developers to complete existing developments where they will not have the benefit of a development contract in place.

Recommendation – Recommend that the Community Land Management Act clarify that the prohibition on proxies and powers of attorney under section 24 of the Community Land Management Act should not be retrospective.