Submission No 37

INQUIRY INTO DEVELOPMENT OF THE TRANSPORT ORIENTED DEVELOPMENT PROGRAM

Name: Professor Cathy Sherry

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SCHOOL OF LAW
Faculty of Arts

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Ms Sue Higgins MLC
Chair, Portfolio Committee No.7
Planning and Environment
NSW Legislative Council

Dear Ms Higgins

Re: Submission to Inquiry into the development of the Transport Oriented Development Program

I am a professor in the Law School at Macquarie University and on the executive of the research group, Smart Green Cities. I am the author of *Strata Title Property Rights: Private governance of multi-owned properties* (Routledge 2017), as well as multiple academic articles in the area.[1] I have been engaged by governments in Australia and overseas to advise on their laws in relation to high density development. I am a long-term Academic Fellow of the Australasian College of Strata Lawyers, the peak industry body for lawyers working in strata industry and am currently a member of the Strata and Building Consumer Roundtable, chaired by the NSW Building Commissioner, David Chandler.

Connecting the supply of housing to the long-term life of housing

The New South Wales government is to be congratulated on its concern with the provision of housing, including the focus on development around transport lines. At the outset of this submission, I want to make very clear that I am in favour of medium to high density development, including around transport. However, I am extremely concerned that to date, there has been almost exclusive focus on the initial creation of housing (supply) with little to no focus on the long-term life of that housing and the experience of individuals, families and communities living in it. It is a bit like focussing exclusively on a wedding or childbirth, with no thought to the decades of marriage or child rearing ahead. Like marriage or childbirth, the creation of housing is simply the first step in a long-term endeavour. If that first step is taken with limited understanding of the challenges to come, it will create an unstable foundation that is guaranteed to cause problems for citizens and governments.

[1] See Cathy Sherry – Research Outputs — Macquarie University (mq.edu.au)

Macquarie University
NSW 2109 Australia

Every time a large high rise building or master planned estate is built, extremely complex legal relationships and financial responsibilities are created that will be imposed on the ultimate owners of apartments for years to come; in other words, the next generation of homeowners with whom the government is concerned. However, few if any of the people making decisions in relation to high density developments – architects, designers, planners and local councils – fully understand the obligations they are creating. In saying that, I don't mean any disrespect to those professions. As a property lawyer with 30 years' experience and a good understanding of strata, community and stratum title, I struggle to understand the legal relationships. They are created by voluminous legal documents - contracts and registered dealings – and it is likely that the only people who understand them properly are the developer's lawyer and surveyor. By way of example, I listened to an excellent presentation at the Australasian College of Strata Lawyers conference last week by the lawyer and surveyor responsible for the development at Wentworth Point. It was mind bogglingly complicated, as evidenced by the fact that the contracts of sale for apartments were two lever arch folders thick. That is two lever arch folders of legal obligations created by the subdivision and associated contracts that will bind all owners on the purchase of their homes. Even if disclosed to purchasers, it is fanciful to think that they, or even their legal advisers, would understand the terms. That is the current (but not necessary) reality of the large-scale, high density developments that the government wants built around transport.

Strata title housing vs Non-strata title housing

There are two key differences between low-density housing and medium to high density housing. The first is physical form (which we can all see) and the second is legal form. Low density housing (freestanding houses, traditional semis and terraces) is legally simple. A house is constructed and sold by the developer to a purchaser. Once the purchase price is paid, the purchaser has no legal relationship with their vendor or their neighbours (other than minimal obligations under the *Dividing Fences Act 1991* (NSW) and the common law of nuisance). Owners are regulated by planning law, but nothing else. That is not an accident; it is a result of active choices made by parliaments and judges over centuries who strove to keep property titles simple to ensure their financial and social viability.[2]

In contrast, medium to high density housing is legally complex. Purchasers of apartments buy an individual lot, along with a share of common property. They immediately become legally bound to tens or hundreds of neighbours. They automatically become a member of a governing body corporate (owners corporation, neighbourhood or community association) which has extensive statutory rights and obligations that they must discharge. They are legally obliged to comply with and enforce privately created by-laws. They are regulated by hundreds of sections of legislation in the *Strata Schemes Development Act 2015* and the *Strata Schemes Management Act 2015*, along with their regulations and associated case law.

[2] C Sherry, *Strata Title Property Rights: Private governance of multi-owned properties*, Routledge, 2017, pp 47-72.

The ultimate authority and responsibility in all strata schemes does not rest with 'the strata' (there is no such thing); it rests with all of the owners, in other words, people who just wanted a home.

Master planned estates are even more complicated still. An apartment might be inside a high rise building, regulated by the strata Acts, inside a master planned estate, regulated by the *Community Land Development Act 2021* and the *Community Land Management Act 2021*. Apartments in Jacksons Landing or Breakfast Point are regulated this way. Individual owners are members of their own owners corporation, but the owners corporation is then a member of an overarching community association. Community title allows all of the roads, parks and infrastructure, that would otherwise be publicly owned, to be private property, controlled and paid for by individual homeowners.[3]

Increasing numbers of master planned estates are now created through stratum (as opposed to stratA) subdivision. These subdivisions are done under the Part 23, Division 3B of the *Conveyancing Act 1919* (NSW) and allow land and buildings to be subdivided into separate lots, some of which might be strata schemes and some of which might have a single commercial owner.[4] Examples of stratum subdivisions include Barangaroo, East Circular Quay (the 'Toaster') and Woolloomooloo Wharf. Woolloomooloo Wharf has three residential strata schemes, one commercial strata scheme, one retail strata scheme, a car park strata scheme, a marina strata scheme, and a non-strata hotel.

Developers and commercial owners like this form of subdivision because it allows commercial owners to sit outside residential strata schemes and most importantly, outside of the protections/limitations in the strata and community title legislation. Rather than having common property, these developments have 'shared facilities', (e.g. a foyer, car park, promenade, park, infrastructure, solar panels, trigeneration plants etc), which are areas of the estate or building that everyone can use or access but are inside the land title of one owner. The use and payment for those facilities is determined by a strata or building 'management statement' (SMS or BMS) which is almost wholly unregulated. It simply has to be 'fair' (cl 2(1)(e1), Sch 8A, *Conveyancing Act 1919*) and must be reviewed by the owners every five years to ensure it remains 'fair' (cl 2(1)(e2), Sch 8A, *Conveyancing Act 1919*). The fact that those provisions are in subclauses (e1) and (e2) tells us that the legislation had to be amended when it was discovered (predictably) that left to their own devices, developers and original landowners would not necessarily create payment obligations that were fair to all owners. To alter a BMS/SMS, all owners of parcels of land must agree (s196G(1)(a) of the *Conveyancing Act 1919*), and inevitably, any owner who is advantaged by the current costs schedule is not going to agree to a change. There is increasing dispute in relation to stratum subdivisions,

[3] C Sherry, *Strata Title Property Rights: Private governance of multi-owned properties*, Routledge, 2017, pp 30-33.
[4] C Sherry, *Strata Title Property Rights: Private governance of multi-owned properties*, Routledge, 2017, pp 33-36.

including Woolloomooloo Wharf,[5] and the notoriously unworkable, failed Italian Forum in Leichhardt.[6]

Some developments, like Wentworth Point combine strata title, community title and stratum subdivision, hence the two lever arch folder thick contracts.

There are two key drivers for this extraordinary legal complexity.

1. *Local councils not wanting to pay for infrastructure*
   Community title and stratum subdivision allow infrastructure that has traditionally been publicly owned to be privatised. This includes roads, parks, hydraulic and energy infrastructure. All of that space and facilities can be common property in a community scheme or shared facilities in a stratum subdivision. Councils are eager for developers to pay for these costs, and that will often be crucial to securing development consent. For example, my understanding is that the community title legal structure at Wentworth Point was necessary because Canada Bay Council did not want to take responsibility for the roads in the estate.

   However, developers never actually bear these costs; they pass them on to homeowners. People pay for the costs of infrastructure in their initial purchase prices and through on-going levies. The key attraction of complex strata, community and stratum titles is that they allow for the imposition of on-going costs on homeowners, that are not possible in ordinary subdivisions. This is because there is an ordinary rule of property law that you cannot sell a freehold fee simple and impose obligations to pay money on it. That is why when you buy a non-strata house or terrace, your only payments will be your purchase price to the vendor and council rates. In contrast, when you buy a property in a strata or community title scheme, you will have a statutory obligation to pay for the maintenance and repair of all common property, and in a stratum subdivision, obligations to pay for shared facilities. Having become a member of the body corporate (owners corporation, neighbourhood and/or community association) you will also become liable to pay for the contractual obligations of that separate legal entity.

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[5] *Walker Corporation Pty Ltd v The Owners - Strata Plan No 61618* [2022] NSWSC 1246 (16 September 2022)

[6] *Italian Forum Ltd v. Owners – Strata Plan 60919* [2012] NSWSC 89 and Ben Cubby and Natasha Chrysanthos, 'Rome's arches have stood for 2000 years. But in Sydney's Italian Forum, they're crumbling', Sydney Morning Herald, 29 August, 2022 < Syd https://www.smh.com.au/national/nsw/rome-s-arches-have-stood-for-2000-years-but-in-sydney-s-italian-forum-they-re-crumbling-20220826-p5bd40.htmlney's Italian Forum in state of ruin (smh.com.au) See also, *Owners Corporation Strata Plan 70672 v. The Trustees of the Roman Catholic Church for the Archdiocese of Sydney* [2011] NSWSC 973; Cathy Sherry, *Strata Title Property Rights: Private governance of multi-owned properties* (Routledge, 2017), 142-148; Cathy Sherry, 'Building management statements and strata management statements: unholy mixing of contract and property', (2013) 87(6) *Australian Law Journal* 393.

2. *On-going contractual obligations*

That brings us to the second reason these developments are so desirable to councils and developers, but so complicated and burdensome for owners. Although every square centimetre of land inside these developments is private property that must be managed and paid for by the owners, lay people are not capable of managing high rise buildings and entire estates on their own. Management requires serious professional expertise. That then compels people to pay for expensive professional services to help them manage their own homes. Those services include strata managers (to deal with the complex finances of the scheme, as well as management of the community), building managers (to help with cleaning and maintenance, control people moving in and out etc), garbage removal contracts, security contracts, landscaping contracts, EV charging station contracts, and increasingly deeply exploitative embedded network (energy and water) contracts. The bigger and more complex the development, the more contracts for professional services will be needed.

Some of these contracts are necessary and value for money. Some are unnecessary, excessive, or downright extortionate. Many exist because the people designing, planning, and approving these developments do not appreciate the legal consequences of the decisions they are making. For example, an architect or planner might want to include shared open space or shared renewable energy infrastructure, quite sensibly thinking that it is an efficient and beneficial provision of services. However, they may have no understanding of the body corporate meetings, levies and professional contracts that will be needed for the on-going management and financing of those facilities by homeowners.

Alternatively, some people, namely developers and service providers, understand perfectly well the costs of facilities to homeowners and are actively making a profit from them. For example, developers are now routinely having electricity and water infrastructure installed in developments by embedded network operators for free, in return for the owners corporation being made to enter into a long-term contract with the embedded network operator. Apartment owners are not only paying excessive bills for energy and water, but they are also literally being made to pay for the infrastructure twice – once in their contracts of sale (no developer discounts the sale price of an apartment because they were given infrastructure for free) and again through the capital costs included in the embedded network contract with the owners corporation.[7]

[7] C Sherry, 'Minns must stop this energy rort before development binge', Sydney Morning Herald, 14 November, 2023; New South Wales Legislative Assembly Committee on Law and Safety, *Embedded Networks in New South Wales*, Report 3/57, November 2022).

The Solution

We cannot avoid medium to high density development, nor its legal and financial complexity. That complexity is inherent in the nature of the development – a single building co-owned and managed by multiple people. However, it is possible to minimise legal and financial complexity with careful consideration of the law at the point of planning and development.

First, the smaller the building, the easier and cheaper it will be for homeowners and tenants. While a high rise tower may give us more bang for our buck, so to speak, in relation to supply, that needs to be balanced with the tower's legal, financial and social complexity. There is a reason apartment buildings did not occupy much community or government consciousness for most of the 20th century. They were modest, three storey walk ups that provided people with manageable, affordable homes. The bigger the building, the more ongoing costs it will create, most obviously those associated with lifts and plant and equipment in the basement. To the extent that we are able to build medium density apartments, we should do so.

Second, whether high or medium density, legally apartment buildings should be stand-alone developments whenever possible. While they might form part of a planned estate in which buildings and facilities have been sited optimally, they should not be legally yoked together through community title or stratum subdivisions. That creates extraordinarily complicated and expensive legal structures that people who just wanted a home have to pay for. That is deeply unequitable for the next generation.

Third, to avoid complex legal structures we need state governments and councils to take responsibility for open space and infrastructure. Government needs to understand that it is not passing the costs on to developers; it is passing the costs on to young homeowners and tenants. The current rise in bankruptcies and loss of homes from unpaid strata levies should sound a warning to government in relation to developments that by definition will need high, and thus potentially unaffordable, levies.

Fourth, government must regulate the legal structures and contracts the private sector is creating. Developers have one motivation – to make money. That is entirely acceptable; they are private businesses. It is not their job to ensure that the housing of the future is manageable by owners and is equitable. That is the job of government. However, government cannot regulate the legal structures that the private sector is creating if it does not understand them. Government understanding is currently insufficient for multiple reasons, *none* of which relate to a lack of commitment on the part of public servants:

1. The Department of Planning, Housing and Infrastructure currently only seems to have expertise in relation to public planning law, not private property law specifically the law that governs the on-going life of strata, community, and stratum developments. As this submission demonstrates, *planning* housing and infrastructure is only half of the

picture if that housing and infrastructure is inside complex property titles. The on-going ownership, management and financial obligations of that housing and infrastructure are governed by private property law.

2. NSW Fair Trading is not the appropriate department to bear responsibility for strata, community, and stratum subdivisions. While its staff, in particular Commissioner John Minns, are excellent, strata, community and stratum title are not about *trading.* They relate to people simply *living* in their homes. To the extent that that involves owners trading – selling or leasing their homes – the general law covers those transactions (e.g. the *Residential Tenancies Act 2010* covers leasing whether an apartment or a freestanding house).
3. With an ever-increasing proportion of the population living in apartments, NSW needs a Department of Strata Titles responsible for both the development and on-going life of complex housing. It could work with the Department of Planning to ensure that new high density housing developments are fair and manageable by future owners. It could assist the homeowners, who simply want a home, but in the process find themselves responsible for a large building and community.
4. The government needs more strata lawyers, not policy makers. Strata title is profoundly and unavoidably legal in a way that other property ownership is not. Strata schemes exist by virtue of legislation, and the responsibilities and relationships of owners are determined by legislation. That is law, not policy. One of the reasons the strata title legislation has become so long is that it has had insufficient expert legal oversight. I was invited to the roundtable discussions during the 2015 reenactment of the legislation. Stakeholders made their positions clear, but there was no overarching rigorous legal assessment of whether those positions were sensible or even legally correct.
5. A lack of legal expertise and knowledge of strata title is sadly evident in work like the NSW Productivity Commission's three reports on housing affordability. The Commission made one recommendation – build higher and at density. All of that development must be strata title and yet in three reports the words 'strata title' were not mentioned once.[8] It is clear that when making an economic calculation about the

[8] As an important aside, some of the research done by the Productivity Commission was concerning. Particularly concerning was their argument in favour of high density housing to give families access to 'high-scoring' schools: NSW Productivity Commission 'What we gain by building more homes in the right places', February 2024, pp 17-20. This argument revealed an absence of understanding or research on school choice theory, its effects on 'residual' schools and their students, as well as the obvious fact that it is not schools that 'score' well, but their students. Children from middle class and migrant backgrounds do well at school. If all of those children are put in the same schools, private or public, the school will do well. The Productivity Commission was simply arguing in favour of greater segregation of children by ethnicity and income (note that the SES of children in selective schools is on par with high fee paying private schools). See C

benefits of high density development, the Commission did not factor in the on-going costs of large-scale development to homeowners, tenants or government (tribunals, commissioners, law reform etc).

Conclusion

We need high density development and placing that development around transport has great benefits. However, the planning and construction of developments must be done with proper knowledge and consideration of the legal and financial obligations that will be imposed on future homeowners.

The last time the New South Wales government made a concerted effort to speed up high density development was prior to the Sydney Olympics. The Carr government replaced local council certifiers with private certifiers to ensure buildings could be completed quickly. That led to 25 years of defective building which has cost the community and government billions of dollars and destroyed many people's lives.

In its concern for housing affordability, the current government needs to ensure it does not make the same kinds of mistakes. Today, the risk is that in an effort to increase supply (which is not in fact guaranteed by planning approval), we will end up with huge high rise towers and estates around transport lines that are legally and financially unmanageable for their owners and residents. With proper understanding of strata, community, and stratum titles, this could be avoided.

Yours sincerely,

Professor Cathy Sherry

Macquarie Law School, Centre for Environmental Law and Smart Green Cities

Sherry and H Easthope, "Under-supply of Schooling in the Gentrified and Regenerated Inner City', (2016) 56 *Cities* 16-23.