IN-SITE Bulletin

July, 2013

The Residential (Land Lease) Communities Draft Bill— Updates and Changes.

Once the Draft Bill was released, the Government provided for a period of time during which submissions would be accepted on its content. As already stated, there is a lot of good in the Draft Bill, but the sections that have had the most publicity are the ones that have caused the most concern.

The Office of Fair Trading has received approximately 1,200 submissions from community groups, stake holders, and individual park residents. ARPRA has voiced its protests against those parts of the Bill that give the most cause for concern, in the loudest possible terms.

As a result of the submissions received, the government has amended various sections of the Draft. Some of those sections and information on the amendments are contained in this version of In-Site.

Section 5.15 Service, Facilities and Improvements— This Section concerns an entirely new concept in which park residents can vote on whether or not they wish to have a new facility or service provided to the home owners of a community. Subsection (9) of 5.15 states that the levy can be imposed only 75% of residents who participate in the vote, actually vote for it. This is a drafting error that means that all home owners could end up with a financial obligation imposed on them by a minimum of participants. The Government has advised that the Bill has been amended to state that 75% of home owners in a community must vote for it, not just 75% of those who turn up to a meeting. If a special levy resolution is passed by at least 75% of the home owners, the community operator must be notified within 90 days of the vote. A right to appeal to the Tribunal will be provided, although it is unclear if this equally available to both home owners and operators. Collected levies will have to be held in a trust account.

Residential Site definition— This definition contains a drafting error which created a divide between short-term and long-term sites that was unintentional. The Government has committed to ensuring consumer protection for home owners is stronger than ever, and has given us its assurance that this error will be corrected, and operators will not be allowed to terminate agreements by changing the use of the site in this manner.

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10.5 Additional Occupants—Subsection 5 of this section allows for home owners to include partners or spouses and their children, to reside with them in their home without having to secure the community operator's consent first. This has raised a lot of concern with home owners, who are worried that the "over 50's" community they bought into will change. There has been a good deal of protest at the idea that children will be allowed to reside in a community.

The Government has amended this Section to allow automatic consent for spouses or partners only, and not their children. A community operator will be able to withhold the consent that would allow children to become occupants, provided that the age restrictions that relate to the community are disclosed up front. In special circumstances, a home owner will be able to ask that a grandchild, for example, can come and stay, but only for short-term care.

6.15 Mediation— Subsection (2) states that an objection to a site fee increase must be applied for by at least 25% of the home owners who received the increase notice. The Government has advised that this 25% threshold is to remain, however, the Minister for Fair Trading will have the authority to vary this requirement in exceptional circumstances. For example, perhaps a number of home owners are away from home at the time the vote is taken, and so they will not be able to vote, despite them receiving an increase notice.

10.8—Payment of part of sale price to operator— This Section has perhaps been the most contentious of all. Currently the Draft Bill does not provide for an alternative, and that is the main problem. If the community operator offers a site agreement with a capital gains share clause which the purchaser does not want, the operator can refuse to enter into a site agreement with that purchaser, and if the sale is lost because of this, it cannot be considered interference with the sale, as it is the operator's right to insist on a capital gains clause. It appears that this section will remain in the Bill, despite all the protests, but will be comprehensively modified to ensure that purchasers will be given a clear choice.

The disclosure documents provided to purchasers must state that if the purchaser does not wish to have a capital gains clause, then the operator *must* provide them with a standard form of agreement without that clause. An operator who then refuses to provide a standard form of agreement *will* be guilty of interfering with the sale.

If an operator does not disclose the standard form option to a purchaser, then any later challenge to the payment will be subject to the Australian Consumer Law (the ACL) as an unfair term. There will have to be a signed declaration, with a certificate signed by both parties at the time the agreement was entered into. If the operator cannot subsequently produce that certificate at a future time when claiming a capital gains share, the home seller will not have to pay the share.

Current residents already have a site agreement and cannot be forced into having a capital gains share clause included in their agreement. However, if they wish to enter into such an arrangement in exchange for a lower site fee, for example, they will be able to do so. It may be that future home owners only wish to enter into a capital gains share agreement in exchange for lower site fees, or some other benefit. Because there will be choice, the market place will ultimately decide if capital gains clauses are popular or not. It may be that no one ever takes one up, or it may be that the enticement of lower site fees is attractive to some. Either way, it will be up to future home owners to decide, because they are the ones who will choose.

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