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Accommodating children's activities in the shared spaces of high density and master planned developments

CATHY SHERRY

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UNSW Law
UNSW Sydney NSW 2052 Australia

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Cathy Sherry

Introduction

When we consider the impact of the built environment on children and whether facilities meet their needs, we are usually examining public open space – public parks, streets, wild spaces, outdoor malls. Public open space is essential for children in cities for two clear reasons: the space is open, allowing activities and a sense of freedom that the smaller, indoor spaces which abound in cities prohibit, and it is public, meaning that at least theoretically, it is accessible by all, regardless of age, class, or wealth.

It is easy to assume that open space in cities is by definition public, but that is not necessarily the case. The great public parks of Europe typically began life as private royal hunting grounds; London's squares were almost all built as private gardens accessible only by adjoining land-owners (Summerson 1978), and this model was replicated overseas in developments like Gramercy Park in New York. However, the growth of civil, democratic society from the 17th century onwards forced the aristocracy to share their open urban spaces with the public and provided incentives for the construction of new public open space. Central Park in New York was audacious not just in its scale and form, but in its commitment to provide recreational space to the diverse masses of the city (Miller 2003). In London, during World War II, the iron railings of private squares were removed to be used for ammunition, causing George Orwell to celebrate that "the squares lay open, and their sacred turf was trodden by the feet of working-class children, a sight to make dividend-drawers [ground landlords] gnash their false teeth" (Orwell 1944, pp.175-6). In the post-War period, many railings were not replaced, leaving the squares permanently accessible to the public. In

Australia, strong government commitment to freehold housing meant that private open space was always rare, and during the 20th century, suburb after suburb was developed with parks, playing fields and bushland, in public ownership and accessible by all.

PICTURE OF HEFFRON PARK, MAROUBRA

Figure 1: Heffron Park, Maroubra, Sydney, a typical publicly-owned and freely accessible recreation space in an Australian suburb

Commitment to public open space grew throughout the 20th century, possibly reaching its zenith in 1970s. By the 1980s doubts began to grow about the ability of government to fund a range of public services, from health to schools to parks and other open space, and in an attempt to fill the gap, policies of privatization were implemented in the United Kingdom, the United States, and to a lesser extent in Australia. In the oft-quoted phrase of Osborne and Gaebler, it was decided that government should steer, not row (Osborne & Gaebler 1992).

Privatization affected city construction and urban governance in four main ways: contracting out, public-private-partnerships, service shedding and 'club forms'[1] of service delivery (Warner 2012). While the first two are relatively common in Australia today, and the third remains rare, the fourth--club forms of service delivery--is on the rise. It is the form of privatization that is most likely to impact the availability of public open space for children, particularly in residential settings.

Privatization of open space through 'clubs form of service delivery' has occurred in Australia as a result of a shift in residential development from freestanding houses in largely unregulated subdivisions to medium and high density developments and master planned estates. Changes in residential development have primarily been driven by state government

urban consolidation policies, to combat suburban sprawl, but the legal form used for new developments – strata and community title – has privatizing effects.

This chapter will begin by setting out the law in relation to high-rise and master planned estates in Australia. The law, more specifically property law, is significant because it determines the public or private nature of open space, and if the latter, who can use that space and how. By examining the law we can also identify some of the unintended and unanticipated social consequences of high rise and master planned development. The chapter will then explore the predicted versus actual presence of children in high rise and master planned estates, and the consequent provision or lack of provision of space for children's outdoor activities. Then, two specific case studies will be presented on the effect that legal form, in particular privately written by-laws, can have on children's activities in share spaces. The chapter will conclude by discussing the necessity for planners, governments and courts to be more mindful of the profound social effects on children who reside with their families in privatized development.

The legal structure of apartments and master planned estates

While it may seem counterintuitive, to explain the privatization of open space in Australia, we have to start with high-density residential development. This is because high-density apartments are a rapidly increasing proportion of the housing market, and because even when new housing remains low or medium-density, developers frequently use the same legal form that they use for high density construction. That is, low, medium and high density housing in Australia is increasingly being constructed as strata or community title.

Strata title, like condominiums in the United States, sectional title in South Africa, unit titles in New Zealand, and the commonhold in the United Kingdom, allows for the subdivision of

buildings into individually owned freehold apartments and collectively owned common property. Common property is typically halls, foyers, lifts, gardens and carparks. Both individual apartments and common property are regulated by by-laws. These are not public law, like council by-laws, but rules chosen by private citizens specific to each building. By-laws are initially chosen by developers, who can either use 'model' by-laws included in the legislation, or bespoke by-laws drafted by their lawyer. Either way, with appropriate majority vote, by-laws can subsequently be changed by the body corporate, the governing body made up of all owners (not tenants). There is little legislative restriction on the content of by-laws in most states, with the only requirement that they relate to individual apartments or common property in some way (Sherry 2014a). By-laws typically regulate noise, garbage disposal, parking and pets, but they can also be more detailed and intrusive, regulating window coverings, balcony furniture, and importantly for our purposes, how and where children can play, with or without supervision.

Strata title legislation was first enacted in Australia in the early 1960s to facilitate apartment construction. By the late 1960s, Australian property developers wanted to be able to expand into the kind of master planned estates they had seen in America; low-rise housing with small private yards, quiet cul-de-sac streets and commonly owned facilities, maintained and run by a private association of owners, a 'homeowner association' (McKenzie 1994). However, a divergence in the common law of Australia and United States made it impossible to create the necessary legal structures (Sherry 2014b) and so developers pressured governments to solve the problem by extending the strata title legislation to low-rise subdivisions. This allowed for the subdivision of suburban areas into individually owned housing lots and collectively owned open space and infrastructure, all governed by a body corporate administering privately-written by-laws, just like an apartment complex. Queensland was the first state to facilitate developers' desires, with legislation in the early 1970s, and other states eventually

followed suit (Sherry 2014b). In New South Wales, these subdivisions are known as 'community title'.[2] While some community title estates are low-rise housing, some contain a mix of low-, medium- and high-rise, while others are a conglomeration of high-rise strata schemes.

This new form of residential development has been adopted enthusiastically by developers and government alike. Developers are eager to use community title, as extensive collectively-owned property like pools, gyms, and country clubs can be advertised as 'exclusive', 'prestigious' or 'resort-style living'. Low-rise developments are frequently marketed to families, with a neo-traditional emphasis on community, friendships and education.

Governments are enthusiastic about community title because it is a form of privatization through 'club service delivery', noted above. The body corporate is effectively a 'club' which people join by acquiring property in the estate. They have access to the assets of the club, such as roads, parks, sewers, bushland and sporting facilities, as well as services, such as eg telecommunications, social organization, street landscaping services, relieving government of the obligation to provide these goods publicly. Community title not only removes initial infrastructure costs from the public purse, but almost all costs in perpetuity, because all assets are privately owned, maintained and insured. The theory that has been propounded in the United States, although never explicitly in Australia, is that purchasers can 'shop' between different private residential estates, choosing the one that best provides the services and facilities they desire (Buchanan 1965; Foldvary 2001; Tiebout 1956). 'Club goods theory' dovetails with 'public choice theory', a central tenet of privatization, that individuals are better placed to choose what is right for them than government. Government's role should be to facilitate the more efficient market provision of goods and services, from which individuals can freely choose; therefore, government is steering, not rowing.

The spread of community title in Australia is arguably privatization by stealth. The legal structure is extremely complicated and research suggests that many purchasers do not understand the complexity of the title they are buying (Goodman & Douglas 2010). Community title sale contracts typically run to well over a hundred pages, 'disclosing' the by-laws that regulate construction, use and maintenance of common property and/or private homes, as well as financially onerous contracts for on-going management of the community (Sherry 2010). It is likely that many purchasers do not appreciate the significance of these documents, nor do they fully understand that the tennis courts, swimming pool, and 690 acre 'community forest' that might form part of the marketing for the estate, are their private property; they just happen to own them with 300 other people. As a result, they have to collectively manage that open space, pay for it and insure it, although their use will be circumscribed by any developer-made or collectively-agreed rules.

While local and state governments are no doubt aware of the privatizing effect of community title and the benefit to their bottom lines, government has arguably not appreciated the social, economic and political consequences of privatized estates. This is consistent with research on 'privatopias' in the United States, where it has been argued that homeowner associations have created a host of unanticipated problems in urban management (McKenzie 1994, 2011).

One of the most significant problems in the United States, which is also present in Australia (Sherry 2014a), is a failure by government and the judiciary to anticipate the implications of allowing private citizens to govern their neighbors via bodies corporate. Those implications are firstly, that traditionally unregulated space within the home and minimally regulated public space outside the home have both become subject to detailed rules that govern behaviour and use. Secondly, that those rules are written by private citizens with no expertise

in governance or land use, and no compulsion to act other than in their own interests.[3] Surveying half a century of privatized residential development in the United States, McKenzie (2011, p.14) concluded that:

> [one] point cannot be overemphasized: the entire institution of common interest housing rests on the volunteer directors, yet they are unpaid, untrained, often unqualified, and almost entirely unsupported by the governments whose work they are often doing.

This point is equally applicable to Australia. While strata and community title developments might be created by professional planners and approved by governments with reference to community needs, any open or recreational space that has been created for children's well-being will ultimately be privately owned and controlled by a body corporate, made up of citizens with no expertise in child development and no legal compulsion to consider children's well-being when writing rules for the use of shared open space. The two case studies presented below will illustrate this phenomenon, whereby the intended benefits of open space for children can be effectively be nullified by private regulation restricting use.

The presence of children in strata and community title developments

The extent to which children are impacted by the privatizing effects of strata and community title depends on their presence in these forms of housing. Low-rise community title estates on the urban fringe, like ordinary residential subdivisions in the same areas, are planned for, and marketed to families with children, who continue to express strong preferences for freestanding, low density housing (Yates 2001). As a result, there are significant numbers of children in these estates. For example, the new, predominantly community title residential

developments on the northern end of the Gold Coast in Queensland, are known as 'Nappy Valley' because of the exceptionally high numbers of young children.

Children's presence in strata title apartments is more complicated. Unlike Europe, where high rise housing estates were planned specifically for families, particularly in the post-War period, apartments were never considered ideal or even acceptable housing for families in Australia. Some low and high rise apartments were built in the public housing sector in the 20th century, but government remained equivocal about their benefits (Butler-Bowden 2000). In the much larger private housing sector, apartments constituted a minority of housing stock and were never planned or marketed to families (Butler-Bowden 2000).

In the late 20th century, pursuant to state urban consolidation policies, apartment construction in Australia's largest cities boomed, however this coincided with declining fertility and a sharp increase in smaller households. As a result, it was assumed that new apartment stock would be taken up by sole person and couple households and that families would remain in the low-rise suburbs. As Woolcock et al. (2010, p.183) note:

> Planners are planning for cities to accommodate singles, couples and the elderly. As far as the planners are concerned, family housing is already oversupplied in this new ageing city and needs little encouragement. As a consequence, contemporary strategic planning has almost become child-blind, with the new higher density centres being built essentially for the childless in mind.

'Child-blind' planning of new apartments is a continuation of a long-standing pattern in Australian apartment construction. While planners have been correct in anticipating a continued preference for low-rise, freestanding housing by families, the preference is not

universal, nor can all families make choices that are consistent with their preference. As a result, there are increasing numbers of children living in apartments in Australian cities. For example, Easthope and Tice (2011) found that between 2001-2006, the proportion of couple families with children in the new high density residential areas on Sydney's redeveloped Olympic site jumped from 13% to 31%, while the proportion of couples without children fell from 46% to 36% (Easthope & Tice 2011). Nearby, in a new high- and medium-density residential development called Liberty Grove, families with children now constitute the largest group on the estate, including a significant proportion of families in which one or both parents were born in China, Korea or India (Randolph et al. 2005). In addition to new developments, there are families with children living in Sydney's ageing apartment stock, built in the pre- and post-War period. These families are predominantly low income, recent migrant families with young children, renting their homes (Randolph 2006).

As Sydney's apartment stock, both old and new, was built without children in mind, the physical form of apartment buildings typically fail to meet children's needs. Firstly, apartments are overwhelmingly one or two bedrooms, with larger three or four bedroom family apartments a rarity. Second, few have any outdoor play space. Many apartment buildings in Sydney were built by small builders, block by block, on former single housing sites, with little planning control (Butler-Bowden 2000). Consequently, buildings typically take up the entire site, with open space only left for cars.

Figure 2: 1970s apartment blocks in Eastlakes, Sydney

The exception to this general rule are the new medium- and high-density developments that have been constructed on large disused industrial or infrastructure sites, pursuant to policies of spot densification. While these apartments remain overwhelmingly one and two bedroom, buildings have been more rationally positioned in relation to each other, with significant open space and facilities between. Liberty Grove, the new residential development noted above, has two swimming pools, two tennis courts, a gymnasium, a basketball court, two playgrounds, two large parks, four small parks and a community hall serving a total population of 2000 in 760 apartments.

While these contemporary apartment developments are a vast improvement on the largely unplanned construction of buildings on discrete, single housing blocks, the legal structure of these developments can present significant impediments to the use of open space and facilities. The individual apartment blocks are strata title and thus internally regulated by

private by-laws, and the entire estate is invariably community title, making the parks and sporting facilities private, not public property, also regulated by by-laws. All of these by-laws can be written by the developer and subsequent community, with no reference to children's well-being.

PICTURE OF LIBERTY GROVE

Figure 3: Liberty Grove community scheme

Case studies on by-laws restricting children's activities in shared spaces

It is axiomatic that play, in the broadest sense of the word, is essential to children's well-being and optimal development. There is a direct relationship between physically active play and children's health (Gleave & Cole-Hamilton 2012), particularly as a factor in avoiding childhood and adult obesity (Reilly & Kelly 2011). Play is essential for cognitive development, contributing to vocabulary, problem solving skills, self-confidence, motivation and awareness of others. Imaginative play is crucial for lateral and creative thinking and risk taking play minimizes anxiety (Gleave & Cole-Hamilton 2012). In addition to playgrounds, children need private play spaces, away from parents' supervising eyes; private cubby houses, secret trees, even alleys are important for children to develop mastery over their own lives (Lester & Russell 2010). Finally, children need 'community play', that is, play in public spaces, which aids the formation of friendships and networks as well as helping children to learn the rules of social life to navigate unfamiliar environments and to develop public trust (Gleave & Cole-Hamilton 2012).

It is equally axiomatic that children must have *somewhere* to play and as noted above, in strata and community title developments, as well as their overseas counterparts, that space

will be private property. It may be the private space of their own home which, if it is an apartment, is likely to be small with little or no outdoor space. Alternatively, the play space will be the collectively-owned, but equally private property of the strata or community scheme. All of that private property will be regulated by private by-laws.

The litigation in *The Owners of 111 The Broadview Landsdale – Survey Strata Plan 38894 v Colavecchio* [2004] WASTR 15 ('*Colavecchio*') provides a clear insight into the power that by-laws have to compromise children's play. The site of the dispute was Kingsdene Mews, a low-rise strata title estate in Perth, Australia with common property grassed nature strips and a circular cul-de-sac road around a central lawn and garden. The grassed pavements and center lawn and garden were ideal open play space for children, and the cul-de-sac road, safe to ride bikes or skateboards. However, the by-laws for Kingsdene Mews included a blanket ban on children playing on *any* common property. While model by-laws often prohibit children playing in areas that might be a danger, this by-law even prohibited children playing on the grassed pavements or central lawn. It prohibited all play, whether active or passive.

A resident owner alleged that a tenant's 8- and 10-year-old children had damaged gardens and made undue noise on common property and within their own yard. Ten owners supported the application and 10 opposed it, with the evidence of each camp revealing conflicting perceptions of appropriate use of property and varying perception of children's needs. Those supporting the application claimed to have been 'plagued' by the bouncing of basketballs, shouting and screaming, along with the playing of tennis on grassed areas, as well as repeated playing of popular songs. Other supporters of the application complained about the children riding their bikes, chasing each other, and laughing and talking loudly.

Opponents of the application argued that the children of the tenants "did nothing that any children their age could and should not have been doing". They noted that private yards were small, that it was reasonable for children to use the common property as a result, and that noise was an inevitable part of "children's healthy play" (*Colavecchio*, 2004, [39]).

The application was dismissed, but only because the evidence was conflicting and it was not clear if an owner could be fined for tenants' actions. There was no consideration of whether by-laws limiting or banning children's play might be harmful and should be disallowed as a result. In fairness to the decision-maker, the legislation gave him no power to consider the effect of private by-laws on children's, or anyone else's well-being. Australian legislatures have assumed that it is entirely beneficial for communities to choose their own rules and have consequently placed few limits on communities' or developers' powers to write by-laws (Sherry 2014a).

However, as the case demonstrates, developers and communities do not always choose wisely;[4] they can create rules that are inimical to children's well-being. With three bedroom homes located in a suburban cul-de-sac, the development was clearly intended for families and public planning law would have required sufficient open space for recreation. However, as a strata title development, all of that space was privately owned and its benefits could be nullified by the private by-law making power.

The case also highlights that choices about the multiple and conflicting uses of open space must be made. The complainants valued the open space for its visual amenity, while the children, and presumably their parents, valued the space for physical recreation and socialising. The strata title legal structure allowed the developer (and subsequent owners with sufficient support) to determine which use prevailed, with no requirement to consider the

objective value of each use and whether play, with the social, cognitive, physical and emotional benefits it provides to children, should weigh higher.

The conflicting uses and benefits of open space are also evident in Liberty Grove, the community title scheme, noted above. Liberty Grove is a large master planned estate, containing 12 medium- to high-density strata schemes, as well as extensive common property, comprising pools, tennis and basketball courts, playgrounds, and multiple parks. Liberty Grove's by-laws include limited regulation of common property open space. They reasonably ban 'organized' sports without written approval of the Executive Committee, and require children under 12 to be accompanied by an adult in the pools. Not being a gated community, the by-laws also require the body corporate to allow members of the public to use the 'public open space' and 'communal open space' for 'passive recreation'. This provision was included as a condition of development consent and cannot be altered without the local council's approval, indicating that at least in the public planning stage and in relation to non-residents, the local council was mindful of the potential effect of by-laws on the use of open space. However, with little legal limit on a body corporate's power to alter other by-laws, in 2010, a reference to the 'Liberty Grove Community Policies Handbook' was added to Liberty Grove's by-laws.

The Handbook provides that "[c]hildren under 13 must be accompanied and supervised by an adult at all times while using any of the community facilities on the estate" and "[s]upervision of children must be carried out by an adult resident of age 21 or older" (Liberty Grove Community Policies Handbook 2010, p.7). The change was most likely inspired by liability concerns and a desire to reduce insurance premiums; insurance being a substantial burden of owning private property. The change no doubt met the needs of adults who could still use the space freely, at less cost, but not families and children. A group of 10

or 12 year olds are not allowed to shoot hoops at the basketball court, kick a ball around the parks or play tag without supervision. As the by-law refers to 'using' any community facility, they are not even permitted to sit on the grass and talk. If their 20-year-old sister offered to watch them, this would not be sufficient, nor would their non-resident grandfather. Liberty Grove has a privately-imposed speed limit of 20 km an hour and the most cautious parent would let their 10 or 12 year old go to the local park unsupervised. However, this is impermissible as a result of rules created by their neighbors.

Unlike the public planning process which addresses social needs and includes an objective of providing "convenient open space and recreational opportunities for the residents of multi-unit housing projects" (Liberty Grove DCP 2007, p.10), there is no legal compulsion for the private body corporate to consider these issues or weigh the proven benefits of outdoor activity for children when creating rules regulating open space. Despite the fact that parks and sporting facilities are essential for active play when children live in apartments, and that Liberty Grove's high proportion of children from Asian migrant backgrounds (Randolph 2005) are at greater risk of childhood obesity (Hardy 2010), the body corporate is free to limit any outdoor activities of children. Strata and community title legislation does not require the ever growing number of bodies corporate to consider children's well-being when creating by-laws, nor does it allow courts or tribunals to review and repeal by-laws on the basis that they are harmful to children. As long as a community agrees to the by-law by appropriate majority, it is valid.

Conclusion

This chapter has documented the privatization of open space in Australia through the increase in medium to high density residential development. Although primarily motivated by policies

of urban consolidation, the legal form of these developments – strata and community title – inevitably creates privately-owned open space which will be regulated by private by-laws.

Owing to planners' assumptions that children will not live in high density apartments, most strata schemes are built with negligible amounts of shared open space, let alone areas designated for children's use. However, even when development occurs on large master planned estates and recreation space is included in accordance with public planning law, private by-laws can nullify the benefits of that space for children. There is almost no limit on the content of by-laws in most states and by-laws can and do ban or restrict children's activities. Further, because of simplistic assumptions by legislatures about the benefits of collectively and/or voluntarily agreed community rules, courts and tribunals are given no power to invalidate by-laws on the grounds that they are inimical to children's and thus the wider community's well-being.

If Australian cities continue to pursue policies of urban consolidation, we are going to have to think more critically and deeply about their impact on children. Planners and government will need to appreciate the consequences of the legal form that is being used to consolidate cities. Strata and community title do not simply pack more housing into smaller spaces, they are a form of 'club service delivery' and give private citizens the power to regulate their neighbors. Legislatures and courts are going to have to confront the reality that there are limits to the benefits of voluntarily chosen private rules. While it makes sense for people to control their own environment, given unlimited power to do so, choices can be made that harm others. Finally, conflicts and choices in relation to land use are inevitable and if we value the well-being of children we need the legal means to prioritize children in those conflicts.

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[1] ‘Club goods theory’ has its genesis in James Buchanan’s seminal article, ‘An economic theory of clubs’, (Buchanan, 1965). Buchanan was attempting to create a calculation for the optimal size of a club, (that is, a voluntary group of people), to provide private goods or services. His ideas were taken up by economists, legal and public policy writers interested in the benefits of collective private, rather than public provision of goods and services.

[2] While terminology varies around the country and across the globe, the term ‘community title’ will be used here to refer to master planned estates with common property and a governing body corporate. ‘Community title’ is the equivalent of homeowner associations or common interest developments in the United States. It is essential to differentiate these developments from master planned estates that do not have any governing body or enforceable by-laws; these are still common in Australia.

[3] In New South Wales, for example, courts have confirmed that when voting on a body corporate, individual owners are entitled to vote in their own interests: *Houghton v Immer (No 155) Pty Ltd* (1997) 44 NSWLR 46, 52-3.

[4] The clearest demonstration of the harm that can be caused by unrestrained private regulation of land are the racially restrictive covenants that were endemic in the United States in the twentieth century, limiting land ownership and occupation to ‘people of the Caucasian race’, (McKenzie 1994, pp 67-78).