Body Corporate Rules: Tensions

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I. Introduction

The Unit Titles Act 1972 (UTA) is described in its long title as:

> An Act to facilitate the subdivision of land into units that are to be owned by individual proprietors, and common property that is to be owned by all the unit proprietors as tenants in common, and to provide for the use and management of the units and common property.

This long title makes it clear that the UTA reflects both individual and collective considerations: units are to be owned by individual proprietors; while common property is to be held collectively.

But there is much more to the UTA than is set out in the long title. This article will show that unit title ownership involves an inherent tension between individual and collective considerations: not just in respect of terms of individual ownership of units as against collective ownership of common property, but in many other ways as well. This tension is most apparent in the notion that individual owners own their units in a 'private' capacity, but these owners collectively constitute a body corporate, which is subject to 'public' considerations such as administrative law rules. In particular, this article examines a number of recent cases on the validity of body corporate rules, rules which regulate the relationship between proprietors and the body corporate. This analysis highlights the factors that make unit title ownership very different from ownership of an estate in fee simple, and shows that the tension between individual and collective considerations in unit title ownership is not altogether a bad thing, as the protection of the collective and democratic nature of body corporate decision making through the UTA has also helped to protect the integrity of individual unit ownership and the rights of individual unit owners.

II. Conceptions of Property

If unit title ownership involves a tension between individual and collective considerations, then to understand this tension it is helpful to examine some commentary on the nature of private property and its relationship to collective and public property. 'Property' is a complex term that today is almost universally understood to involve both individual and collective (or public and private) considerations.

The starting point is Blackstone. In his *Commentaries on the Laws of England*, first published between 1765 and 1769, William Blackstone observed that:[1]

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1 Sir William Blackstone, Commentaries on the Laws of England (New ed, 1857) Vol II, 1.

> There is nothing which so generally strikes the imagination and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.

Despite – or perhaps because of – his rather heroic and colorful language, Blackstone is hardly a popular jurist these days. Indeed, criticism of passages such as this has come from a number of directions. While acknowledging that Blackstone's *Commentaries* (as the four-book work is commonly known) is virtually the only systematic attempt to present a theory of the whole common law system, critical legal studies writer Duncan Kennedy regarded Blackstone's 'great vice' (though one among many) as being his disregard for the ambiguities that exist in the use of the word 'property'. 'Property', in Kennedy's view, could mean either a thing or a right – and often a right in a thing (such as an easement over land), or perhaps even any right at all.[2] In Kennedy's words:[3]

> If property means 'absolute dominion over the external things of this world', then it is only a small part of private law.... If property simply means 'right', then it includes all of private law. There is nothing that compels us to adopt one particular usage or categorical scheme rather than another. But it *is* essential to use the usage adopted consistently.

Kennedy, concerned as he was with the structure of Blackstone's thought, was unhappy with the arbitrary nature of much of the way in which Blackstone categorized legal concepts and ideas. But others have criticised Blackstone from differing perspectives. Kevin and Susan Gray, for example, have accused Blackstone of treating property as 'a solid, reassuringly three-dimensional concept … absolute, unequivocal and quite possibly cosmic in its implications'[4] – a narrower view of Blackstone's treatment of the topic than Kennedy, perhaps, but no less withering: the Grays go on to note that '[m]odern property theory has long such disavowed such naīve accounts .... [accepting] that 'property' is not a thing or a resource, but a power relationship'.[5] In fact, the Grays argue:[6]

> It is beginning to be agreed that the power relationship implicit in 'property' is not *absolute* but *relative*: there may well be *gradations* of 'property' in a resource .... Far from being a monolithic notion of standard content and invariable intensity, 'property' has come to be viewed as having an almost infinitely divisible and commensurable quality.

What Kennedy and the Grays are saying is partly the same thing: Blackstone has overreached himself in describing property as a 'sole and despotic dominion' – 'property' is not just a thing, or a right, but an expansive concept that can mean very different things in different situations. The Grays go on to describe property as a 'spectrum' concept, with the allocation to different persons of differing quantums of 'property' in the same resource depending upon collective perceptions of the public merit attaching to competing users of the resource.[7]

The differing approaches of Blackstone, Kennedy and the Grays can be further illuminated by considering the work of Geoffrey Samuel, who has fleshed out some valuable historical insights in this field. In Samuel's view, two models underpin Western conceptions of property. One is the

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2 Duncan Kennedy, 'The Structure of Blackstone's Commentaries' (1979) 28 *Buffalo Law Review* 209, 318-319.

3 Ibid, 319.

4 Kevin Gray and Susan Francis Gray, 'Private Property and Public Propriety' in Janet McLean (ed), *Property and the Constitution* (1999) 11, 12.

5 Ibid, 12.

6 Ibid.

7 Ibid, 13.

Roman conception, based on a unitary notion of ownership, giving rise to an exclusive power relationship between a person and a thing – a kind of *dominium*, to use the language of the Romans.[8] The other is the feudal conception, emphasizing a strong distinction between moveable and immoveable property, and recognizing that a range of different people could each have a different interest in a single piece of land. The feudal conception approached property as a matter of different legal rights rather than physical things.[9] Whatever the limitations of Blackstone's terminological consistency, it is clear from Kennedy's commentary that Blackstone was influenced by both the roman and feudal conceptions.

The difficulty for theorists like the Grays has proved to be the application of what they call 'modern' conceptions of property in decided cases. It is one thing for a Court to take the view that 'property is not the land or thing, but is *in* the land or thing'.[10] It is quite another for a Court to entertain the 'spectrum' notion of property. The House of Lords, for example, relatively recently voiced an approach which, in its claim to certainty, would surely be criticized by the Grays as old-fashioned, even Blackstonian:[11]

> Property rights are determined by fixed rules and settled principles. They are not discretionary. They do not depend upon ideas of what is 'fair, just and reasonable'. Such concepts, which in reality mask decisions of legal policy, have no place in the law of property.

Clearly, then, the tension between differing conceptions of 'property' is not entirely a thing of the past. As Kennedy identified, 'property' can mean both a thing and a right; and as the Grays rightly point out, not all kinds of 'property' are exclusory or despotic. To the Grays, 'property' is not a 'private' matter, but has 'public' aspects: while we still talk of private property ownership, and many property relationships are seen as private, the vast majority of property relationships are best described as 'quasi-public', resting not at one end or the other of a public-private dichotomy, but rather in the middle of a gradated field with a multitude of finely intercalated distinctions.[12]

Another theorist deserves attention. Carol Rose, while acknowledging that the notion of 'exclusivity' is important to property theory,[13] also notes that property is 'a highly malleable institution',[14] and that different kinds of rights (such as exclusivity) necessarily apply to different kinds of property: you can fence land, but you can't fence water, and so regimes for the ownership of water rights are different to ownership regimes for land.[15] Property rights, in Rose's view, are constantly in flux and may change to meet new demands – but the fact that particular kinds of property rights may be 'fuzzy' does not mean that they are not rights: in Rose's own language, 'fuzzy rights are rights too'.[16]

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8 Geoffrey Samuel, 'The Many Dimensions of Property' in Janet McLean (ed), *Property and the Constitution* (1999) 40.

9 Ibid, 42.

10 *Dorman v Rodgers* (1982) 148 CLR 365, 372, cited in Gray and Gray, above n 4, 12.

11 *Foskett v McKeown* [2000] 3 All ER 97, para 3 of the judgment of Lord Millett.

12 Gray and Gray, above n 4, 18.

13 Carol Rose, 'Property in All the Wrong Places?' (2005) 114 *Yale Law Journal* 991, 994.

14 Ibid, 993.

15 Ibid, 1005.

16 Ibid, 1006.

Rose has also made the point that many of Blackstone's critics appear not to have read much of Blackstone 'beyond the first few pages, or indeed beyond the first few lines'.[17] In her view, the 'despotic' quote set out above is more metaphor than literal description.[18] What is more interesting to her is the way Blackstone avoided trying to justify the uneven allocation of property (particularly land) through society, and emphasized doctrinal aspects of property.[19]

It is important to keep in mind that Blackstone may not have meant the quote set out above to be taken at face value, or to be taken out of context. Albert Alschuler, for example, has noted that while Blackstone sometimes spoke of property in 'rapturous tones', he also emphasised the importance of governmental and societal controls on property, and 'tended to see individualism and community as reciprocal rather than opposing values'.[20] Even as metaphor, however, Blackstone's dictum about property has proved of lasting impact, if only as a 'straw man' for theorists such as the Grays to knock down. In addition, even if we acknowledge that Blackstone saw property as having both individual and collective aspects as much as modern theorists do, this doesn't take anything away from modern theorists; and amplifies rather than diminishes the notion that 'property' is a concept with both individual/collective and public/private – 'quasi-public' – considerations.

Property rights in unit titles, as we will see, fit easily into the Grays' notion of the 'quasi-public'. A fee simple estate, for example, is, following the leads of the Grays and Rose, subject to general laws, town planning regulations, and society's decisions about resource allocation. It is not a 'sole and despotic dominion' but is seen to represent a bundle of rights greater than that in any other modern legal estate in land.[21] As we will see, a stratum estate under the Unit Titles Act 1972 involves a very different bundle of rights of a much less private and exclusory nature.

III. The Unit Titles Act 1972

A. *The Nature of Land*

In his discussion of 'land' – comprehending 'all things of a permanent, substantial nature'[22] – Blackstone noted that land had, 'in its legal signification, an indefinite extent, upwards as well as downwards' – no building could overhang another's land, and anything in a direct line between the surface of land and the centre of the land belonged to the owner of the surface.[23] 'Land', in this sense, begins at the centre of the earth, crosses through specified boundaries at the earth's surface, and continues into space.[24] It was inevitable that this model would cause difficulties, and the com-

17 Carol Rose, 'Canons of Property Talk, or, Blackstone's Anxiety' in Jack M Balkin and Sanford Levinson (eds), *Legal Canons* (1999) 66, 67.

18 Ibid, 66.

19 Ibid, 67 and generally.

20 Albert W Alschuler, 'Rediscovering Blackstone' (1996) 145 *University of Pennsylvania Law Review* 1, 30-31, 46 and generally.

21 Kevin Gray, 'Property in Thin Air' (1991) 50 *Cambridge Law Journal* 252: '[I]n jurisdictions of common law derivation, the amplest or fullest bundle of rights which can exist in relation to land is the fee simple estate … [t]he rights enjoyed by the owner of the fee simple come closest to … *dominium*'.

22 Blackstone, above n 1, 14. Rose, above n 17, 77 also notes that land 'sticks around indefinitely', and this is why it is subject to so many claims and doctrines.

23 Blackstone, above n 1, 16.

24 It should be noted that this conception of land was not invented by Blackstone: it has existed since at least the 13th century. See Gray, above n 21, 253.

mon law was quite comfortable with strata titles, under which different persons could own different levels of a building, though there were some problems with multi-level ownership under the Torrens system, primarily because of the complexity of the easements that would be required.[25]

In the context of increasing urbanization in New Zealand after World War II, there were calls for the subdivision of land to be made easier and more flexible.[26] Town planning restrictions favoured single-level section no less than a quarter-acre in size,[27] and even in 1972, New Zealand could be called a 'quarter acre paradise'.[28] Two main mechanisms emerged to allow separate titles for separate flats and offices within a single building or area. The first is now known as the company share scheme, under which a company would own a building, and the shareholders of the company would each hold a licence from the company to occupy a particular flat, with a certificate of title being issued for this type of 'ownership'. A number of problems arose however, particularly in relation to raising mortgage finance and transferability.[29] The second was the cross-lease system, first developed during the 1960s to avoid town planning restrictions on subdivision.[30] This provided for adjacent owners to each own a share in a fee simple estate, with all owners of the fee simple granting leases for (commonly) 999 years over particular buildings. A cross-lease owner holds an undivided share in a fee simple estate, and a leasehold estate in a certain building (or part thereof), often with the right to exclusive use of a further area under the lease. A number of difficulties with cross leases have been identified, however, and they have rarely been seen as suitable for high rise buildings.[31] Problems associated with both the flat-owning company regime and the cross- lease system, provided a strong impetus for reform in this area.[32] There were calls for a legislation allowing for the separate ownership of flats and offices on a number of occasions during the 1960s, and a Flat and Office Ownership Bill was introduced into Parliament in December 1971.

B. The Unit Titles Act 1972

The Flat and Office Ownership Bill – based largely on Australian models – was designed to eliminate these difficulties.[33] Each owner would be entitled to a stratum estate in his or her unit, which could be dealt with freely without the consent of other owners. The Bill allowed the subdivision of land into units, whether side by side or vertical, and provided for the deposit of a three-dimensional plan; though we have seen that strata titles could exist under common law, in discussing the Bill, Parliament understood deposited plans only in two-dimensional terms.[34]

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25 See D W McMorland, 'Titles to Flats, Town Houses, and Offices' in Hinde, McMorland and Sim, Land Law in New Zealand (looseleaf, updated 2007), para 14.001; Rod Thomas, 'Unit Titles' in New Zealand Land Law (2005) 887, 891; and Munro (1972) NZPD 1770.

26 Thomas, ibid, 889.

27 McMorland, above n 25, para 14.008.

28 See Austin Mitchell, The Half-Gallon Quarter Acre Pavlova Paradise (1972).

29 McMorland, above n 25, para 14.006.

30 Ibid, para 14.008.

31 Ibid, paras 14.020(i) and 14.022.

32 See McMorland, above n 25, para 14.022; and Wall, (1972) NZPD 1771.

33 Munro (1972) NZPD 1089; Jack (1972) NZPD 1763.

34 Jack (1972) NZPD 1763-1764. See also Riddiford (1972) NZPD 1773-1774 for some key benefits of the UTA as understood at the time.

The name of the statute morphed on its way towards enactment, and the Unit Titles Act 1972 as passed reflected a number of varying considerations. The Long Title describes it as '[a]n Act to facilitate the subdivision of land into units'.[35] Under s 2 of the UTA, 'unit' means 'a part of [any] land consisting of a space of any shape situated below, on, or above the surface of the land, or partly in one such situation and partly in another or others, all the dimensions of which are limited, and that is designed for separate ownership'.[36] The proprietor of an estate in fee simple or leasehold can subdivide that land into two or more principal units, accessory units, and common property, being land not comprised in any unit.[37]

An outline of the Act is helpful to understanding its scope and scheme. Section 12(1) provides that on the deposit of a unit plan, the registered proprietor of the land to which the subdivision relates 'shall become a body corporate'.[38] The 'body corporate'[39] is defined in s 2 as '… the body corporate that comprises the said proprietor or proprietors in accordance with section 12': circular definitions are not unknown in statute law.[40] Thereafter, under s 12(2), the proprietor or proprietors for the time being of all the units comprised in the unit plan comprise the body corporate.[41] The body corporate is a separate legal entity, 'capable of suing and being sued in its corporate name',[42] and has perpetual succession.[43] Section 15 imposes various duties on the body corporate, including insuring all buildings and improvements on the land owned by the proprietors comprising the body corporate, maintaining the common property, maintaining an administrative fund, and levying proprietors to carry out these duties.[44] More broadly, section 16 states that, subject to the UTA, the body corporate has 'such powers as are reasonably necessary to enable it to carry out the duties imposed on it by this Act and by its rules', but that it does not have the power to carry on trading activities.[45]

The provisions relating to the body corporate rules – the primary focus of this essay – are set out in section 37 of the UTA. Section 37 is set out in full in Appendix One of this article, but an outline at this point is desirable. Section 37(1) provides that, except as provided elsewhere in the UTA, the 'control, management, administration, use and enjoyment' of the units and common property, and 'the activities of the body corporate', are regulated by the rules of the body corpo-

35 Compare clause 3 of the Unit Titles Bill (the Bill): 'The purpose of this Act is to provide a legal framework for the ownership and management of land and associated buildings and facilities on a socially and economically sustainable basis by communities of individual owners

36 The definition in clause 5 of the Bill is unchanged.

37 *Unit Titles Act* 1972, Section 3. This provision is the same in the Bill.

38 Compare clause 62(1) of the Bill): 'When a unit plan is deposited … a body corporate is created and is the body corporate for that unit plan'.

39 An uneasy term, as it applies to many kinds of corporate entities outside those contemplated by the Unit Titles Act 1972.

40 Clauses 5 and 62 of the Bill are similarly circular: 'body corporate' means a body corporate of a unit title development created under section 62 on the deposit of that unit plan …', while clause 62 provides that '[w]hen a unit plan is deposited … a body corporate is created and is the body corporate for that unit plan'.

41 Compare clause 63(1) of the Bill: 'The members of a body corporate for a unit plan are the unit owners of all the units in the unit plan'.

42 *Unit Titles Act* 1972.Section 13(1).

43 *Unit Titles Act* 1972.Section 12(4).

44 Clause 72 of the Bill sets out the main powers and duties of a body corporate under the Bill.

45 Compare clauses 64-66 of the Bill: A body corporate may do anything authorised by the Bill, or any other Act, and anything a natural person of full age and capacity can do – but only for the purposes of performing its duties or exercising its powers.

rate. The rules are those set out in the Second and Third Schedules of the UTA, unless these are amended.[46] The Second Schedule rules may only be amended by unanimous resolution of the proprietors comprising the body corporate, while the Third Schedule rules may be amended by majority resolution of proprietors.[47] Section 37(5) states that:[48]

> Any amendment of or addition to any rule shall relate to the control, management, administration, use, or enjoyment of the units or the common property, or to the regulation of the body corporate, or to the powers and duties of the body corporate (other than those conferred or imposed by this Act):
>
> Provided that no powers or duties may be conferred or imposed by the rules on the body corporate which are not incidental to the performance of the duties or powers imposed on it by this Act or which would enable the body corporate to acquire or hold any interest in land or any chattel real or to carry on business for profit.

Section 36(6) provides that no rule may restrict the transfer of a unit, while section 37(7) provides that any amendments to the rules must be recorded with the titles for the units. Section 37(8) and (9) require the body corporate to keep a copy of the rules, and provide a copy to proprietors on request. Section 37(11) states that the rules bind the body corporate, the proprietors, and any person in occupation, and 'enure for the benefit of the body corporate and every proprietor', and s 37(12) states they may be enforced in any court by an order for performance, restraint, or damages.

Section 41 sets out some restrictions on voting rights, such as that persons voting must be over 18.[49] Section 42 sets out that in any case where a unanimous resolution is required but not obtained, then as long as a majority of '80 per cent or more of those entitled to vote' has supported the resolution, a person in the majority may apply to Court for an order that the resolution be deemed unanimous. Conversely, where a resolution or consent is passed, any person who voted against it may apply to the Court to have the resolution or decision declared of no effect, on the grounds that the consequences of the resolution would be inequitable for the minority.[50] There are also some further sections in the UTA, not relevant to our considerations here.

IV. The Individual and the Collective

It is useful at this point to consider an interesting aspect of unit title ownership. One of the concerns of those drafting the Unit Titles Act was to ensure that a unit title would be freely transferable,[51] and this is reflected both in the statute,[52] and in common parlance: a unit title would

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46 Section 37(2) refers to rules being 'added to, amended or repealed'. For simplicity, all of these are referred to in this dissertation as 'amendment'. In the Bill, 'body corporate operational rules' bind the body corporate: clause 91(5), though these operational rules are to be effected through regulations which have not yet been made publicly available.

47 Sections 37(3) and (4). These 'default rules' are set out in full in Appendix Two. The Bill provides that the body corporate operational rules may be amended, revoked or added to by ordinary resolution of the body corporate.

48 Compare clause 91(3) of the Bill: 'Any amendment or addition must relate to the control, management, administration, use, or enjoyment of the principal units, accessory units, and the common property, or to the regulation of the body corporate, and no powers or duties may be conferred or imposed on the body corporate that are not incidental to the powers or duties conferred or imposed on the body corporate under this Act.'

49 The Bill is much more prescriptive as to voting: clauses 75 set out specific requirements as to meetings, quorums, proxies, and polls; matters which are left to body corporate rules under the Unit Titles Act 1972.

50 *Unit Titles Act* 1972, Section 43.

51 See eg Riddiford (1972) NZPD 1092.

52 *Unit Titles Act* 1972, s 37(6).

generally be seen as private property. As such, an individual can enter into a contract to purchase a unit title with another individual without recourse to any other person: an agreement to purchase and sell a unit title property is a matter of private contract. Upon becoming the owner of the unit title, however, the purchaser, while remaining an individual owner, also becomes part of the body corporate. As an individual unit proprietor, the owner must comply with the body corporate rules. The body corporate must also comply with these rules, some of which relate to duties to proprietors. An individual unit owner becomes part of a collective, which, in turn, has duties to other individuals who comprise the collective.

The nature of the body corporate collective deserves some attention. A body corporate has a legal personality separate from the individual proprietors: it has perpetual succession, and is capable of suing and being sued.[53] On the other hand, it can be seen as essentially a collective of proprietors. As section 12(2) of the UTA states, 'the proprietor or proprietors for the time being of all the units comprised in the unit plan shall, by virtue of this Act, be the body corporate'.[54]

These two notions of the body corporate – as an independent entity and as a collective of proprietors – have been further discussed in case law. In *World Vision of New Zealand Trust Board v Seal*,[55] (*World Vision*) Heath J set out what he saw as the 'underlying principles' of the UTA, the first being:[56]

> The need to synthesise the conflicting views, needs and desires of proprietors who have differing interests through the adoption of a democratic model. That model is designed to enable proprietors to make collective decisions (through the body corporate) about the use of common property and proposals to make structural changes or additions to the property likely to affect the use, enjoyment or value of units owned by other proprietors.

Heath J's view sees the body corporate essentially as a kind of mini-democracy allowing proprietors to make collective decisions, and emphasizes the collective nature of a body corporate.

The case of *Velich v Body Corporate No. 164980*[57] (*Velich*) illustrates the other notion of a body corporate as a legal entity separate from the relevant unit proprietors. *Velich* concerned a decision by a body corporate to withhold consent to a proprietor's alterations to his unit. The Court took the view that the body corporate could not unreasonably or arbitrarily withhold consent: the case had a 'public law dimension',[58] as decisions by bodies corporate involved the exercise of statutory power, with the court having jurisdiction to review 'irrational' decisions under the Judicature Amendment Act 1972.[59]

In commenting on the decision in *Velich*, administrative law specialist Michael Taggart has compared a body corporate to a public authority, with its decisions subject to judicial review (though in Taggart's view the courts should intervene under their inherent supervisory jurisdic-

53 *Unit Titles Act* 1972, sections 12 and 13.

54 The Bill is more express about this collective aspect: clause 3 specifically states that the Bill is concerned with 'communities of individual owners'.

55 [2004] 1 NZLR 673.

56 *World Vision*, para 51.

57 (2005) 5 NZConvC 194,138.

58 Ibid para 45.

59 Ibid.

tion, rather than under the Judicature Amendment Act).[60] In other words, a body corporate can be seen as subject to administrative law considerations.[61]

The conceptions of the body corporate in *World Vision* and in *Velich* – though both deriving from the UTA - can be seen as somewhat contradictory. In *World Vision*, the body corporate is a democratic vehicle for collective decision making by proprietors; in *Velich*, the body corporate is an entity separate from the proprietors themselves, and charged with an obligation of reasonableness in decision making. One conception of the body corporate sees it as a collective of proprietors; while the other sees it as an independent body with quasi-public functions and subject to administrative law considerations. There is a tension here between the body corporate's collective function and its independent responsibilities.

But if a tension exists in the nature of the body corporate, a greater tension exists for individual proprietors. As noted above, an individual can acquire a unit title through private contract. Through ownership, that proprietor becomes a member of the body corporate and, through the democratic model described by Heath J, a voice in the body corporate's collective decisions. But the proprietor's 'democratic' rights are not unfettered: decisions of the body corporate must be reasonable, and this means that the voice of the proprietor must also be reasonable. A proprietor considering a body corporate decision must not only consider his or her own interests, but also the administrative law duties of the body corporate. In certain circumstances, a proprietor mindful of these duties might be required to make a decision that would go against the interests of that proprietor. In this way, the notion of the body corporate as an entity separate from the proprietors may trump the notion of a body corporate as a kind of mini-democracy: the body corporate remains in each case a vehicle for collective decision-making, but the way in which it must exercise its duties and discretions mean that it cannot always be democratic, in the sense of proprietors as voters having a free choice in their contributions to collective decision making. Proprietors may as individuals have their own interests and agendas, but when they put on their hats as members of the body corporate, these may have to be set aside to allow the body corporate to properly carry out its duties as an entity separate from its proprietors.

These tensions arise from the UTA, but they are more hinted at than expressed. To better understand these tensions, it helps to look to two sources: first, the way the UTA provides for body corporate rules to regulate relationships between proprietors and the body corporate; and second, to some recent cases on invalid body corporate rules, which show the courts grappling with these tensions and how the UTA seeks to mediate them through body corporate rules. The cases in particular illustrate how developers have sought to avoid these tensions through limiting the powers or collective nature of the body corporate, and how the courts have resisted most attempts of this kind by developers. The courts have instead upheld the tensions between individual and collective considerations, in effect supporting the view that these tensions are an integral part of the scheme of the UTA.

60 Michael Taggart, 'Administrative Law' (2006) *NZ Law Review* 75, 99-100.

61 Ibid, and *Velich*, para 48.

IV. Body Corporate Rules

The default rules are set out in Schedules 2 and 3 of the UTA. Schedule 2 begins with duties of a proprietor, such as permitting the body corporate (or its agents or servants[62]) to enter the unit for the purposes of maintaining common property or ensuring compliance with the rules; complying with all relevant laws; paying all rates; and not making any structural alterations to the unit without the consent of the body corporate. Right from the outset, it is clear that exclusivity and despotic dominion are not integral to unit title ownership. Schedule 2 continues with the duties of the body corporate, including repair and maintenance of common property; and providing proprietors and mortgages with insurance information on request; and the powers of the body corporate, including borrowing and investing money; establishing bank accounts; entering into agreements with proprietors for the provision of amenities to units. These provisions – which state the duties of proprietors and the powers and duties of the body corporate, which are clearly of considerable importance to proprietors both in their role as private owners and as members of the body corporate – occupy just 3 of the 34 clauses of rules set out in Schedule 2.

Rules 4-13 of Schedule 2 set out provisions for the establishment of a body corporate committee, to which the powers and duties of the body corporate may be delegated if there are more than three proprietors.[63] The default rules state that the committee 'shall' be established if there are more than three proprietors, and go on to specify quorum requirements, provisions for decision making by the committee, conduct of meetings, and minute keeping. Rules 14-31A set out the provisions for general meetings of the body corporate, to be held at least annually and otherwise in certain circumstances. These rules set out quorum, voting, and other procedural requirements. Rules 32-34 provide for the body corporate to have a common seal, and rules concerning special resolutions.

As noted above, s 37(2) of the UTA provides that the Second Schedule rules may be 'added to or amended or repealed in relation to any body corporate by unanimous resolution of the proprietors and not otherwise'. The rules in the Third Schedule, by contrast, may be added to, amended or repealed by (simple) resolution of the body corporate at a general meeting.[64] The Third Schedule rules impose further duties on proprietors: not to use any unit for any purpose illegal or injurious to the reputation of 'the building'; not to make undue noise in or around any unit or the common property; keep any animal without the consent of the body corporate or its committee; not use the common property in a way that interferes with the use and enjoyment of other proprietors; and not to use a unit in such a manner as to cause a nuisance or disturbance to any occupier or proprietor.

The right to amend the rules is not unrestricted. As noted above, ss 37(5) and 37(6) contain some important restrictions on amendment. To paraphrase, any amendment must relate to:

- The control, management, administration, use or enjoyment of the units or the common property; or
- The regulation of the body corporate; or
- The powers and duties of the body corporate;

but

- No power may be conferred or duty imposed that is not incidental to the powers and duties under the UTA;

62 An interesting phrasing, considering the body corporate can *only* act through agents or servants.

63 *Unit Titles Act* 1972, Rule 4, Schedule 2.

64 *Unit Titles Act* 1972, Section 37(4).

- No power may be conferred or duty imposed that would enable the body corporate to acquire of hold any interest in any land or chattel real, or to carry on business for profit;
- No amendment may restrict the devolution of units or any dealing with any unit;
- No amendment may destroy or modify any right implied or created by the UTA.

As should be clear from this paraphrase, there are specified parameters for amendment; and, even if amended rules are within these parameters, there are further restrictions – some specific, such as the restriction on the body corporate carrying on business; and some general, such as the restriction on amendments which may modify any right implied under the UTA.

There have been a number of cases relating to the interpretation of rules – perhaps most notably, a 1999 decision on whether a Rhodesian Ridgeback dog was a 'small domestic animal'.[65] Until a few years ago, no body corporate rules had been found to contravene the UTA. This may be partly because unit title developments were unpopular for a number of years:[66] even in 1993, it was necessary for the Court of Appeal to enter into a detailed discussion of some of the key concepts of the UTA.[67] In recent years, however, there have been a number of cases where certain body corporate rules have been found to be ultra vires on the basis that they are outside the restricted powers of amendment contained in the UTA.

The rules found invalid – or *ultra vires* – to date have been found invalid on one of two bases: that the amended rule imposes a power or duty that is 'not incidental' to the powers and duties under the UTA,[68] or that the amended rule modifies a right implied or created by the UTA. Amended rules found to be ultra vires are interesting for three reasons. First, there have been a number of cases in recent years in which amended rules have been found to be invalid, and these cases are thought to represent just the tip of the iceberg: many more invalid rules may exist that have not come before the courts as yet, but may in future.[69] Second, these cases illustrate the strict boundaries set out in the UTA for the amendment of rules: the statute expressly allows the amendment of rules, almost suggesting that amendment can be a regular thing, but the courts have shown that the parameters for amendment are narrow: amended rules have only occasionally been found to be valid when challenged.[70] Third, these cases clearly show the tensions between individual and collective considerations present in the UTA. It is this third reason which is most important for these purposes.

In illustrating the tension between individual and collective considerations in the UTA, it is argued here that invalid rules can be divided into two categories, categories based not on which part of the UTA the rules breach, but on the way the rules illustrate the individual/collective tension. The tension between individual and collective considerations is reflected in amended rules that seek to alter the statutory composition of the body corporate and in amended rules that relate to decisions by the body corporate. Each category reflects the tension between understanding the body corporate as a collective of proprietors and understanding it as a separate legal entity; and the tension between proprietors with individual interests whose property is not wholly private or exclusory, but who are subject to body corporate rules, and the administrative law duties imposed on the body corporate to which those proprietors belong.

65 *Godoy v Body Corporate No. 164980*, unreported [14 June 1999] HC, Auckland, M 1906/98.

66 Thomas, above n 25, 889.

67 *Disher v Farnworth* [1993] 3 NZLR 390.

68 The wording 'not incidental' is repeated in clause 91(3) of the Bill.

69 See eg Rod Thomas, '*Fifer*, Unit Titles and No 8 Wire' [2006] *New Zealand Law Journal* 152.

70 See eg *Young v Body Corporate No.120066*, unreported [6 December 2007] HC, Auckland, CIV 2007-404-002375.

V. Composition of the Body Corporate

The first conception of the body corporate described above was as a collective of proprietors, a view supported by the comments of Heath J in the decision in *World Vision*. Under this conception, the composition of the body corporate is greatly significant. If the membership of the body corporate or the voting rights on the body corporate are altered from those specified in the UTA, then the body corporate cannot properly operate – or be understood – as a collective of proprietors. These cases show situations where developers have attempted to alter the composition of the body corporate, or the voting rights of the proprietors that would normally comprise the body corporate. In doing so, the tensions between proprietors interests present in the UTA have been upset in favour of a particular proprietor (the relevant developer). The courts have stepped in under the UTA, and in doing so have preserved the tension for the benefit of proprietors.

The first New Zealand case on the invalidity of body corporate rules was *Chambers v Strata Title Administration Ltd*[71] (*Chambers*). This case concerned a staged development under the Unit Titles Amendment Act 1979, which allows titles to be issued for principal and accessory units as well as a 'future development unit' (FDU), to be turned into a principal unit in future. The owner of an FDU, however, is not a member of the body corporate and has no voting rights.[72] To try to maintain control of the body corporate, the developer amended the default rules in the UTA to provide that as long as there was an FDU, Strata (the defendant) would be the body corporate secretary, and the developer would have to approve all resolutions of the body corporate. Disagreement soon arose between the unit owners on the one hand, and Strata and the developers on the other. The members of the body corporate sought to remove Strata as body corporate secretary, and the matter went to court, where the validity of two amended rules was challenged. One of these was rule 10A, which provided that as long as there was a future development unit in the development, the body corporate committee would comprise the body corporate secretary, the future development unit owner, and another representative of the proprietors. In the court's view, this rule contravened s 37(6) of the UTA as it modified a right implied or created by the UTA – namely, the right of proprietors to manage their own affairs, as the future development unit owner could not, by statute, be a member of the body corporate. Rule 10A was therefore ultra vires.[73]

It was noted above that amended rules will be ultra vires if they contravene the amending powers set out in the UTA, and this is of course the basis on which the court in *Chambers* found Rule 10A invalid. It is submitted here that the rule was also invalid because it disturbed the composition of the body corporate (and in particular its elected decision making arm, the body corporate committee). In doing so, Rule 10A prevented the body corporate being a vehicle for collective decision making by proprietors, and instead made it a collective at the mercy of a particular individual – the developer. In this way, the rule disturbed the tension between individual and collective considerations that is a necessary part of the UTA.

This point can be clarified by reference to some further cases in which rules which depart from the notion of the body corporate as a collective of proprietors have been found ultra vires. In *Body Corporate 199883 v Clarke Family Associates Limited*[74] (*Clarke*), Rule 35 stated (first) that as long as the developer owned a unit or FDU, the body corporate could not pass any resolution,

71 (2004) 5 NZConvC 193,864.

72 Section 9, *Unit Titles Amendment Act* 1979.

73 *Chambers*, para 46-47.

74 (2005) 5 NZConvC 194,087.

form any committee, or use the common seal without the consent of the developer; and (second) that the body corporate would sign any documents necessary to enable the developer to divide the existing unit 7 to be subdivided into 5 further units.[75] The 17 applicants, being the proprietors constituting the body corporate, argued that this Rule 35 was ultra vires.

The first part of Rule 35, which gave the developer a veto over any substantive action by the body corporate, was found to breach s 37(6) of the UTA and so was ultra vires.[76] The second part of Rule 35 provided that the body corporate would do all things required to allow the developer to divide unit 7 into five further units. The applicants relied on *Chambers*, particularly the finding that a rule which differed from the Second Schedule rules would be ultra vires if outside the amending power conferred by the UTA,[77] and the court agreed that 'incidental' meant 'naturally attached to or pertaining to the duties and powers set out in the Act'.[78] Here, the duty imposed on the body corporate was found to be 'well beyond' anything arising under s 44 of the UTA, which governed redevelopment.[79] Rule 35 was 'not incidental' and essentially sought to override other provisions of the UTA. It was therefore contrary to s 37(5).[80] It was also contrary to s 37(6), as it modified the usual right of proprietors to consent or otherwise to a plan of redevelopment. The Court declared that Rule 35 was ultra vires the UTA.[81]

In *Clarke*, similar to as in *Chambers,* part of Rule 35 stated that as long as the developer owned a unit or future development unit, the body corporate could not pass any resolution, form any committee, or use the common seal without the consent of the developer. This rule severely restricted the ability of the body corporate to make decisions or take actions on behalf of the proprietors, and undermined the collective model of the body corporate set out in the UTA by effectively making the developer the controller of the body corporate.

Body Corporate No. 86975 v Cassels[82] (*Cassels*) provides a further illustration of an ultra vires rule relating to the composition of the body corporate. Cassels was the owner of a future development unit, which had been developed and was tenanted, but which had never become a principal unit, and so was not part of the body corporate. The body corporate attempted to levy Cassels on the basis that the body corporate rules required Cassels to pay. Cassels denied liability on the basis that the body corporate rules were ultra vires.

The relevant amendments to the default rules were numbered 40 – 42. Rule 40 provided that until a final unit plan was deposited, the unit proprietors would contribute levies according to their unit entitlements on the proposed development plan, notwithstanding that the proprietorship might only be over a future development unit. Rule 41 provided that until all titles had issued, the proprietors would have voting rights for body corporate affairs based on the unit entitlement in the proposed unit plan. Under Rule 42, every future development unit proprietor was deemed to be the proprietor of a principal unit. The intention of these rules was relatively clear: they were designed to ensure that the owner of a future development unit was treated as a member of the body corporate and would contribute levies at a similar rate to other unit owners. Looking to the 'incidental'

75 Ibid paras 10-11.

76 Ibid para 34.

77 *Chambers*, para 39, cited in *Clarke* para 38.

78 *Clarke*, para 39.

79 Ibid para 40.

80 Ibid para 41.

81 Ibid para 42.

82 (2005) 6 NZCPR 733.

test in the UTA, the court found that the amended rules appeared to confer a power and impose a duty on the BC that was 'more than incidental' to those under the UTA.[83] The court also noted that the amended rules modified the rights of the future development unit in relation to the body corporate, and in conferring voting rights on the future development unit also diluted and modified the voting rights of the principal units. Rules 40-42 were outside the scope of the amending power in the UTA and were ultra vires.[84] Reading *Cassels* another way, Rule 41 altered voting rights and Rule 42 altered the composition of the body corporate by making owners of future development units members of the body corporate. The rules purported to alter the composition of the body corporate, and offended against the model for collective decision making set out in the UTA.

If we understand the body corporate as a kind of 'mini-democracy', and as a vehicle for collective decision making by proprietors, it is clear that any rule which alters the composition of the body corporate (or the body corporate committee) or the voting rights of proprietors will upset the tension between individual and collective considerations in the UTA. This kind of rule will prevent properly collective decision making: most notably, in the case of case in *Clarke Family*, by placing the body corporate at the mercy of particular person with a veto right, such as the developer; but also, as in the case of *Cassels*, by giving someone voting rights who is not actually part of the body corporate, such as a future development unit owner. If the body corporate is understood as a collective of unit proprietors, then its integrity as a collective is disturbed if persons other than (principal) unit proprietors are able to become members and exercise voting rights; and by disturbing the integrity of the collective, the rights of individual unit owners are also affected.

VI. Decisions by the Body Corporate

The second kind of ultra vires rules are amended rules which relate to the manner in which the body corporate makes or may make decisions. These kinds of rules may be of a similar kind to the first type described above: there is a degree of fusion between the two categories.

In *Fifer Residential Limited v Gieseg*[85] (*Fifer*),Parkbrook made plans to develop a seven-level apartment block in Parnell in the mid-1990s, though the units were marketed and sold as being part of a six-level development. Fifer took an assignment of the development in 2002, after a number of units had been sold, and claimed the right to develop a seventh floor, a claim proposed by a number of proprietors, some being original purchasers and some being on-purchasers.[86] Rule 2.2(g) of the amended body corporate rules provided that the body corporate would permit a redevelopment of the building, utilizing the seventh floor airspace. The rule was argued by the unit proprietors to contravene s 37(5) of the UTA, which provides that a duty imposed on the body corporate must be 'incidental' to the duties imposed by the UTA. With reference to *Chambers* and *Clarke Family*, the court held that the duties of the body corporate were quite limited under the UTA, and that Rule 2.2(g) was not 'incidental' – it was not naturally appertaining to the statutory duties, and rather purported to create an entirely independent duty requiring the body corporate to

83 *Cassels*, para 23.

84 *Cassels* was appealed to the High Court on issues unrelated to the rules: the High Court agreed with the DC's finding as to the relevant rules being ultra vires. See *Cassels v Body Corporate Number 86975*, unreported [13 June 2007] HC, Wellington, CIV 2006-485-701.

85 (2005) 6 NZCPR 306.

86 Ibid paras 8-9.

consent to the seventh floor development. Falling outside the scope of s 37(5), it was ultra vires.[87] The court held that the rule also contravened s 37(6), which provided that no amended rule could destroy or modify and right implied or created by the UTA. Drawing on *Clarke*, the Court noted that one of the rights implied or created by the UTA was the right of a proprietor to consent to a redevelopment. If Rule 2.2(g) required consent, it would override s 44 of the UTA and therefore be ultra vires on this basis.[88] Following the approach advanced here, the rule can be seen to have restricted proprietors from making decisions in accordance with the democratic processes set out in the UTA, by binding unit owners to a certain course of action. A similar approach was taken with the second part of Rule 35 in *Clarke*, which stated that the body corporate would sign any documents necessary to enable the developer to subdivide the existing unit 7 into 5 further units.

While *Clarke* and *Fifer* dealt with rules that required a body corporate to make a certain decision, *Velich*[89] was different. In *Velich*, an office building was converted to apartments in the 1990s, but before the conversion was complete, the developer experienced financial difficulties and a number of purchasers sought to complete their apartments themselves. One apartment, including principal unit 4G and accessory units AU49 and AU50, was sold off the plans, and at the time of the financial difficulties consisted of a shell on the fourth floor, while a further apartment structure and deck (with significant views) were to be built on the fifth floor. A two year time limit was set for work to be completed by owners, but while the fifth floor building work was completed within this two year time frame, the deck itself was not.[90]

Velich purchased apartment 4G in early 2002. He wished to complete the deck and obtained council consent for this. However, he could not obtain the consent of the body corporate. Under Rule 2(1)(f) of the body corporate rules for the development, a proprietor was to 'make no additions or alterations to the unit … or in any way alter the elevation or external appearance of the unit without the consent of the Body Corporate'. Consent was not to be unreasonably or arbitrarily withheld where:

(i) The additions and alterations were of a non-structural nature, did not alter the external elevation or appearance of the unit, and were being carried out to fit-out or partition the unit;
(ii) Prior to the non-structural partitions or alterations, the body corporate was provided with written evidence of builder's insurance; and
(iii) The proprietor complied with any reasonable rules or regulations of the body corporate.

The body corporate took the view that as the work was structural; its consent was required before Velich could complete the work. In a letter to Velich, it noted that it could arbitrarily withhold consent, but, given that the proposed work would affect other units within the development (essentially as to the outlook and privacy of certain other unit owners), it could withhold consent here even when acting reasonably. Consent was not granted. Velich, feeling some frustration, commissioned the deck building to be done anyway. The body corporate obtained judgment in the High Court requiring Velich to obtain the consent of the body corporate before he completed the deck, and granting a permanent injunction against Velich undertaking any further works without the written consent of the body corporate. In the High Court's view, Rule 2(1)(f) was 'clear and unambiguous' in stating that any additions or alterations to a unit required body corporate consent,

87 *Fifer*, paras 41-44.
88 Ibid paras 45-46.
89 (2005) 5 NZConvC 194,138.
90 *Velich*, paras 1-6.

and it was 'unarguable' that the construction of the deck would alter the external appearance of the unit, and this was a case in which consent could be arbitrarily or unreasonably withheld.[91]

The Court of Appeal's first main issue was whether Rule 2(1)(f) was ultra vires. If Rule 2(1)(f) applied, then it was 'perfectly clear' that the consent of the body corporate was required to Velich's proposed work.[92] The default body corporate rules in the second schedule of the UTA had a similar rule – 1(f) – which simply provided that a proprietor could not make any 'additions or structural alterations' to its unit without body corporate consent. In the Court of Appeal's view, it was arguable whether the completion of the deck would require consent under default Rule 1(f).

In this situation, Velich's title to unit 4G extended over an area including the area above the roof of the fourth floor area included in unit 4G where the deck was originally intended to go. The Court of Appeal expressed the view that Velich's entitlements as owner necessarily included rights of use in relation to the entire space on the fifth floor of the building in respect of which he has title. These rights were 'implied or created' by the UTA for the purposes of s 37(6) and so could not be destroyed or modified through the rules.[93] As the Court of Appeal further noted, s 37(5) of the UTA required that amendments to the default rules relate to the 'control, management, administration, use, or enjoyment' of the units or common property; the regulation of the body corporate; or the powers and duties of the body corporate (other than those conferred or imposed by the UTA). As Rule 2(1)(f) related to the powers and duties of the body corporate, it was within the scope of the proviso to s 37(5), but would only be valid if the powers and duties conferred were 'incidental' to those imposed by the UTA.[94] In the Court of Appeal's view, at the time Rule 2(1)(f) was adopted, there was no rule in place which required the body corporate to carry out Rule 2(1)(f) beyond the scope required by default Rule 1(f): Rule 2(1)(f) 'expanded the powers and duties of the body corporate, and did so appreciably'.[95] A rule which appreciably expanded the standard powers and duties of the body corporate was not 'incidental' to those powers and duties. Rule 2(1)(f) was therefore ultra vires.[96]

This reflects what we could call an orthodox reading of the powers of amendment set out in the UTA, with ss 37(5) and (6) setting out the parameters for amendment. But it is possible to go further, as is proposed by this essay and as was done in *Velich*. The Court of Appeal went on to note that even if Rule 2(1)(f) were lawful, it was 'plain' that the body corporate would not be entitled to act capriciously in granting or refusing consent.[97] Body corporate rules were not contracts, and the 'public law dimension' could not be overlooked: [98]

> A decision by a body corporate to grant or withhold consent under either rule 2.1(f) or default rule 1(f) would involve the exercise of a statutory power of decision for the purposes of s 3 of the *Judicature Amendment Act* 1972. This does not mean that the body corporate must act as if the rules provided that consent not be declined unreasonably. But we think it elementary that the body corporate, when exercising its statutory power of decision, must give proper effect to the rules and the statutory scheme as a

91 *Velich* High Court decision, paras 67-68, 70, 73, cited in the *Velich* Court of Appeal decision, paras 15-17.

92 Ibid, para 23.

93 Ibid, para 27.

94 Ibid, paras 29-30.

95 Ibid, para 31.

96 Ibid, paras 31-32.

97 Ibid, para 43.

98 Ibid, para 45.

> whole. It follows that there is jurisdiction to review as irrational and indeed invalid a decision which cannot sensibly be supported in light of that regulatory and statutory scheme.

It would not have been open for the body corporate to pass a rule preventing Velich from using as a deck part of his unit which was designated on the plan as a deck. It would then be 'surprising' if it could achieve the same effect by withholding consent to some minor works required to facilitate such use.[99] It was therefore 'well arguable' that any decision by the body corporate to refuse consent would be invalid on administrative law grounds, as '[n]o sensible or rational body corporate' could take exception to the alterations proposed by Velich.[100] The decision of the High Court was set aside, and Rule 2(1)(f) was declared ultra vires.

As noted above, *Velich* represents a conception of the body corporate as something different to – or at least something more than – a collective of proprietors. In the words of the Court of Appeal, the body corporate is a statutory body with statutory powers of decision making. Commentary on *Velich* – also noted above – sees the body corporate as subject to administrative law rules analogous to those applying to public bodies.[101]

So we can conceive the body corporate not simply as a collective of proprietors, but also as an entity in its own right – and further, as an entity subject to public law considerations and obligations. This further illuminates the tension between individual and collective considerations present in the UTA. Individuals acquire units as 'private' property through private dealings. In doing so, they become members of the body corporate, a collective of proprietors. On body corporate matters, individuals may *as individuals* wish to vote a particular way on body corporate matters: Velich's neighbours, for example, may have had their own views interfered with by the completion of his deck. But the body corporate is not simply a collective. Individuals voting *as members of the body corporate* must be mindful of the public law aspects of the UTA, and in particular, the duties of the body corporate as a statutory body subject to administrative law principles in the exercise of its discretions.

The relevant rule in *Velich* related not to a *required* decision of the body corporate, as was the case with the second part of Rule 35 in *Clarke* and the rule in *Fifer*, but rather to a *discretion* of the body corporate: the decision whether or not to grant consent to alterations in particular circumstances. As noted above, in the Court's view, Rule 2(1)(f) 'expanded the powers and duties of the body corporate, and did so appreciably'.[102] It was therefore not 'incidental' to the powers and duties of the body corporate under the UTA, and was ultra vires.

Inasmuch as Rule 2(1)(f) expanded the powers and duties of the body corporate, and so was ultra vires, this rule was almost the opposite of many of those noted above. Rather than altering the composition of the body corporate (and so denying proprietors their rights to be properly involved in the body corporate's decisions), or mandating or restricting certain decisions of the body corporate (and so denying proprietors the right to determine for themselves what actions and decisions the body corporate should take), the ultra vires rule in *Velich* purported to increase the powers of the body corporate. In doing so, however, the rule granted the body corporate certain powers exercisable against proprietors which, under the UTA, the body corporate was not supposed to have. This rule, like many of the others, can be seen to be denying proprietors rights,

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99 *Velich*, para 46.

100 *Velich*, para 48.

101 Taggart, above n 60, 98-99, referring to Wade & Forsyth, Administrative Law (9th ed, 2004), 355.

102 *Velich*, para 31.

by permitting certain proprietors (through the body corporate) to make decisions affecting other proprietors that those proprietors should not have had the power to make. In so doing, the rule denied certain proprietors their usual rights in relation to the development. In other words, this rule, like the others, had implications for the operation of the body corporate as a vehicle for collective decision making in accordance with democratic principles: but rather than limiting proprietors' rights in relation to the body corporate, as the other ultra vires rules did, this rule purported to extended the body corporate's rights in relation to proprietors. To draw an analogy, the rule in *Velich* was not about the procedural rights of citizens, but about the powers of the state. This indicates that there are both similarities and differences between the two conceptions of the body corporate advanced here.

The court in *Velich* went further than any other court in the decisions above or the court in *World Vision*: while *World Vision* emphasized the view that the body corporate is a collective of proprietors, *Velich* made it clear that the body corporate is something more – it is a collective that is subject to administrative law considerations. In this sense, it is a fettered collective, and proprietors voting on body corporate matters are fettered democrats as well as owners of 'private' property, a point which makes clear the tension between individual and collective considerations present in the UTA.

VII. Developer's Rules

A consistent theme of many of the above cases is the role played by developers. Most obvious is the rule in *Clarke*, which required that the developer approve all resolutions of the body corporate. Less overtly, in *Chambers, Fifer* and *Cassels*, a future development unit owner was to have rights not provided for in the UTA: this future development unit owner would generally be a developer seeking to protect rights to develop the future development unit in a particular way: in *Chambers*, for example, the court noted that the developer had relied on Rule 10A to frustrate the wishes of a majority of proprietors.[103] *Fifer* has been described as illustrating '[a] situation which is not at all uncommon in a unit title situation – endeavours by a developer to retain an unfettered power to control unilaterally a redevelopment aspect of the scheme'.[104]

The role of developers in ultra vires rules has been commented on by Rod Thomas, an Auckland barrister who has been involved in a number of unit title cases. In explaining the phenomenon of invalid rules, Thomas places particular blame on developers' solicitors. As he puts it, the ability to alter the default rules is 'quite limited. This however, is not the way lawyers have dealt with the default rules'.[105] He observes that most unit title developments were small until the mid-1980s, and generally involved only three or four units. From the 1990s, more complex developments arose:[106]

No doubt under the encouragement of their developer clients, lawyers felt the need to tinker with the default rules, and try to improve them. In doing so, they appear to have been guided primarily by pragmatic reasons, and in doing so, to have paid insufficient attention to the restrictions set out in the legislation, restricting what changes can be validly made …. [From the mid-1980s]

103 *Chambers*, paras 33-35.

104 D W McMorland, 'Body Corporate Rules and the Ultra Vires Principle' (2005) *Butterworths Conveyancing Bulletin*, 159, 160.

105 Thomas, above n 69, 152.

106 Ibid 152-153, 160.

solicitors, no doubt trying to assist their developer clients, undertook 'creative' solutions by adopting 'by-laws' changing the character of obligations intended by the legislation ….

> Insofar as solicitors have to date, in creating new rules, given inadequate attention to statutory limitations prescribed in the Unit Titles legislation, they embraced a 'No 8 Wire' mentality. This has laid the seeds of uncertainty and discord, which will become an increasing problem into the future.

Thomas recognizes that ultra vires rules arise because of non-compliance with the UTA. He also goes further, however, in arguing that ultra vires rules have arisen because of a pragmatic but flawed approach by solicitors, ignoring the restrictions on amendment contained in the UTA; that is, a 'Number 8 Wire' mentality on the part of solicitors.

It is submitted here that difficulties have arisen not simply because of a Number 8 Wire mentality, but also because of a misunderstanding of the tension between individual and collective considerations inherent in the UTA. The body corporate is a collective of proprietors, and its composition must not be upset through the rules. The body corporate is also a body charged with administrative law duties. It is not simply a tool of developers. Developers and their solicitors must comply with the provisions of the UTA, to be sure, and where they do not play close attention to the words of the statute, they run a strong risk that amended body corporate rules may be declared ultra vires. But they must also pay attention to what the UTA implies but does not express: a tension between individual and collective considerations – between proprietors and the body corporate - which may prevent proprietors from becoming subject to the whims of developers by protecting the integrity of both private unit ownership and the body corporate, itself both a collective of proprietors and an entity separate from them.[107]

VIII. Conclusion: The Tension

This essay began by pointing out that both individual and collective considerations are an inherent part of the scheme of the UTA. This is uncontroversial. What has been further suggested here is that there is a tension between these individual and collective considerations, both as between proprietors and between proprietors and the body corporate. This can be made clear through a simple analysis: a unit proprietor can purchase a unit through a private contract. That individual then becomes part of the body corporate, a collective of proprietors which has the role of facilitating collective decision making by proprietors through a democratic model. Proprietors cannot, however, act only in their own individual interests: the body corporate is a statutory body and its decisions are subject to administrative law considerations, such as reasonableness. A proprietor is both an individual and part of a collective. In addition, a body corporate is both a collective of proprietors and an independent entity subject to interests and duties which may be very different from those of the majority of the proprietors which comprise it.

These individual and collective considerations are often in tension, as should be clear from the cases discussed above. This tension may however act to protect proprietors from unscrupulous developers – undoubtedly a minority – who try to ignore collective considerations and force a body corporate to act in the best interests of a particular individual: the developer. By mandating that the body corporate be comprised in a particular way, the UTA protects the rights of the proprietors who make up the body corporate and prevents developers controlling the body corporate. By being subject to administrative law duties, the body corporate is also prevented from acting

107 The Bill is notable for the suspicion it casts on developers: clauses 138-141 place specific disclosure obligations on the original owners of units (that is, developers).

unreasonably or arbitrarily as against proprietors. Proprietors as individuals are protected from both developers and the body corporate; in exchange, they give up some of their own rights by becoming part of a collective subject to both internal rules (the body corporate rules in the UTA) and external rules (administrative law principles).

This raises the question: what would Blackstone think? Though there are individual/private aspects to unit title ownership, the fact that the owning a unit title has necessarily collective implications means Blackstone's model of the 'sole and despotic dominion' of property ownership falls short. As was suggested above, however, this description is better understood as a metaphor than a statement of law. More helpful is the Grays' understanding of property as a power relationship, with most kinds of ownership sitting on a spectrum between 'public' and 'private' ownership. In particular, the Grays have advanced the view that certain kinds of property are 'quasi-public'. One notable example given by the Grays is a shopping mall sitting on private property but open to the public: it is part of the mall's nature that it is open to 'the public', and not everyone can be excluded, as Blackstone would (perhaps) have wished.[108]

A unit title, with its peculiar tension between individual and collective rights and duties, can easily be seen as 'quasi-public': an individual proprietor becomes, through the body corporate, subject to public law considerations and limits on discretions. The significance of this 'quasi-public' nature becomes apparent when we compare a unit title to a fee simple title. A fee simple owner, as the Grays would suggest, does not possess a 'despotic dominion' but is subject to community decisions as to resource allocation. But if all titles are public, as the Grays might argue, some are *more public than others*. A fee simple owner is not subject to the kind of individual-collective tensions that a unit title owner is. To draw on the work of Samuel discussed above,[109] fee simple ownership comes close to the Roman notion of *dominium*, a point recognized elsewhere.[110] Unit title ownership, on the other hand, is much more like a feudal conception of property: it is a series of complex relationships and rights. This essay has shown that these relationships arise both between individuals and between private individuals and their collective, with the relationships in a tension that both protects proprietors and restricts their discretions and rights.

It is obvious and uncontroversial that a unit title is very different to a fee simple title, and as indicated above, one way commentators have drawn attention to this is to observe that a fee simple title represents a bundle of rights greater than those pertaining to any other title.[111] What this essay has shown is that a unit title involves a bundle of rights better described as *different* to, rather than lesser than, the rights involved in fee simple ownership. A unit title is subject to a particular statutory regime, but the statute does not express the tension between individual and collective considerations that has been presented in this essay. Rather, this tension is implied.

The tension is clearest when we consider body corporate rules. These mediate relationships between proprietors and between proprietors and the body corporate. The UTA contains the power to amend body corporate rules within certain parameters; courts have found certain rules to be ultra vires when they have failed to comply with the UTA.[112] What the courts have also done,

108 See Gray and Gray, above n 4, 20-31.

109 Samuel, above n 8.

110 Gray, above n 21, 252.

111 Ibid.

112 Under the Bill, the scope of rules may be narrower, as indicated by the phrasing 'body corporate *operational* rules', though this is not yet known, as the regulations which will contain the rules have not yet been made publicly available.

wittingly or unwittingly, is to show that unit ownership involves becoming part of a collective, that that collective is fettered by administrative law, and therefore that the rights of proprietors on the collective are fettered, perhaps fuzzied. This does not mean these rights do not exist: as Carol Rose has observed, fuzzy rights are still rights.[113] Through showing this tension between the individual and the collective, and within the collective, the courts have helped protect the rights of proprietors against developers and against the body corporate.

The tension between individual and collective considerations which is part of unit title ownership, then, is not altogether a bad thing. It is widely agreed that the UTA is in need of amendment,[114] and new legislation is expected to be passed within the next couple of years.[115] What is to be hoped, however, is that any new statute will not undermine the tension between individual and collective rights present in the UTA, particularly inasmuch as this tension is mediated by body corporate rules. Currently, where someone such as a developer tries to alter the nature of the collective, or the collective tries to ignore its responsibilities to individuals, then the courts can intervene to protect the parties. This is as it should be. Unit title ownership is not a 'sole and despotic dominion', but rather a series of complex and intertwined relationships that can aptly be described as 'quasi-public'. Individuals become part of a collective, and the collective becomes responsible to the individual. This creates a tension which fetters the rights of both individual and collective, but which ultimately acts to protect both.

Appendix One: Section 37 of the Unit Titles Act 1972

37 Rules

1. Except as otherwise provided by this Act, the control, management, administration, use, and enjoyment of the units and the common property shown on a unit plan, and the activities of the body corporate that comprises the proprietors of those units, shall, while there are more proprietors than one, be regulated by the rules for the time being applicable to that body corporate.
2. Subject to any amendment or repeal thereof or addition thereto the rules applicable to each body corporate shall be those set out in the Schedules 2 and 3 to this Act.
3. The rules in the Schedule 2 to this Act and any additions thereto or amendments thereof may be added to or amended or repealed in relation to any body corporate by unanimous resolution of the proprietors and not otherwise.
4. The rules in the Schedule 3 to this Act and any additions thereto or amendments thereof may be added to, amended, or repealed in relation to any body corporate by resolution of the body corporate at a general meeting.
5. Any amendment of or addition to any rule shall relate to the control, management, administration, use, or enjoyment of the units or the common property, or to the regulation of the body corporate, or to the powers and duties of the body corporate (other than those conferred or imposed by this Act):

113 Rose, above n 13, 1006.

114 See eg Regional Growth Forum, *Unit Titles Act 1972: The Case for Review*, Discussion Report (2003) 1: '[the *Unit Titles Act* 1972] urgently needs reviewing'; Rod Thomas, 'Duties and Powers of Bodies Corporate' [1998] *New Zealand Law Journal* 337 refers to '[t]he dated and inflexible nature' of the Unit Titles Act 1972.

115 See generally Department of Building and Housing, *Review of the Unit Titles Act 1972* <http://www.dbh.govt.nz/unit-titles-review-index> at 11 March 2008. That said, 2008 is an election year, and it is easy to anticipate that this may cause delays in the enactment of any new legislation.

Provided that no powers or duties may be conferred or imposed by the rules on the body corporate which are not incidental to the performance of the duties or powers imposed on it by this Act or which would enable the body corporate to acquire or hold any interest in land or any chattel real or to carry on business for profit.

6. No rule or addition to or amendment or repeal of any rule shall prohibit or restrict the devolution of units, or any transfer, lease, mortgage, or other dealing therewith, or destroy or modify any right implied or created by this Act.
7. No addition to or amendment or repeal of any rule pursuant to subsection (3) or subsection (4) of this section shall have effect until the body corporate has lodged a notification thereof in form 4 in the Schedule 1 to this Act with the Registrar, and the Registrar has recorded it appropriately on the supplementary record sheet.
8. The body corporate shall keep a record of the rules in force from time to time.
9. The body corporate shall, on the application of a proprietor, or a person authorised by a proprietor to apply, supply to him a copy of the rules in force, and may require him to pay a reasonable charge.
10. The body corporate shall, on the application of any person who satisfies the body corporate that he has a proper interest in so applying, make the rules available for inspection.
11. The rules shall be binding on—
    (a) The body corporate;
    (b) All proprietors; and
    (c) Any other person in actual occupation of a unit—
    and shall enure for the benefit of the body corporate and every proprietor.
12. The body corporate or any proprietor shall be entitled to apply to any Court of competent jurisdiction for an order—
    (a) Enforcing the performance of or restraining the breach of any rule; or
    (b) Awarding damages for any loss or damage arising out of the breach of any rule—
    by any person bound to comply therewith or by the body corporate.

Appendix Two: Schedules Two and Three of the Unit Titles Act 1972

A. Schedule 2

Rules that may be amended by Unanimous Resolution Duties of Proprietor

1. A proprietor shall—
    (a) Permit the body corporate (or its agents or servants) at all reasonable hours to enter into and upon his unit for any of the following purposes, that is to say,—
        (i) Viewing the condition thereof;
        (ii) Maintaining, repairing, or renewing any pipes, conduits, wires, cables, or ducts for the time being in, upon, or passing through his unit and capable of being used in connection with the enjoyment of any other unit or common property;
        (iii) Maintaining, repairing, or renewing any common property; and
        (iv) Ensuring that the rules are being observed:
    (b) Comply in all respects with all Acts, bylaws, and regulations for the time being in force in the area in which his unit is situated in so far as they relate to the use, occupation, or enjoyment of his unit:

(c) Forthwith and at all times carry out all work that may be ordered by any competent local authority or public body in respect of his unit to the satisfaction of that authority or body:
(d) Duly and punctually pay all rates, taxes, charges, and other outgoings from time to time payable in respect of his unit to any local authority or public body and all sums properly levied in respect of his unit by the body corporate:
(e) Repair and maintain his unit, and keep it in sufficiently good order, repair, and condition to ensure that no damage or harm shall ensue to the common property or any other unit in the building of which his unit forms part:
(f) Make no additions or structural alterations to the unit without the consent of the body corporate.

Powers and Duties of Body Corporate

2. The body corporate shall—
(a) Repair and maintain all chattels, fixtures, and fittings (including stairs, lifts, elevators, and fire escapes) used, or intended, adapted, or designed for use, in connection with the common property or the enjoyment thereof;
(b) Repair and maintain all pipes, wires, cables, ducts, and all other apparatus and equipment of whatsoever kind and wheresoever situate which may be reasonably necessary for the enjoyment of an incidental right which may from time to time exist by virtue of section 11 of the Unit Titles Act 1972:
(c) On request, produce to any unit proprietor, or a registered mortgagee of any unit, or any person authorised in writing by any unit proprietor or registered mortgagee of any unit, all policies of insurance effected by the body corporate under the provisions of section 15 of the Unit Titles Act 1972 and the receipt for the last premiums paid in respect thereof.
3. The body corporate may—
(a) Borrow any money necessary to enable it adequately to perform its duties or exercise its powers:
(b) Invest any money for the time being held by it (whether in a fund established under section 15 of the Unit Titles Act 1972 or otherwise) in any of the modes of investment for the time being authorised by law for the investment of trust funds:
(c) Establish a current account at a bank, and nominate for the purposes of this paragraph three persons (including the secretary) of whom any two may operate the account:
(d) Enter into any agreement with a proprietor or an occupier of any unit for the provision of amenities or services by it to the unit or to the proprietor or occupier:
(e) Grant to a proprietor of a unit or to anyone claiming through him any special privilege (not being a lease) in respect of the enjoyment of part or parts of the common property: Provided that any such grant shall be determinable by special resolution.

Committee of a Body Corporate

4. Where there are more than three proprietors, the powers and duties of the body corporate shall be exercised and performed by a committee, subject to any restriction imposed or direction given at a general meeting of the body corporate:
Provided that any expenditure of over $100, not being expenditure which the body corporate is legally obliged or previously authorised to incur, shall be referred to a general meeting; and if the share of the proprietor or proprietors of any principal unit in any expenditure that is referred to a general meeting exceeds $30, that expenditure shall not be incurred unless it is approved by at least a three-fourths majority of votes.

5. Until the first annual general meeting of the body corporate, the proprietors of all the units shall constitute the committee. Thereafter the committee shall consist of such number of proprietors, not being fewer than three, as is fixed from time to time by the body corporate at an annual general meeting.
6. The members of the committee shall be elected at each annual general meeting, to hold office until the next annual general meeting:
   Provided that, unless the committee consists of all the proprietors, the body corporate may by resolution at an extraordinary general meeting remove any member of the committee before the expiration of his term of office and appoint another proprietor in his place to hold office until the next annual general meeting.
7. Any casual vacancy on the committee may be filled by the remaining members of the committee.
8. The quorum necessary for the transaction of the business of the committee may be fixed by the committee; and, unless so fixed, shall be two if there are not more than six members and three otherwise.
9. If the number of committee members is reduced below the number which would constitute a quorum, the remaining members may act for the purpose of increasing the number of members to that number or of summoning a general meeting of the body corporate, but for no other purpose.
10. At meetings of the committee all matters shall be determined by a simple majority of votes. In the case of equality of votes the chairman for the time being of the meeting shall have a casting vote as well as a deliberative vote.
11. Subject to any restriction imposed or direction given at a general meeting, the committee may—
    (a) Meet for the conduct of business, adjourn, and otherwise regulate its meetings as it thinks fit:

    Provided that it shall meet when any member of the committee gives to the other members not less than seven days' notice of a meeting proposed by him, specifying the reason for calling the meeting:
    (b) Employ for and on behalf of the body corporate such agents and servants as it thinks fit in connection with the control, management, and administration of the common property, and the exercise and performance of the powers and duties of the body corporate:
    (c) From time to time elect one of its members to act as convener of the committee:
    (d) Delegate to one or more of its members such of its powers and duties as it thinks fit, and at any time revoke the delegation:
    (e) Whenever it thinks fit, convene an extraordinary general meeting of the body corporate.
12. The committee shall—
    (a) Keep minutes of its proceedings:
    (b) Cause minutes to be kept of general meetings of the body corporate, and include therein a record of all unanimous resolutions:
    (c) Cause proper books of account to be kept in respect of all sums of money received and expended by it, and the matters in respect of which all such income and expenditure is received or incurred:
    (d) Prepare proper accounts relating to all money of the body corporate, and the income and expenditure thereof, and arrange for the accounts of the body corporate for each year to

be duly audited by an independent auditor, for a copy of the duly audited annual accounts to be sent to each proprietor before each annual general meeting of the body corporate, and for the duly audited annual accounts to be presented to each annual general meeting of the body corporate:

(e) On application by a proprietor or a mortgagee of a unit, or any person authorised in writing by either of them, make the books of account and all minutes available for inspection at all reasonable times:

(f) Upon a requisition in writing made by proprietors entitled to 25 per cent of the total unit entitlement of the units, convene an extraordinary general meeting of the body corporate.

13. Except as provided in clause 9 of these rules, no act or proceeding of the committee or of any person acting as a member of the committee shall be invalidated in consequence of there being a vacancy in the number of the committee at the time of that act or proceeding, or of the subsequent discovery that there was some defect in the election or appointment of any person so acting, or that he was incapable of being or had ceased to be such a member.

General Meetings of a Body Corporate

14. A general meeting of the body corporate, to be called the annual general meeting, shall, in addition to any other meeting, be held at least once in every calendar year and not more than 15 months after the holding of the last preceding annual general meeting. The first annual general meeting of the body corporate shall be held within 3 months after the date of the deposit of the unit plan or of the first sale of a unit, whichever is the later.
15. All general meetings of the body corporate other than annual general meetings shall be called extraordinary general meetings.
16. At least 7 days' notice of every general meeting of the body corporate specifying the place, the date, and the hour of the meeting, and the proposed agenda shall be given to all persons entitled to exercise a vote in accordance with the provisions of section 41 of the Unit Titles Act 1972 and of clause 23 of these rules:
    Provided that accidental omission to give such notice to anyone so entitled shall not invalidate any proceedings at any such meeting.
17. Any notice required to be given under clause 16 of these rules shall be sufficiently given if delivered personally to the person concerned or if left, or sent by letter posted to the person concerned, at the last address of that person notified to the body corporate, or if no such address has been so notified at that person's last known place of residence:
    Provided that, if a proprietor advises the body corporate in writing that he requires notices sent to him by post to be sent by registered post, a notice thereafter sent to him by post shall not be sufficiently given unless it is sent by registered post.
18. At a general meeting of the body corporate, the persons entitled, on an ordinary resolution, to exercise the voting power in respect of not less than one-third of the units shall constitute a quorum.
19. Save as otherwise provided in these rules, no business shall be transacted at any general meeting of the body corporate unless a quorum is present at the time.
20. If within half an hour from the time appointed for a general meeting of the body corporate a quorum is not present, the meeting shall stand adjourned to the same day in the next week at the same place and time, and if at the adjourned meeting a quorum is not present within half an hour from the time appointed for the meeting the number of persons present and entitled to vote at the expiration of that half hour shall constitute a quorum.

21. At a general meeting of the body corporate, the chairman shall normally be the convener of the committee if he is present. If there is no convener or if the convener is not present or is unwilling to act, a chairman shall be elected at the commencement of the meeting.
22. Save as otherwise provided by the Unit Titles Act 1972 or these rules, all matters at a general meeting of the body corporate shall be determined by a simple majority of votes. In the case of equality of votes the chairman for the time being of the meeting shall have a casting vote as well as a deliberative vote.
23. Subject to the provisions of section 41 of the Unit Titles Act 1972, at any general meeting of the body corporate—
    (a) Where a unanimous resolution is required each person who is a proprietor shall be entitled to exercise one vote:
    (b) In all other cases one vote only shall be exercised in respect of each principal unit, and no separate vote may be exercised in respect of any accessory unit.
24. At any meeting of the body corporate any person present and entitled to vote on the matter that is under consideration may demand a poll thereon, which shall be taken in such manner as the chairman thinks
25. The result of the poll shall be deemed to be the resolution of the meeting at which it was demanded. Where a poll is not demanded, a declaration by the chairman that a resolution has been carried shall be conclusive evidence of that fact without proof of the number or proportion of votes recorded for or against the resolution.
26. Any vote to be cast at a general meeting of the body corporate may be exercised personally or by proxy. Where 2 or more persons are jointly entitled to exercise one vote and wish to do so by proxy, that proxy shall be jointly appointed by them and may be one of them. A proxy shall be appointed in writing. If only one of those persons is present at a general meeting and they have not appointed a proxy as aforesaid, he or she may exercise the vote.
27. Where a poll is demanded or a special resolution is before the meeting, each vote shall correspond in value with the unit entitlement of the principal unit and accessory unit (if any) in respect of which it is exercised. In all other cases each vote shall be of equal value.
28. Except where a unanimous resolution is required, a power of voting in respect of a unit shall not be exercised unless all amounts accrued due and payable under the Unit Titles Act 1972 to the body corporate in respect of the Unit in respect of which the vote is exercisable have been duly paid.
29. If there is no committee, the responsibility for the matters set out in clause 12 of these rules except paragraph (a), and the powers given to the committee by clause 11 of these rules except paragraph (a), shall be those of the body corporate; and, unless the context otherwise requires, every reference in these rules to the committee shall be read as a reference to the body corporate.
30. A secretary (who may or may not be a proprietor) shall be appointed by the body corporate at its first annual general meeting for such term, at such remuneration, and upon such conditions as it may approve; and any secretary so appointed may be removed by the body corporate, either at a subsequent annual General meeting or at an extraordinary general meeting called for that purpose. At any such meeting the secretary shall have the right to attend and be heard.
31. The function of the secretary shall be to keep proper books of account in which shall be kept full, true, and complete accounts of the affairs and transactions of the body corporate and

to carry out such other functions as may from time to time be delegated to him by the body corporate.

The secretary shall in each year prepare a statement of financial position showing the body corporate's financial dealings during that year, and shall, within six months after each annual general meeting, send a copy of the latest balance sheet to every proprietor.

Miscellaneous

32. The common seal of the body corporate shall not be used without the authority of the committee of the body corporate previously given. Whenever the seal is affixed to any instrument, that instrument shall be attested by at least two members of the committee or, where an administrator has been appointed or there is only one proprietor, by the administrator or that proprietor.
33. For the purposes of these rules a special resolution means a resolution proposed at a general meeting of the body corporate of which at least 14 days' notice specifying the intention to propose the resolution as a special resolution has been given.
34. Where a resolution is proposed as a special resolution, the vote of the meeting shall be taken in the same way as if it had been proposed as an ordinary resolution and a poll had been demanded:

    Provided that a special resolution shall be deemed not to be carried unless persons entitled to exercise not less than three-fourths of the value of the votes and not less than three-fourths of the number of votes exercisable in respect of all the units vote in favour of it.

C. Schedule 3

Rules That May Be Amended By Resolution of Body Corporate

A proprietor or occupier of any unit shall not—

(a) Use of [sic] permit his unit to be used for any purpose which is illegal or may be injurious to the reputation of the building:
(b) Make undue noise in or about any unit or common property:
(c) Keep any animal on his unit or the common property without the prior consent of the committee of the body corporate, or, if there is no committee, of the body corporate:
(d) Use the common property in such a manner as unreasonably to interfere with the use and enjoyment thereof by other proprietors and their families and visitors:
(e) Use his unit or permit it to be used in such manner or for such purpose as to cause a nuisance or disturbance to any occupier of any unit (whether a proprietor or not) or the family of any such proprietor.