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Statutory Review of the Residential (Land Lease) Communities Act 2013,

- Policy and Strategy Division,

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The Officer-in-Charge.

As a homeowner in a Residential Land Lease Community (RLLC) village, I am pleased to contribute to the Review of the RLLC Act.

The greatest concern to living in my Banksia Grove Village, is the unexplained and unjustified rise in site fees over and above the expected and published Consumer Price Index (CPI).

Broadly the RLLC Act must reflect.

### ☆ **Fair rents/low cost housing**

- Fair and equitable rent determination and application. Where rent rises occur, they should only be based on the CPI.
- More/less desirable areas (land valuation is an indicator)
- Establish 'capping mechanism' to prevent rent costs compounding over the years with the proviso that 'special levies' only apply to new works/structures and not applied to any repairs and maintenance of existing facilities.
- Fair rent must also reflect the standard of facility maintenance. Why are all RLLC villages paying round \$175/week when there is a vast difference in the quality of resources and maintenance undertaken.
- What is a fair and reasonable rent considering location and quality of village resources and maintenance. All villages are not created equal.
- A grading system such as hotel stars or Aged Care Accreditation would assist prospective home buyers to decide where to live. This grading system will require monitoring by Inspectors from the Department of Fair Trading.
- Ensure reasons for rent increase does not place the Operators responsibility for the cost of resources, structures and maintenance onto Residents.

### ☆ **Consumer protection against rent spiral**

- ON the question of 'Low Cost AFFORDABLE HOUSING'. Establish 'Market Rents' for Land Lease the same as applies in the residential rental market, and the Government supplies and maintains the home. [fact.nsw.gov.au/housing/policies/charging](http://fact.nsw.gov.au/housing/policies/charging) Rent policy:- "If a householder is eligible for a rent subsidy, the tenant will pay between 20%-30% of their household income as rent".
- It is a well known fact that pensioners and all people on fixed incomes, have limited financial resources. A single pensioner receives:-  
Pension per fortnight \$1083.90 (including Rent Assistance and Energy Rebate)  
= \$541.95 per week  
Our current rent per week will increase to \$171.00 on 16 March \$169.10 (31.2%)
- Is not the objective of 'low cost affordable housing' to keep costs below alternatives such as home ownership/renting in the wider community.

- Remove the practice of 'voluntary sharing agreements' which is an opportunity for operators to erode home ownership and is open to vulnerable person abuse. This practice would not be needed if rents were controlled better.
- It seems that 'one off' costs to residents keep on recurring. This is definitely wrong

☆ **Protection against the possibility of unfair levies**

- Only new, Resident approved items/structures, NOT replacing or refurbishing existing items/structures.
- Ensure reasons for rent increase do not place the Operators responsibility for the cost of resources, structures and maintenance onto Residents.
- The Act must state that all rent increases to be CPI ONLY.

☆ **Sales commission**

- Real Estate Agents have to be qualified to sell houses. Operators are not bound by the same regulations. Real Estate legislation allows a maximum of 3% selling fee. Operators are not bound by the same legislation. Needs to change.

Our Banksia Grove Village Residents Committee Inc, has investigated these issues and adopted the report developed by the Riverbend Village Residents Committee report titled "Site Fee Increases Searching for an Explanation". The findings of this report have been outlined to me and I fully endorse its findings and recommendations for changes to the Act.

Additional to the Submission, are points raised by our Residents, in no particular order:-

- Need a capping mechanism to ensure rents are fair according to the quality of facilities available in a village to prevent the unending spiral.
- We need Value Parity rather than Cartel Pricing.
- Needs to be transparency in operators costs - as with community groups such as Rotary, Probus, Lions clubs who are required to provide a detailed monthly report to members. These small groups, often with an annual budget of less than \$20,000 are accountable but multi million dollar Operators are not held to account - this is wrong
- Operators need to display full transparency when claiming the required 80% of Residents have agreed to the new contracts.
- Consumer (Residents) Protection to maintain RLLC as low cost housing.
- Rent parity based on less/more desirable areas eg land valuations. Why are all RLLC villages paying around \$175/week when there is a vast difference in the quality of resources available in each village.
- How is the 'end point price' determined, ie all rents being raised to the same top level of rent regardless of size of house and land.
- Remove the practice of 'voluntary sharing agreements' which is an opportunity for operators to erode home ownership and is open to vulnerable person abuse.
- It seems that 'one off' costs to Residents that keep reoccurring, is definitely wrong

The Residents Committee report forms part of my submission. That Submission has been adopted from Riverbend Village Ballina and is attached. I have also attached a forecast of how rents will increase over coming years using the operators current compounding formula of CPI + \$2.00. It is most unlikely the Aged Pension will keep pace with this increase.

Yours sincerely

	Base	CPI @ 2%	Plus \$2	Total
2021	\$169.75	\$0.00	\$1.75	\$171.00
2022	\$171.00	\$3.42	\$2.00	\$176.42
2023	\$176.42	\$3.53	\$2.00	\$181.95
2024	\$181.95	\$3.64	\$2.00	\$187.59
2025	\$187.59	\$3.75	\$2.00	\$193.34
2026	\$193.34	\$3.87	\$2.00	\$199.21
2027	\$199.21	\$3.98	\$2.00	\$205.19
2028	\$205.19	\$4.10	\$2.00	\$211.29
2029	\$211.29	\$4.23	\$2.00	\$217.52
2030	\$217.52	\$4.35	\$2.00	\$223.87
2031	\$223.87	\$4.48	\$2.00	\$230.35
2032	\$230.35	\$4.61	\$2.00	\$236.95
2033	\$236.95	\$4.74	\$2.00	\$243.69
2034	\$243.69	\$4.87	\$2.00	\$250.57
2035	\$250.57	\$5.01	\$2.00	\$257.58
2036	\$257.58	\$5.15	\$2.00	\$264.73
2037	\$264.73	\$5.29	\$2.00	\$272.02
2038	\$272.02	\$5.44	\$2.00	\$279.47
2039	\$279.47	\$5.59	\$2.00	\$287.05
2040	\$287.05	\$5.74	\$2.00	\$294.80
2041	\$294.80	\$5.90	\$2.00	\$302.69
2042	\$302.69	\$6.05	\$2.00	\$310.75
2043	\$310.75	\$6.21	\$2.00	\$318.96
2044	\$318.96	\$6.38	\$2.00	\$327.34

# Submission

20<sup>th</sup> January 2021

## To Statutory Review

Residential (Land Lease) Communities Act 2013 No 97 NSW

Prepared by - T.C. Coster

For the Riverbend Residents Committee

## Site Fee Increases Searching for an Explanation

Part A. Introduction

Part B. The Explanation

Part C. Non-Recurring Expenses

Part D. Asset Preservation

## Part A. Introduction

The focus of this submission is, from a homeowner's perspective, on one of the most serious defects in the RLLC Act. That is the control of site fee increases in RLLC villages.

In considering this subject, it is useful to consider recent history since the introduction of the RLLC villages Act. When the Act was introduced in 2013, it was aimed at improving the regulation of caravan parks offering long term site rentals upon which a resident could place a removable home. Long term sites were usually grouped with conventional short-term camping and caravan sites. Hence the principal lobby group for operators is the Caravan & Camping Industry Association NSW. Fast forward to the present, while caravan parks with long term site rentals remain, the overwhelming bulk of these RLLC villages are now purpose built, in conjunction with the Manufactured Housing Industry, as permanent long-term home sites with not a tent or caravan in view.

This transformation has been accompanied or facilitated by a dramatic change in ownership of these parks. From a municipal council or privately owned caravan park, they are now owned by large investment companies, often international organisations, and operated by specialist management companies. In conducting their business this class of ownership has access to legal and financial resources homeowners can only dream of.

At the expense of homeowners, mainly self-funded retirees or pensioners it is becoming apparent, this new class of operator is now using their resources to find weaknesses in the RLLC Act, through which they can maximise their returns on investments. *Site fees* have become a pipeline enabling the transfer of private and public pension money, into operator coffers.

Certainly, the quality of life provided in these new styles villages and the contribution to homing an ageing population is commendable, but as when the 2013 Act was introduced, regulation appropriate to current circumstances is now needed.

The 2013 Act has a weakness that puts the operators in control of the valve regulating the flow of cash to their coffers. That valve is the 'By Notice site fee increase'. While a provision of the Act requires an 'explanation' to be provided justifying the reason for site fee increases, by failing to mandate the form and content of that 'explanation' the operator has control of that valve.

A form and content of the explanation has been constructed by operators that is meaningless and devoid of information useful to a homeowner in administering their site agreements. By blinding the homeowner with this veil of secrecy as to the reason and justification for increases, the operator is freely charging whatever the market will bear. These actions are causing major distress to older long-term residents. Unable to meet the escalating fees demanded, they are being forced out of their homes only to be replaced by newer, younger, cashed up replacements yet to encounter the inequity. That defeats the overall objective of the Act; to facilitate affordable retirement housing.

The operator is entitled to operate a profitable business, but not by using unfair, predatory tactics against a community with limited resources to defend itself. Our submission deals with an important aspect of this issue, the **explanation**, and its dependant issues.

## Part B. The Explanation

### Synopsis

*The **explanation** required to be provided by the operator under the Act justifying a By Notice site fee increase, provides no information useful to the homeowner, in the form and content adopted by village operators for that notice.*

*There are more than 70,000 people living in residential land lease communities (RLLC) in Australia, 35,000 in NSW alone. Homeowners are classified by the Operator lobby group<sup>1</sup> as over 55 low-income retirees and pensioners.*

*The explanation universally provided is a concoction created by the operator lobby group designed to hide and conceal financial information necessary for homeowners to administer their site agreements.*

*The Act requires amending to ensure the form and content of the explanation is fit for purpose as the homeowner's source of financial evidence relating to site fee increases and related ability to administer homeowner site agreements.*

#### *Statutory Review – Discussion Paper*

20. Is the process for resolving disputes over site fee increases by notice working effectively? **No. In our 192-home village, over last 9 years fees have exceeded CPI increase by more than \$700,000 without explanation.**

21. Should there be changes to the grounds for challenging site fee increases by notice? **Yes, the requirement for a valid fit for purpose 'explanation' should be mandatory, and the obligations of site agreements observed.**

22. Should the factors the Tribunal may have regard to when determining site fee disputes be expanded or changed? What changes would you suggest? **Yes, the Tribunal system is highly legalistic requiring legal expertise to navigate and advocate. An expense beyond homeowners' resources. It requires change to provide a consistent and common-sense system within the financial and intellectual grasp of the homeowner clientele, +55's low-income retirees and pensioners.**

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### Introduction - The issue

1. A site agreement is a contract that sets out the rights and obligations of parties to that contract.
2. The standard form of site agreement provides an option for the operator to vary the fee charged for rental of the homeowner's site in a village. This option may be exercised by the operator but only under conditions set out in a site agreement and the Act.

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<sup>1</sup> Source: Submission to Commonwealth Treasury 2017 consultation paper on Stapled Structures by Land Lease Living, Caravan & Camping and Manufactured Housing Industry Association.

3. The Act [Article 65] allows two methods for the operator to increase site fees. A **Fixed** method or a **By Notice** method. The discussion that follows relates specifically to the By Notice method.
4. Article 67 of the Act prescribes the conditions under which a By Notice increase in site fees can occur. One of those conditions is the provision of an **explanation** for the increase. Article 67 (4) (c, d, and e) refers.
5. The Act makes the requirement for the provision of an explanation clear. However, by failing to prescribe the content and form of the explanation in the regulations to the Act, homeowners have been left impotent in accessing from the operator, the financial information envisaged by this provision. It is the clear intent of the Act that the explanation should reveal to the homeowner the **evidence** supporting a 'by notice' site fee increase.
6. Compounding the impact on homeowners of that omission, a situation has now been created where operators have stepped in and created their own form of explanation. This form of explanation can be characterised as being a model of concealment and not one of being open, informative, and transparent as envisaged by the objective of the Act. Their model continues to exist only by lack of challenge, and by some Tribunal members taking a very broad overview of the requirement, failing to grasp the significance of the intended purpose of the explanation, and accepting the operator's model. The Act provides no authority to support the operator's 'explanation' model.

### **The impact on homeowners**

7. An explanation is meant to make something clear, to provide justification for an action.
8. The explanation provided by operators is incapable of scrutiny as to,
  - a. evidence of cost increase,
  - b. evidence the included costs are payable by homeowners under their site agreements,
  - c. whether the increases are recurring or non-recurring in character, or if the cost increases are limited to increases since the last site fee increase,
  - d. or even if the operator just plucked an amount, he thinks he can get away with, out of the air.
9. An example of the form of explanation offered almost universally by operators follows.

*["Explanation for the increase.*

*The following are some of the issues that have been assessed in determining the increased site fees: Government rates and charges, sewage and drainage, telecommunications, insurances, gardening and landscaping, wages/salaries, waste disposal, building and grounds maintenance, machinery upkeep, accounting and administration, site management and vehicle expenses.*

*These costs as well as the commercial reasoning associated with these issues impact directly upon the operation and sustainability of the community.*

*The site fee increase of \$7.00 is required to ensure the impacts of these issues are accounted for and help maintain the continued viability of the community"].*

Source: Riverbend Village By Notice site fee increase dated 30<sup>th</sup> August 2019

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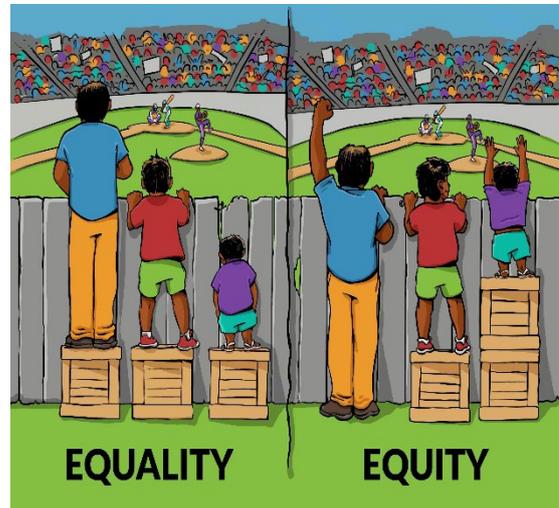
10. The format of the operator's notice is generic in construct, concocted by the operator's lobby group, and has found almost universal use within RLLC villages. Using this form of explanation, operators claim, '*costs however incurred in operating a village contribute to the assessment and inclusion in site fee increases*'. Coupled with some Tribunal Members rulings supporting the operators form of explanation, it is virtually impossible for homeowners to challenge that concept, faulty as it is.
11. A valid fit for purpose explanation is fundamental to the homeowner's ability to administer their site agreement (contract).
12. To administer that contract, the parties are entitled to equal access to critical information bearing on a contractual matter. In principle, if one party because of a privileged position withholds information relevant to an issue from the other party, procedural fairness may be breached - in this case access to evidence of costings that support site fee increases incurred in operating a park. These costings are central evidence in determining site fee increases that a homeowner is responsible to pay under their site agreement. The Act recognises this principal in its requirement for an explanation. However, failure to be definitive as to what is required by the explanation, has allowed operators to create their own form of explanation and corrupt the intention of the Act, for fair dealing. Their form of explanation is the reverse of everything an explanation is.

#### **Recommended changes to the Act**

13. It is recommended that Article 67 (4) (c) and (d) be amended by removing reference to the regulations and inserting in the Act, requirements for the content and form of the explanation.
14. The amended explanation content should have the following characteristics. The explanation for each expense item contributing to the 'by notice site fee increase' should contain the following information: -
  - the date or date range over which the expense was incurred,
  - A description identifying the nature and purpose of the expense',
  - A statement of the amount in \$ of the expense,
  - A mechanism to trace the expense back to source documents evidencing the expense.
15. If an expense is included as a justification for all or part of a site fee increase, then evidence of this expense should be mandatory. [*Refer also paragraph 11 above and Part C. recommendations*]. If the operator does not want an expense examined, then he need not include that expense in the calculation of the increase. The explanation should show mathematically, how the site fee for a homeowner site was calculated based on the expense data outlined in the foregoing paragraph.
16. Like expenses could be grouped for reporting purposes in a summary format, **provided always**, if required by the homeowners, verifiable detail of the group component items shall be provided to the homeowner by the operator. Verifiable, meaning presentation of original source documents supporting grouped items. In other words, be capable of audit.
17. Reasonable and private access is required to be provided at the homeowner's village for homeowners and their advisers to examine financial evidence supporting site fee increases. The operator should be available, but not present during examination of the

financial evidence, to answer questions that may arise or provide, on notice, a response. In essence an open book review process regarding evidence for by notice site fee increases.

18. The timing and period of examination of financial evidence should be agreed between the parties but the examination period should be no less than two working weeks from the financial evidence being handed to the homeowners or their representatives. If additional financial information is to be provided, then the period for review recommences from receipt of that evidence.
19. The process of reviewing financial evidence for a By Notice site fee increases should occur prior to any need for mediation or tribunal hearings. The whole process should be designed to permit **informed decision making** by homeowners prior to accepting or rejecting a site fee increase.
20. No paragraph.
21. The writer is aware this may be a difficult assignment for the legislation drafters and political decision makers, but it cannot be ignored as was done when the Act was introduced in 2013, and ignored again in the regulations in 2015, with the subsequent abuse by operators of this inaction. Unless addressed carefully to provide balance and equity between homeowner and operator interests, and that balance includes consideration of the relative financial and technical imbalance of resources available to homeowners as compared to operators, a major defect will remain in the Act.
22. In the foregoing discussion the term site fee **increase** is used. As discussed in following Part C. that process must also include **decrease** where applicable.



## Part C. Non-Recurring expenses

### Synopsis

*An anomaly exists in the procedure for determining site fee increases where non-recurring expenses or any other expenses of fleeting duration are included. The problem is, that once a new expense is added to the retiring site fee, it stays there for ever, even after the cost, for which that expense was originally included, has been recovered and justification for its inclusion long gone. It becomes a classic 'fee for no service' issue.*

*The inclusion of non-recurring expenses in site fee increases is exacerbated by the form of explanation provided by operators, that format conceals any useful financial information revealing the existence of such non-recurring expenses and their treatment. To deal with this and other site agreement administration issues, mandated access to relevant financial data via a fit for purpose 'explanation' is required.*

*A similar issue arises when services are reduced, or an otherwise recurring expense is reduced. Unless these reduced expenses are reflected as a reduction in calculating a new site fee, another 'fee for no service' situation arises.*

*The Act makes no provision for treatment of this type of fleeting non-recurring expenses, allowing only a ratcheting up of site fees but no reduction when an intermittent cost recovery, or a recurring cost reduction has occurred. This anomaly in the Act requires correction.*

### Statutory Review – Discussion Paper

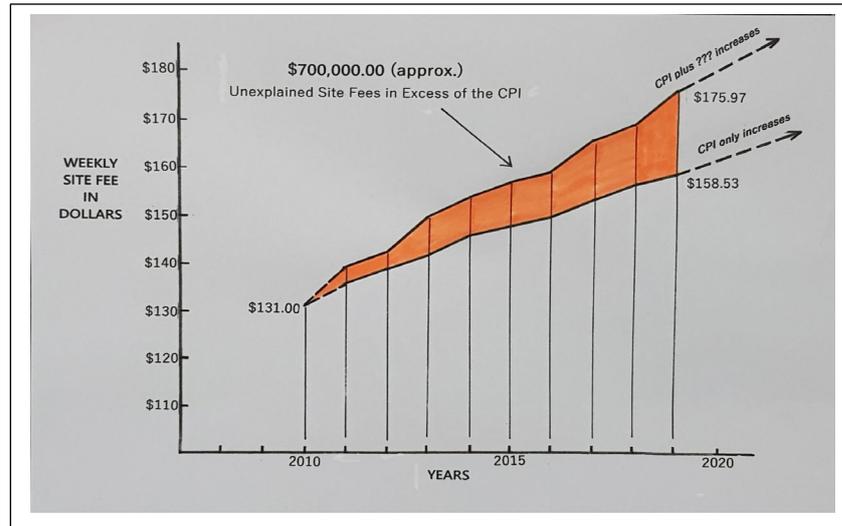
21. Should there be changes to the grounds for challenging site fee increases by notice? **Yes, Act should provide for adjustment to site fee for non-recurring expenses previously paid.**
22. Should the factors the Tribunal may have regard to when determining site fee disputes be expanded or changed? What changes would you suggest? **Yes, the Act should allow for reductions in site fees where costs have reduced or are no longer applicable.**

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### Introduction - The Issue

1. For example, in Riverbend Village over the past nine-year period, site fees are noted to be escalating at a rate considerably exceeding CPI increase. In the graph below, these increases are illustrated.
2. Viewed from an individual homeowner's perspective it is difficult to understand why these increases should be occurring. While the operator is claiming cost increases are occurring there seems to be no corresponding increase in site workload or increase in services that general cost inflation as described by CPI, could not explain. As new homes were coming online, the additional homeowner site fees contribute to the cost new homes create. Meanwhile, common community facilities and services remain unchanged, but their cost is shared by more homeowners. So, a reduction per homesite should follow.

3. The explanation for a site fee increase provided by the operator provides no useful information to enable homeowners to understand these increases. The following graph based on Riverbend Village experience, illustrates the unexplained increases. It shows actual site fee increases, and site fees if only increased by CPI.



4. For the nine-year period prior to 2019, the unexplained difference between what the village was charged in site fees and what it would have been charged if increased by CPI alone, was more than \$700,000.
5. How can this cost increase be explained? We submit there can be three likely reasons for actual site fees charged exceeding CPI increases.
  - (i) Non-recurring expenses included in a site fee increases as a cost recovery, are rolled over into the next period and compound period on period,
  - (ii) Increases based on expenditure for the preservation of village community assets, not the responsibility of homeowners, are included and
  - (iii) Increases without specific justification, just because the operator could.

While noting items (ii) and (iii), this section of the submission focuses on item (i). Item (ii) is dealt with in Part D and item (iii) is self-evident.

6. Site fees are subject to adjustment as prescribed by the Act and Site Agreements. In general terms a *new By Notice site fee* is arrived at by adding an increase, to the value of the *retiring site fee*. This process occurs when a notice of site fee increase, is issued. The date specified in that notice, as the effective day, signifies the date the *retiring site fee* terminates, and the *new site fee* becomes effective.
7. In this submission we argue that in the case of By Notice site fee increases, when calculating the \$ amount of the new site fee, non-recurring expenses included in the *retiring site fee* as a 'cost recovery' must be **deducted**. If not deducted the already paid non-recurring expenses will be included again in the *new site fee*. Further, and if occurring, recovery of these non-recurring expenses compound into each future site fee increases, for ever.
8. A non-recurring cost included in a site fee increase 10 years ago, remains there to the present day and into the future. As each period passes more non-recurring expenses are added even though they too have been paid long ago. This, to permit such transactions to occur, and additionally when coupled with the operator's concealment

of useful cost evidence in the 'explanation', is behaviour that could be classed as unconscionable commercial conduct.

### The impact on homeowners

9. Consider the following real-life example for Riverbend Village Ballina NSW.

*A preceding site fee for 2018/19 was \$168.97/homeowner/week.*

*The equation for the new site fee following the preceding site fee was.*

*\$168.97/homeowner/week (2018/19)*

**plus**

*2019/20 increase (\$7.00/homeowner/week) comprising (non-recurring expenses (\$A) + recurring expenses (\$B))*

**equals**

*retiring site fee of \$175.97/homeowner/week.*

10. Recurring expenses (\$B) - these are an ongoing expenses type that occur year on year. Such as grass cutting, electricity, wages, insurance and like recurrent expenses.
11. Non-recurring expenses (\$A) - these are intermittent expenses that once incurred, do not recur on a routine or annual basis. For example, re-tiling a swimming pool, refurbishment of a community building floor, re-mulching garden areas, repairing damaged or failed road pavement. These are intermittent non-recurring expenses.
12. Now, *provided payment for such an expense by the homeowner was provided for in the homeowners site agreement (and that is an issue discussed in Part D of this submission)*, that cost could contribute to the calculation of the site fee increase for the next period. Then, over that next period, say the period between site fee notices of increase, that cost is recovered by the operator as part of the site fee for that period. In effect a cost recovery.

*Note also, that the period within which an expense contributing to a site fee increase can be considered is defined by the Act as being between the previous increase and a new increase (Act article 73 (4) and that period is not less than 12 months (Act article 67 (6)).*

13. It follows then, that if unjust and unconscionable commercial conduct is **not** to occur, an adjustment is required in determining the magnitude of the new site fee (2020/21) to account for non-recurring expenses already recovered (paid for) during the retiring 2019/20 period. In other words, the equation for striking a new site fee, becomes:

*In our example, from the value of the retiring site fee*

*175.97/homeowner/week*

**deduct**

*the value of **non-recurring** expenses included in the retiring site fee \$A (now paid)*

**plus**

*a valid\* cost increase incurred during the retiring site fee period.*

**equals**

*the new site fee for next period 2020/21.*

*\* a cost the homeowner under the terms of his/her site agreement is contracted to pay.*

14. If this adjustment for non-recurring expenses is not made, then these expenses forming part of the retiring site fee roll over into the new site fee. **This compounding process repeats each site fee period thereafter, and unless halted, continues compounding forever.**
15. Consider also the following hypothetical example e.g., from our day-to-day commercial life.
  - *A homeowner calls in a plumber to unblock a drainpipe.*
  - *The plumber arrives and performs the work.*
  - *In due course he presents his invoice for the work.*
  - *As the homeowner is a bit short on funds, he arranges with the plumber to pay the invoice in monthly instalments over the next 12 months at 1/12th of the invoice amount per month.*
  - *However, to the homeowner's surprise, having paid the last instalment, the plumber issues to the homeowner a demand for payment for exactly the same service (already performed and paid for), and demands that same service be paid for again over the next year. The following year the same demand is repeated.*
16. What law of the land entitles the plumber to a second and forever recurring payment for a service already performed and paid for? 'Fee for no service' comes to mind.
17. The foregoing example expresses exactly the action an operator is imposing on homeowners when the cost of non-recurring expenses, having been recovered by the operator in the retiring site fee, are included again as a component of new and subsequent site fees. In a similar way, any expenses claimed as actual or projected increases, article 73 (4) of the Act, of a non-recurring nature, must be considered.
18. A similar cost reduction may also occur in what may normally be a recurring expense. For example, a reduction in staff levels, ending of a government levy, withdrawal of a service or some other reduction in what would normally be a recurring expense. That too requires an adjustment (reduction) in the level of site fee to account for the reduced cost of those services in the same way as if there is a valid increase in a recurring expense, where an increase is permitted. Else again, homeowners would be paying for a service they were not receiving.

### **Recommended Corrective Action**

19. The Act be amended to require the operator to include, in the explanation, a statement (with evidence) of
  - (i) non-recurring expenses (cost recovery) included in a retiring site fee, and
  - (ii) cost reduction associated with a reduction in services. [*Refer also to Part B paragraph 14*].
20. The Act be amended to require retiring non-recurring expenses and cost reduction associated with a reduction in services to be credited (deducted) from the site fee before any new increase is added.
21. The Act, Division 2 – "Reduction of site fees", be amended to allow a site fee reduction for retiring non-recurring expenses and other reductions in expenses, additional to those presently listed in article 64 of the Act, without first requiring a tribunal direction.

## Part D. Asset Preservation Costs

### Synopsis

*Park operators are increasingly attempting to include the cost of preservation of park capital assets into site fee increases. It is the homeowners understanding that under the standard site agreement such costs are the operator's responsibility not the homeowners.*

*The homeowner leases a site upon which to place his home. That lease includes the right of access to partake in the village services and amenities presented to him by the operator when entering into a site agreement. At that time there is normally no suggestion or disclosure by the operator to the homeowner that, over time, the homeowner will be required to pay the cost of preserving village amenities and services, the property of the operator. Potentially a serious financial commitment and one not disclosed to the homeowner.*

*This is another case where the explanation of a site fee increase must clearly explain what costs go to justifying an increase, so homeowners can be assured cost of preserving park capital assets are not included.*

### Statutory Review – Discussion Paper

4. Is the ban on inducing a person to enter an agreement through false, misleading, or deceptive statements or promises working effectively? **No. Example, that homeowners would be liable to fund the cost of preservation of the operator's assets is not disclosed. There are no requirements for Sinking Funds or the like payments.**

20. Is the process for resolving disputes over site fee increases by notice working effectively? **No, Tribunal jurisdiction scope narrow and legalistic and not capable of dealing with issues involved.**

21. Should there be changes to the grounds for challenging site fee increases by notice? **Yes, Act should define that the costs of preserving Capital Assets (asset preservation) are not costs that contribute to Site Fee increases. The village infrastructure does not belong to the homeowners and they have no say in how it is managed, site agreements just include the use of it.**

22. Should the factors the Tribunal may have regard to when determining site fee disputes be expanded or changed? What changes would you suggest? **(a) Explanation content be made fit for purpose, (b) Capital asset preservation cost be excluded from assessment of increases. The dispute settlement process to be made accessible to homeowners within their financial and experience capacity to use it.**

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## Introduction - The issue

1. In assessing site fee increases operators claim that *"any expenditure, for whatever purpose incurred in operating the park, contributes to the calculation of site fee increases"*. This position is challenged.
2. The site agreement and the Act require the Park Owner to maintain all common assets in good working order for the benefit of the Homeowner. The Park Owner is also required to keep the grounds and gardens clean and tidy, cut the grass, remove all rubbish, control weeds and vermin and pay all statutory charges relating to the park. The Park Owner is required to maintain the common areas, amenities, utilities and village security in the condition presented and described to the Homeowner, and specified in the site agreement, at the time of entering into a site agreement. That is what the Park Owner, for the receipt of a site fee, has contracted to do.
3. To provide these services, the Homeowner is aware that site fees may be subject to review. When undertaking this review what is not explained in the site agreement or the Act is, what cost increases are to be considered the responsibility of the Homeowner and potentially contribute to a site fee increase, and what costs are attributable to the Park Owner in maintaining and preserving the capital assets of the park.
4. The Homeowners contend that not all expenditures incurred in operating the park contribute to the calculation of site fee increases. There are five main expense groups to consider.
  - a. Sales and Marketing
  - b. Capital Development
  - c. Preservation of Capital Assets
  - d. Additional Facilities
  - e. Outgoings and Operating expenses

### Impact on Homeowners

The Homeowner's position is that, of these five groups, only Recurring Outgoings and Operating expenses can be included in the calculation of site fee increases. The Act in the 'explanation' should make it clear that only those increased expenses, for which the Homeowner has a contractual responsibility to pay via site fees, are included in the site fee increase calculation.

5. **Sales and Marketing costs** - The Park Owners' model for calculation of increases in site fees includes costs relating to sales and marketing. These costs are recouped through sales commission. These are costs (direct and indirect) we, as Homeowners, do not accept as our responsibility. They are a Park Owners' commercial expense unrelated to the Homeowners' occupancy of a site or site agreement responsibilities and precede a homeowner's occupation of a site.
6. **Capital Development Costs** - Costs in creating the park or its expansion are a commercial matter for the Park Owner and precede any Homeowner site agreement. There are also other development costs that should not be included in site fee increase calculations. For example - delayed capital works, part of an approved development but delayed in being provided, such as a car wash facility, or security fencing.
7. **Cost of Preserving Capital Assets** - What do we mean?

We mean any expenditure incurred in maintaining or extending the life of an asset to keep that asset in its near new condition including repair, refurbishment, or

replacement of the asset as required or necessary, to provide the services contracted for in the site agreement.

**What are these Capital Assets?**

A capital asset is property that is expected to generate value over a long period of time. Capital assets form the productive base of an organization. Examples of capital assets are infrastructure, buildings, computer equipment, machinery, and vehicles. Expenses in respect to maintenance and refurbishment of capital assets will tend to be intermittent non-recurring expenses. Such expenses are normally managed through a sinking fund or similar financial provisions, including owner simply financing on an as required basis.

For example, following is a list of capital assets belonging to the owners of Riverbend village, the maintenance and refurbishment of which are not the homeowner’s responsibility to finance. They are the facilities that provide the services the operator has contracted to provide as a component of the site lease.

	Item
1	The land occupied by the village
	<b>Built infrastructure</b>
2	The built roads, road substructure, road surfaces, road kerbs, and road drainage pits, pipes, grates, covers, and subsoil drainage system.
3	Rainwater (stormwater) detention basins and channels and associated engineered structures.
4	Paths, including substructure and path surface treatment.
5	Retaining walls and associated drainage provided to create the landform of the leased site.
6	Security gates and fencing
	<b>Services and utilities</b>
7	Sewer drainpipes connecting more than one house sewer to the sewer collection system and sewers external to a leased site.
8	Sewer pumping station structures and equipment including all associated pipework, valves, electrical and ancillary equipment connecting the pumping station to the ultimate council or other collection and disposal system including onsite septic systems and treatment plants.
9	Water reticulation system up to and including water meters, or if not individually metered to the homesite potable water isolating valve.
10	Fire service water system including all pipes valves, hydrants, and fire hoses.
11	Car washing facility
12	Village electrical installation up to homeowner electricity supply meters.
13	Street lighting system including all ancillary components.
14	Village fixed line telephone system up to house junction box.
	<b>Recreational facilities</b>

15	Swimming pool and pool water treatment and water quality monitoring equipment.
16	Bowling greens, tennis courts and other sporting and recreational installations and their related facilities.
17	Community hall and associated ancillary common area structures including, floors, roof system, internal and external walls and wall surfaces including, windows, doors, and window and door operating systems, and protective and decorative coating systems.
18	Community hall ancillary facilities including shower and toilet facilities, kitchen fit out, hall furnishings, pool table, gym equipment, TV and PA system, window dressings, hall lighting, air conditioning and ventilation systems, and all associated electrical and plumbing systems.
	<b>Landscape and plantings</b>
19	Landscape shrubs and trees
20	Common area garden beds and their plantings.
21	Lawns, and ground cover plantings, mulching.
22	Irrigation and garden drainage systems.
	<b>Management, Workshops, Equipment and Store</b>
23	Operators site office and administration buildings including workshops, garages, and storage sheds.
24	Office and workshop equipment, and tools used to maintain village assets.
25	Motor vehicles, and other mobile maintenance equipment.
26	Village bus used as a mobile advertising platform and as a service to homeowners.

## 8. Additional Facilities

Should additional facilities be required or improved, articles 50 and 51 of the Act require the creation of a special levy for the purpose. This levy is separate from site fees and therefore these costs do not contribute to site fee increases.

## 9. Outgoings and Operating expenses

### What are Outgoings and Operating expenses?

There is no direct requirement under the site agreement or the Act for payment of operating cost increases. However, there is a reference, in the Standard Form site agreement and the Act at article 67, enabling the operator to increasing site fees By Notice, but only if the increase is accompanied by an **explanation** for the increase. There is also a reference in article 73 (4) of the Act regarding orders the Tribunal may make relating to excessive increases in *outgoings and operating expenses*.

In the context of a RLLC village a reasonable understanding of increases in 'outgoings and operating expenses' would be a reference to **recurring** expenses that are incurred on a daily, weekly, monthly, or yearly basis, including minor repairs and

maintenance performed by on-site staff in running the village. A schedule of such expenses, again based on Riverbend village, follows.

	Item
	<b>Labour costs</b>
1	Salaries and wages for administration and on-site operating staff.
2	Salaries and wages on costs.
	<b>Statutory Government charges and Insurance</b>
3	Statutory government fees and charges other than Municipal Council rates
4	Insurance including public risk, and property damage.
5	Vehicle insurance, registration.
	<b>Utilities and services</b>
6	Solid waste collection and disposal charges.
7	Domestic sewerage disposal charges.
8	Septic pump-out services.
9	Water supply usage for common areas, including swimming pool makeup water for splash, evaporation and filter washing, but excluding recharge water following pool emptying.
10	Electricity supply charges for village common area usage (i.e., non-leased areas, the property of the operator), excluding electricity utility charges for separately metered homesites.
11	Telecommunications and business purposes internet usage costs.
12	Materials used for minor servicing and maintenance undertaken by village site staff.
	<b>Consumables</b>
13	Consumables including, swimming pool chemicals, fuel, lubricants, garden fertilisers, weed control chemicals, stationary, printing.
14	Routine servicing (excluding rectification of damage and/or mechanical failures) of equipment.
	<b>Administration</b>
15	Account keeping and statutory reporting costs.

#### 10. Disclosure of Cost Liability to potential Homeowners -

- a. The Park Owner's argument that *any expenditure, for whatever purpose incurred in operating the park, contributes to the calculation of site fee increases* must be tested against the provisions of Consumer Law in relation to disclosure.
- b. Consider this at time of entry into a park, were potential homeowners made aware, that through site fee increases, homeowners would be required to fund expenditure relating to the preservation of park capital assets? Because that is what the Park Owner's stated policy for the calculation of site fee increases implies. Such additional costs could be significant.

- c. Were these future cost liabilities, that were clearly known to the Park Owner at the time of entering into a site agreement, disclosed to the potential Homeowner? If not, then such behaviour would clearly be a breach of Consumer Law if, in practice, expenditure relating to preservation of park assets was included in site fee increase determinations.
- d. In effect under the Park Owner's calculation policy, Homeowners would be providing by default, a 'sinking fund' for funding the costs of preserving park assets. In the case of Riverbend village, the operator has clearly stated such a fund is none of the homeowner's business. With this we would agree.

Quote: Letter to Riverbend Residents Committee dated 16th May 2018 paragraph no #3

*....Residents own their own homes and pay for their site upon which it is sited. Under RLLC there are no Strata Titles, Sinking Funds, Deferred Management Fees etc. Therefore the Residents do not have a say in how the owners of the village wish to execute their business.*

*Signed Brian Callard and Helen Jamison on behalf of Riverbend Ballina P/L*

- e. The Act in Schedule 1 prescribes Rules of Conduct for Operators. Section 1 (b) of Schedule 1 of the Act requires an Operator to have a knowledge and understanding of, among other laws, Fair Trading, and Australian Consumer Law. These laws have relevance at the time of entering into site agreement contracts.

11. The Department of Fair Trading summarise relevant aspects of Consumer Law as follows.

*Business conduct is likely to break the law if it creates a misleading overall impression towards the intended audience about price, value or quality of consumer goods or services. Whether a business intends to mislead or deceive is irrelevant; what matters is how their statements and actions, the business conduct, affect the thoughts and beliefs of a consumer.*

*A business can break the law if it fails to disclose relevant facts to you. Silence can be misleading or deceptive when:*

- *One person fails to alert another to facts known to them, and the facts are relevant to the decision.*
- *Important details a person should know are not conveyed to them.*
- *A change in circumstance meant information already provided was incorrect.*

*Whether silence is misleading or deceptive will depend on the circumstances of each case.*

12. Until very recently, the operator has not disclosed to prospective homeowners that they would be responsible, through site fee increases, for the cost of preserving village assets. There was no information provided to the prospective homeowners that would affect the thoughts and beliefs of incoming homeowners that this would be the case. That silence clearly breaches consumer law if site fee increases include the cost of asset preservation.
13. Now recently in Riverbend village, following a mediation conducted in September 2019, site agreements presented to new entrants have included a term under the heading 3. SITE FEES - Notes on Site Fees, as follows.

*Fees will, as agreed by mediation, increase on the 1<sup>st</sup> November 2020 by CPI and on 1<sup>st</sup> November 2021 by operating expenses and again on the 1<sup>st</sup> November 2022 by CPI*

*Some of the items your site fee covers are – Repairs and Maintenance of all community areas, facilities and amenities, roadways, village lighting, Council Rates, seasonal pool heating, lawn mowing and edging of your yard, repairs and maintenance of village machinery, wages, insurances and the everyday operating expenses of the village. \**

\*In even more recent cases this latter paragraph has been moved to a modified disclosure statement. By what authority is not known.

14. This is clearly a back-door attempt to give legal authority to the Operators claim that "*any expenditure, for whatever purpose incurred in operating the park, contributes to the calculation of site fee increases*". However, as the homeowners understand the Act, the operator is not entitled to modify the Standard Terms and if he does, such modifications are null and void. **This again, is an example of an operator attempting to manipulate the Act to the disadvantage of homeowners and reinforces the need for the Act to be explicit regarding the requirements for clear financial disclosure in the 'explanation'.**
15. In summary, the Act seems to allow for site fee increases in respect to outgoings and operating expenses, that is, increases in recurring expenses. The Act does not provide for expenses related to preservation of village capital assets, owned by the operator, to be included as an operating expense.
16. The distinction between the two classes of expense needs to be made much clearer, especially in legal terms, to avoid needless time consuming and costly legal challenges.
17. This distinction is a further reason why a clear and informative explanation of site fee increases is of paramount necessity in changes to the Act. On this hinge the viability of leasing a site in a RLLC village.

#### **Allocation of Whole of Park cost increases to individual Homeowners.**

18. The 'explanation' does not provide a statement of how the total site fee increase in outgoings and operating expenses for the park is distributed across the total number of site fee paying Homeowners in arriving at the increase per Homeowner.
19. In Riverbend Village we have noted increased operating costs (without explanation) have been quoted as a percentage increase for the whole village. Then, that percentage increase is applied to each homeowner's retiring (previous) site fee to determine a new site fee, notwithstanding, that as part of expansion of the village over the period of increase, additional homes have been added to the village total.
20. Of course, the additional homes may have added to operating costs, but so too is the additional revenue from the additional homes available to meet those costs. This is another example of unethical manipulation of site fee increases hidden to homeowners by failure to supply open and transparent financial information.
21. This process also has the same implications as the issue of non-recurring expenses included in site fees [Refer also following part C.]. Once the manipulation has occurred it remains permanently imbedded in the site fee.

#### **Recommended Corrective Action**

22. The Act should make it clear that expenditure required to preserve the operator's capital assets in a village is not the homeowner's responsibility and does not contribute to increases in site fees.
23. The changes to the Act recommended in Part B of this submission should be implemented to permit the homeowner a clear understanding of what expenses are being claimed, and the evidence for increases that contribute to a site fee increase under a site agreement and the Act.
24. **The implementation of these changes will reduce the need for homeowners, with limited resources, the need to apply to tribunals and courts to preserve their rights against the predatory actions of major corporations supported by their lobby groups, accounting firms and legal teams.**