Comments on CMA working paper on Private management of public amenities on housing estates

Personal response: Professor Susan Bright

It is clear that the issues raised by the matters in this WP are very important. A key question raised in the WP is whether the response should be the provision of greater protection to households, and/or reducing the prevalence of such arrangements.

Both are needed. I am in broad agreement with the majority of suggestions made in the working paper. My comments are focussed on England, and suggest further areas to consider.

The WP does not mention the absence of consumer choice. In many areas of the country there is such a shortage of housing for purchase that purchasers are faced with a 'take it or leave it' option. Given this absence of choice you must ensure that there are strong consumer protections that are effective, in addition to there being increased transparency prior to the decision to purchase. No mention is made of legal advice – in the past developers have promoted the use of particular solicitor's firms and we must ensure that consumers are not pressured to do deals with the developer's favoured panels.

Standards of amenities as constructed:

An issue on some estates is that as infrastructure is not built to adoption standards it will not be durable over time. This is not about 'design' but the standard of construction. Poor standards reduce the costs of construction, in the knowledge that future – and higher- costs will be borne by the home purchasers. This raises potentially serious problems in relation to the future of these estates and whether they are sustainable in the long term. Although in the different context of US common interest housing developments, Prof Evan Mckenzie has written a great deal about the very serious problems that have emerged over time in relation to similar communities in the USA where there has been insufficient governmental oversight of the financial health of these sites and the resources of homeowners are often inadequate (for example: Rethinking Residential Private Government in the US: Recent Trends in Practices and Policy | SpringerLink; https://typeset.io/pdf/private-covenants-public-laws-and-the-financial-future-of-38oy0aent2.pdf)

The WP suggests the use of common adoptable standards. This should be considered even if the goal is not LA adoption. Some service providers are not able to deliver services 'to the door' eg roads that are not wide enough for refuse collection require residents to walk long distances with bins etc. Thought should be given as to whether the design standards currently approved under planning permission are appropriate eg road widths, footpaths, cycling provision, landscaping.

In addition, it is crucial that there is effective inspection of these standards. We know that there are serious concerns about construction standards for homes, and must ensure that infrastructure and other amenities are built to appropriate standards. What is the inspection regime for these amenities? For example, in the study by Professor Bright referred to in the WP it is reported that some purchasers complained that SUDs were not constructed in a safe and correct way.

Thought might also be given to whether warranties, or similar, should be provided so that the costs of any defects emerging in the early years are covered by the warranty provider/developer and do not fall to the homeowners.

From the consumer perspective it is hard to defend the position which enables a local authority to impose public access requirements in relation to, for example, play areas that are paid for by homeowners, particularly given the maintenance and liability costs associated with this. If the WP's

economic assumptions are correct and it is possible to model affairs to ensure that these are adopted, and the price of land purchase effectively drops to reflect the developers' commuted sums, this is a much preferable outcome.

Enhanced consumer protection

In addition to matters mentioned in the WP:

- It should not be possible embed particular management companies trapping homeowners into one provider for ever. See https://www.smh.com.au/national/nsw/minns-must-stop-this-energy-rort-before-development-binge-20231102-p5eh0u.html for problems highlighted in Australia, but mirrored here.
- There should be a cap on the percentage of management fees allowable. The problem with a cap, however, is that it may become the norm. Thought should be given as to how to ensure that only 'reasonable' management fees can be included within estate management charges
- Many estates include controls on how property is used. There is a need for balance between measures that enhance the appearance of the estate, and measures that restrict the liberties of homeowners. When the Leasehold Reform Act 1967 was enacted there was provision for management schemes when necessary to 'maintain adequate standards of appearance and amenity'; covenants that go beyond this should not be permissible. Further, save in relation to structural alterations that may impact on adjoining properties, homeowners should not have to secure permission for any measures that are internal to the home.
- There must be control of permission fees so that such fees are allowed only where there is a legitimate management reason and the level of the fee should be set by regulation which is reviewable at intervals. Thus, for example, there should be no fees for things such as changing carpets (at least in non-vertical units). There should also be service expectations about, for example, how quickly responses must be given to requests (eg a home sale pack).
- There is no specific mention of consultation rights, such as provided for leaseholders by section 20 of the Landlord and Tenant Act 1985. Consideration should be given to extending consultation requirements to those paying estate management charges.
- The WP recommends that the transparency principle (pre-sale) should include information that charges are likely to increase over time. This is rather weak. It is not unusual for estate charge estimates to be under-stated pre-sale and in the early years of a development. Is it possible to require developers to have models of likely lifetime costs, anticipating renewal of particular items at certain intervals?
- Thought should be given to whether reserve/sinking funds should be compulsory.
- It is good to see the report emphasise the importance of effective redress. Leaseholders have increasingly become concerned about the costs of taking disputes to the FTT, and that landlord charges can be passed onto them. We do not want to make the same errors again. It is sensibly suggested that all homeowners should have access to an ombudsman scheme. In addition, thought should be given the use of ADR, something that the FTT is now developing.
- Supporting RMCs. In some other jurisdictions there is effective public messaging, and user-friendly advice notes about how to manage eg strata developments. The WP notes comments by management companies about the burden that RMC directors carry, and the fact that they are not expert. The response to this is not to embed further professional layers but to provide support to RMCs in the form of accessible information, and advisory support. Hopefully this is something that the LEASEHOLD advisory service will be able to move into.